



# Notre Dame Journal of International & Comparative Law

Volume 7 | Issue 1

Article 5

3-23-2017

## The Rationale of China's Media Regulation Policy in the Process of the Institutional Transformation

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### Recommended Citation

Weiguang, Wu (2017) "The Rationale of China's Media Regulation Policy in the Process of the Institutional Transformation," *Notre Dame Journal of International & Comparative Law*: Vol. 7 : Iss. 1 , Article 5.

Available at: <http://scholarship.law.nd.edu/ndjicl/vol7/iss1/5>

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# THE RATIONALE OF CHINA'S MEDIA REGULATION POLICY IN THE PROCESS OF THE INSTITUTIONAL TRANSFORMATION

WU WEIGUANG \*

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## INTRODUCTION

Freedom of speech is critically important. As a fundamental human right, free speech has been enshrined in many constitutions and international conventions, such as the First Amendment of the United States Constitution, the United Nations Human Rights Bill, the Human Rights Convention of the European Countries, and even the constitution of China. But it seems that not all the countries in the world have truly upheld this fundamental human right—China included.

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The restrictions on the freedom of speech in China are obvious. For a long time, freedom of speech and several other fundamental individual rights in China's constitution have been considered mere aspirations because the constitution has not yet been fully implemented or enforced. It is apparent that, when compared with the extent of freedom of speech in the United States, China has many restrictions on the content of speech in both traditional media as well as online. If we were to place countries on a spectrum illustrating the range of free speech—with the leftmost point having extreme censorship and the rightmost point having no censorship—the former Soviet Union (USSR), Iran, North Korea, and pre-modern China—before the reform and open policy in 1979—would be on the far left. On the opposite end would be the United States.<sup>1</sup> Modern China would probably fall in the middle of the spectrum—or perhaps a bit left of middle—showing the unique characteristics of China's media regulation policy.

Why does China's media policy have such unique characteristics? What led to the situation today and what will China's media policy become in the future? More broadly, what can be anticipated for the whole political structure? We need to answer these questions with a general overview of the developing process of China's historic institutions, culture, and geopolitics rather than just focusing on the policy of media itself. As Douglass North stated:

History matters. It matters not just because we can learn from the past, but because the present and the future are connected to the past by the continuity of a society's institutions. Today's and tomorrow's choices are shaped by the past. And the past can only be made intelligible as a story of institutional evolution.<sup>2</sup>

This article discusses the route of institutional transformation, justifications, and historical precedents for China's media policy and regulations.

In conclusion, human civilization can be categorized into two types: power-regulated societies and rights-regulated societies. Each type of society has its own institutional features and exhibits a different policy of media regulation; because China is in the process of transitioning from a power-regulated society to a rights-regulated society, its current policies of media regulation exhibit the overlap of the dynamic characteristics of both types of societies.

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<sup>1</sup> See FRED S. SIEBERT ET AL., *FOUR THEORIES OF THE PRESS: THE AUTHORITARIAN, LIBERTARIAN, SOCIAL RESPONSIBILITY AND SOVIET COMMUNIST CONCEPTS OF WHAT THE PRESS SHOULD BE AND DO* 67 (1956). As Fred Siebert stated,

The United States and Great Britain have been the chief custodians of libertarian principles for more than a century, but other countries of the world have to a greater or lesser extent adopted these same principles. As the democratic form of government spread throughout the world, the concept of freedom of speech and press followed as an integral part of the libertarian doctrine.

*Id.*

<sup>2</sup> DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* vii (James Alt ed., 1990).

This article consists of five sections. First, the foundation of this article is based on the essences of institutions, their functions in society, and the factors that have compelled institutional transformation. The second section compares the qualities of a power-regulated society versus a rights-regulated society. These two contrasting societies are based on different methods of force used by governments to control social order, power, and private rights. The third section compares and analyzes the different requirements and functions of media in the two contrasting societies. This comparison will explain why China and the US have different attitudes and policies toward speech. The fourth section explains the current policies of media regulations in China, including the characteristics stemming from the interaction of both types of societies. Also, it is important to examine the progress of modern China's institutional transformation from a power-regulated society to a rights-regulated society. The conclusion, drawing from this research, proves that China's media regulations are dynamic—continuously adjusting according to the institutional transformation—and contain overlapping and interacting characteristics of both types of societies.

## I. CONCEPTS, COMPETITION, AND INSTITUTIONS

### A. *Concepts*

In this article, four concepts form cornerstones for the entire discussion. They are: the power-regulated society, the rights-regulated society, the media power-controlled model, and the free media model.

A power-regulated society refers to a society in which the social order is enforced or regulated by one or several powers. Because members of society compete for scarce resources, which may cause social disorder, the regime of power, as the enforcer, controls social members' competition to maintain order. They control the scarce resources and distribute them in an organized manner. