

China's Hate Speech Conundrum

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This paper discusses the regulation of ethnically based hate speech in China. It will first identify three approaches to hate speech that are applicable to China and then place China's evolving approach to hate speech in a larger regulatory context.

There is first of all a political approach that treats hate speech primarily as a national security issue that may threaten the legitimacy of the Chinese state. Secondly, there is a legal approach that treats hate speech primarily as a violation of law, especially criminal law. Finally, there is a rights-based approach which treats hate speech as a rights issue in the larger context of ethnic relations. The rights-based approach emphasizes the balance of competing constitutional rights but places individual rights in the context of development of inter-ethnic harmony, trust and respect.

The paper does not imply any evolution from a suppressive political approach to a rights-based democratic approach, even though society generally develops from one end to the other when it develops a constitutionalist democracy. In the Chinese case at least, all the three approaches to hate speech co-exist and compete for political prominence.

The prominence of one approach over the other varies in responding to particular political circumstances in different historical time. But conceptually the three approaches are distinguishable by: 1) the political significance each approach assigns to hate speech and the objectives that each approach aims to achieve; 2) the tools that each approach uses to regulate hate speech; and 3) the degree to which legal institutions and procedures are used to regulate hate speech.

A Political Approach

China is a multi-ethnic country. Ethnical autonomy and equality is one of the core constitutional principles and one of the pillars of China's political foundation. Paragraph 1 of Article 4 of China's Constitution provides:

All nationalities in the People's Republic of China are equal. The state

protects the lawful rights and interests of the minority nationalities and upholds and develops a relationship of equality, unity and mutual assistance among all of China's nationalities. Discrimination against and oppression of any nationality are prohibited; any act which undermines the unity of the nationalities or instigates division is prohibited.

Ethnic relations in China are fragile and complicated. There are a total of 56 ethnic groups in China and the Han is the largest ethnic groups. As of 2001, the minority groups account for 8.41 percent of the total population of 1.3 billion, but they live in 60 percent of China's land mass which are rich in natural resources and of great geopolitical importance. Historically, the relations between the majority, the Han, and the minorities, especially the Mongo, the Tibetans and the Urghurs, had been a major concern of each government. Although the government under the Chinese Communist Party (CCP) has been able to hold all ethnic groups together, largely through economic integration in the past 30 years, ethnic tensions have surfaced with greater frequency and intensity in recent years.

In general, China rules its minority regions through economic stimulation and political suppression and the regulation of hate speech should be understood in this larger political context.

From the political perspective, any hate speech that may "cause ethnic disputes" and "incite the splitting of ethnic groups" would be regarded as a national security threat because it not only harms China's fragile ethnic relations but also undermines the political stability of the regime. In prohibiting hate speech, the government is not merely protecting the victimized minority groups; it is principally protecting one of the pillars of its political order.

The political approach would silence meaningful political discussion on sensitive issues. As Professor Muntarbhorn well puts it:

...the greatest conundrum is that the region's non-democratic settings, there is not much room for freedom of expression and consequently not much room for hate speech from individuals and groups beyond the power base. ¹

¹ Vitit Muntarbhorn, *Study on the prohibition of incitement to national, racial or religious hatred: Lessons from Asia Pacific Region*.

In the Chinese case, national security trumps all other considerations and no room can be left for speech that may incite ethnic tension or violence. In particular, the political approach places tight control over the majority ethnic group, the Han, from expressing any view that may be interpreted as offensive toward other ethnic groups. There has been clear sense of anxiety on the part of the government that unless hostile feeling toward other ethnic groups is suppressed, the Pandora's box would be open and chaos would immediately follow.

Rule of law would have no place in the sensitive area of ethnic relations. Beyond the rhetoric of ethnic harmony as expressed in the Constitution, there are no general rules to govern the inter-ethnic relations. The state suppresses any politically sensitive discussion through imposing media censorship and instilling a culture of self-censorship. In any event, press is owned by the state and there is little open discussion on ethnic and religious matters in the press. As such, hate speech does not have any public forum. Ethnic hatred, where it exists, is largely suppressed and does not appear in a public forum.

To maximize the silencing of political discussion in general and ethnic hatred in particular, the state relies on prior constraint to rein in the press, publishers and other media. Ethnic relations are governed by policy documents issued by the executive government, often in response to *ad hoc* issues. Earlier examples include:

- Notice of the State Ethnic Affairs Commission on Problems Concerning Treating Customs of Ethnic Minorities Correctly in Propagandizing, Reporting and Cultural Work [国家民委关于宣传报导和文艺创作要正确对待少数民族习俗问题的通知] (25 January 1983);
- Notice of the United Front Work Department of the Central Committee of the Chinese Communist Party on Cautiously Handling Issues Relating to Ethnic Minorities and Religious Groups in Openly Publishing Books and Periodicals [中央统战部关于公开发行的书籍报刊中慎重对待民族宗教的通知] (23 March 1985); and
- Notice of the State Ethnic Affairs Commission on Problems Concerning Treating Customs and Traditions of Ethnic Minorities Cautiously [国家民委《关于慎重对待少数民族风俗习惯问题的通知》] (17 February 1986)

The political approach relies on national security law to reinforce silence and media regulation to practice censorship. In the relatively narrow area of hate speech, there

are numerous executive regulations for content control in different media sectors, including newspapers, magazines, books, radio and films. While the contents of the sector-specific regulations vary, they all have the common rules against ten categories of contents,² including “contents which incite the nation hatred or discrimination, undermine the solidarity of the nation, or infringe upon national customs and habits.”

There are also a range of Internet regulations to allocate responsibilities among different institutional players in the Internet sector (e.g. ISP, ICP, and Internet user). They provide similar content restrictions, as mentioned above, which are equally applicable to BBS, Internet publication and online audio-visual programmes. Censors are appointed at different media sectors to practice censorship, and editors and webmasters are made responsible for any questionable content, including hate speech that may have appeared. Censorship and self-censorship, instead of law, is the principal means to prohibit hate speech in China.

A Legal Approach

A combination of factors, including a new political openness since the 1980s, the commercialization of the media sector and the emergence of Internet and social media, has created a larger space in China for the discussion and deliberation on ethnical and religious affairs. At a more individual level, political relaxation has led to more freedom in social and economic spheres, including free speech on certain issues. While sensitive political speech, such as fighting words against the socialist system and the CCP rule, remains prohibitive and tightly controlled, speech on certain ethnic and religious matters, including hate speech, is possible. Under the dual attacks of commercialization of the media and increasing personal freedom, Chinese censorship

² See for example, Article 26 of the Regulations on the Administration of Publication [出版管理条例 (2001)]; Article 32, Regulations on the Administration of Radio and Television [广播电视管理条例]; and Article 25 of the Regulations on the Administration of Movies [电影管理条例]. The ten categories of prohibited contents are:

- (1) Contents which defy the basic principles determined in the Constitution;
- (2) Contents which endanger the unity of the nation, sovereignty or territorial integrity;
- (3) Contents which divulge secrets of the State, endanger national security or damage the honor or benefits of the State;
- (4) Contents which incite the nation hatred or discrimination, undermine the solidarity of the nation, or infringe upon national customs and habits;
- (5) Contents which propagate evil cults or superstition;
- (6) Contents which disturb the public order or destroy the public stability;
- (7) Contents which propagate obscenity, gambling, violence or instigate crimes;
- (8) Contents which insult or slander others, or infringe upon the lawful rights and interests of others;
- (9) Contents which endanger public ethics or the fine folk cultural traditions;
- (10) Other contents prohibited by laws, regulations or provisions of the State.

is losing its rigor. A legal approach therefore becomes a necessity after the political approach failed to silence political speech and, for this matter, hate speech. A partial failure of prior constraint demands a new regime of subsequent punishment. The rule of law, in its narrow and technical sense, is needed to pick up cases that fall through the cracks of censorship.

A few examples are given below to illustrate the demand for punishment when censorship and political control were no longer effective.

- In November 1997, the defendant Fang Min wrote a report on the Tibetans in China. However, majority of the report was said to be mere fabrication. The report also insulted Tibetan customs and traditions, and questioned, in a malicious tone, Tibetans' loyalty to China. After its publication, the report attracted angers from the Tibetans. Many of them took to streets to demand the Chinese government to punish the author. Others tried to use the opportunity to call for Tibet's separation from China.³
- In another case, Mr. Yang, an editor of a publishing company, invited contributions to a book on customs of various ethnic groups. Some Hui Muslim people were enraged by the humiliating content in the book and demanded public apologies from, and criminal prosecution of, the authors and the editor. Responding to the Hui people's complaint, the book was recalled and Yang was subject to unspecified punishment.⁴
- In a similar case, Zheng Lin posted a "big-character poster" in the factory where he worked to insult Hui Muslim after a fight with a fellow Hui Muslim worker. Upon seeing the poster, hundreds of Muslim workers in the factory demanded the factory management to dismiss Zheng. After the manager's decision not to take an immediate action, the Hui Muslim workers started a strike and during which some of them damaged property belonging to Han workers. News about the Han-Muslim conflict in the factory soon spread to the whole township where the factory was located, eventually leading to a three-day strike by all Hui Muslim workers and students in the township.⁵

³ Hu Yuanteng (ed.), *Xingfa Tiaowen Anli Jingjie* [Detailed Case Analysis of the Provisions in the Criminal Law] (Beijing: Law press, 2007), p. 407.

⁴ Zhang Shiqi, *Zhongguo Xin Xingfa 422 Ge Zuiming Lijie* [Cases and Analysis of the 422 Offences Under China's New Criminal Law of China] (Beijing: People's Court Press; Shenyang: Liaoning University Press, 2003), pp.454-456.

⁵ Han Yusheng (ed.), *Xingfa Gelun Anjian Fenxi* [Case Analysis of Each Provision in the Criminal Law] (Beijing: Press of Renmin University of China, 2000), p. 152, cited in Hu Yuanteng (ed.), *Xingfa Tiaowen Anli Jingjie* [Detailed Case Analysis of the Provisions in the Criminal Law] (Beijing: Law

There is a visible trend in de-politicizing criminal law in China. In the reform era, crime and punishment were no longer treated as highly political events that may affect China's national security. Significantly, China's abolition of counterrevolutionary offences in 1997 symbolized a decisive shift toward an apolitical use of criminal law.

Reflecting this larger change, there is a gradual and subtle shift from treating hate speech as national security threat to treating it as a violation of criminal law. Seen not from a security lens but from a public order lens, ethnic relations and hate speech would no longer be principally a political matter. It is, at least in part, a legal matter to be regulated through legal rules and subject to judicial supervision.

In 1997, China amended its criminal law and added two articles that are relevant to hate speech. Article 249 of the Criminal Law provides that:

Whoever incites ethnic hatred or discrimination, if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance or deprivation of political rights; if the circumstances are especially serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years.

Article 250 of the Criminal Law provides that:

Where a publication carries an article designated to discriminate or humiliate an ethnic group, if the circumstances are flagrant and the consequences are serious, the persons who are directly responsible for the offence shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention or public surveillance.

Public Security Administration Punishments Law [治安管理处罚法] also punishes hate speech of a minor nature. Article 47 of the Law provides that:

Anyone who incites ethnic hatred or discrimination, or publishes any content discriminating or insulting any ethnic group in any publication or on the Internet, shall be detained for not less than 10 days but not more than 15 days, and may be concurrently fined 1,000 yuan.

press, 2007), p. 406.

While the legislature and the judiciary have been silent in giving details to these provisions, scholars have tried to work out some detailed rules to guide the application. For example, on the meaning of “flagrant” and “serious” circumstances, some scholars proposed that they should refer to malicious motives, the use of malicious means in committing a crime, and “dirty” contents. In addition, the act should result in negative political impacts such as leading to ethnic conflicts.⁶ Other scholars have proposed a range of factors to be considered in determining whether the circumstance of a publication is flagrant, including the volume of the publication published; the frequency of the publication; and the truthfulness of the claims made in the publication.⁷ There are also lively academic discussion on the meaning of publication, such as whether Internet postings constitute publication, and the liability of editors, publishers and ISP.

The new criminal law provisions relating to hate speech was put to immediate usage after their promulgation. In November 1997, Mr. Chen and his friend Mr. Wang jointly published a book on sex and marriage customs of 24 ethnic groups in China. Chen was responsible for preparing the book, and Wong was in charge of printing and publication. The book was sold in 36 cities in China for a total of over 60,000 copies. Some ethnic minority people were enraged by some of the false and insulting claims made in the book and protested against its publication. They also demanded criminal prosecution of the persons concerned.

Both Chen and Wang were prosecuted for violating Article 250 of the Criminal Law. The court held that the acts of Chen and Wang had constituted the offence of publishing materials to discriminate and humiliate ethnic minorities. Because 24 out of China’s 55 ethnic minority groups were humiliated by the book, because over 60,000 copies of the book were distributed in 36 cities, and because strong protest of various ethnic groups were resulted from the publication, the court held that the circumstances were flagrant and the consequences were serious. The court found them guilty as charged and sentenced Chen and Wang to 3 years and 2 years’ imprisonment respectively.⁸

There are many similar cases in which a Han Chinese is found guilty for insulting

⁶ Zhang Shiqi, *Zhongguo Xin Xingfa 422 Ge Zuiming Lijie* [Cases and Analysis of the 422 Offences Under China’s New Criminal Law of China] (Beijing: People’s Court Press; Shenyang: Liaoning University Press, 2003), p.455.

⁷ See the interpretation of Article 250 of the Criminal Law that is available in *Beida Falü Xinxi Wang* [Chinalawinfo.com], <www.chinalawinfo.com> (Visited on 17 May 2011) (On file with the author).

⁸ Cao Zidan (ed.), *Xin Xingfa Zuiming Liangxing yu Anli Tonglan* [Sentencing Guide and Case Analysis for the Offences under the New Criminal Law] (Changchun: Jilin People’s Press, 2000), pp. 749-750.

another person from a minority ethnic background. Thus, in the case of Sun Yuanhe, Sun developed hatred against Islam after having a fight with his Muslim colleagues. In 2003, Sun sent eight anonymous letters to a Mosque, a Muslim secondary school in Beijing, a TV station and other places. The letters were said to contain defamatory and insulting statements against Muslim in China. Sun was subsequently arrested and prosecuted for violating Article 249 of the Criminal Law. After the trial, the court held that Sun's act amounted to inciting ethnic hatred and discrimination. Given the serious circumstances of his act, he was sentenced to two years' imprisonment.⁹

In another case, Zhang, a Han factory worker had a fight with a fellow Urghur worker and the fight was stopped by a manager. Believing that the manager was bias in favour of the Urghur worker, Zhang put up a big-character poster in the factory in the following morning in which he abused both Urghur people and the factory manager. Upon reading the poster, some of the Urghur workers made a complaint to the management, accusing Zhang of harming ethnic unity and threatening the factory manager with strikes had he failed to take action against Zhang.¹⁰ Zhang was later prosecuted for inciting ethnic hatred in violation of Article 249 of the Criminal Law and found guilty as charged. He was sentenced to one year's imprisonment.

China's legal approach to hate speech is typically instrumental in using criminal law expediently to achieve a political objective. As such, it is largely an extension of the political approach and to use subsequent punishment to fill in the gaps left by the failure of prior constraints. Within this legal process, the state imposes criminal punishment on hate speech but there are no other legal mechanisms to deal with an ethnic-based discrimination and hatred more comprehensively and systematically. In the criminal process, there is no serious attempt to develop a free speech rights and strike a balance between the competing constitutional rights as provided by the Constitution. The courts have not considered properly the constitutive elements of the crime, with decisions made politically in response to the protest of the victim groups and their ability to take action.

A Rights-based Approach

There are different rights-based approaches to hate speech in different nations

⁹ "The case of inciting ethnic hatred and discrimination by Sun Yuanhe", available at *Beida Falü Xinxī Wang* [Chinalawinfo.com], <www.chinalawinfo.com> (Visited on 17 May 2011) (On file with the author).

¹⁰ Cao Zidan (ed.), *Xin Xingfa Zuiming Liangxing yu Anli Tonglan* [Sentencing Guide and Case Analysis for the Offences under the New Criminal Law] (Changchun: Jilin People's Press, 2000), pp. 747-748.

according to variation in the political and legal systems. Hate speech exists in a larger political environment. Where extreme speech is constitutionally protected, it flourishes. It vanishes in a society where political speech is effectively muzzled and a “speak no evil” policy is adopted. Democracies differ in their approaches in limiting speech that are hateful, violent or otherwise offensive. The United States criminalizes speech only when it has the imminent danger of inciting violence. The First Amendment of the US Constitution regards the individualistic right to free speech as the cornerstone of the American democracy. Other liberal democracies, such as Canada and Germany for example, are less tolerant of speech which is likely to incite hatred. Each jurisdiction has to strike a balance between free speech and other important values.

A rights-based approach aims at a proper balance between the freedom of expression and the dignity of ethnic minorities, tilting toward prohibition of speech that may incite hatred or violence. Hong Kong has recently enacted an anti-racial discrimination law which may serve as a model for China. Under the Race Discrimination Ordinance, racially based vilification is unlawful¹¹ and serious vilification is a criminal offence.¹² The law also strikes a proper balance between criminalizing vilification and protecting free speech.¹³ Importantly, Hong Kong law not only imposes legal and criminal liability on any incitement to racial vilification, but also tackles a wide range of discriminatory practices which may form the social foundation for racial vilification. The law also empowers an independent commission to investigate alleged racially-based discrimination, harassment and vilification and take certain measures to prohibit the abusive acts.

¹¹ Section 45 of RDO provides that:

It is unlawful for a person, by any activity in public, to incite hatred towards, serious contempt for, or severe ridicule of, another person or members of a class of persons on the ground of the race of the person or members of the class of persons.

¹² According to Section 46 of RDO:

A person commits an offence if (a) the person, by any activity, incites hatred towards, serious contempt for, or severe ridicule of, another person or members of a class of persons, on the ground of the race of the second-mentioned person or the members of the class of persons.

¹³ Section 45 provides defenses as follows:

Nothing in this section renders unlawful—

- (a) a fair report on an activity in public;
- (b) an activity in public that—
 - (i) is a communication or the distribution or dissemination of any matter; and
 - (ii) consists of a publication which is subject to a defence of absolute privilege in proceedings for defamation; or
- (c) an activity in public done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussions about and expositions of any matter.

The rights-based approach, even it allows a proper balancing between different constitutional rights as provided in the Hong Kong's Race Discrimination Ordinance, may still be limited in the Chinese context due to the law's individualist orientation. Different from many constitutional democracies in the West, the Chinese minority ethnicity is both defined as a people and as a region, hence Mongo in the Inner Mongolia, Tibetans in Tibet or Urghur in Xinjiang. Hate speech is only the symptom of a larger problem in ethnic relations. The root cause of many of the problems that China is facing relates to the fundamental system of ethnic autonomy and the degree to which various ethnic groups are allowed to govern themselves autonomously.

In recent years, ethnic tension has resurfaced in China in an unprecedented manner. There was first the "uprising" in Tibet in 2008, followed by a bloody unrest in Xingjiang in 2009 and a series of public protests in the Inner Mongolia in 2011. It is now an urgent matter for the Chinese government to design a new constitutional mechanism to regulate the complicated inter-ethnic relations. Hate speech is only part of this larger problem.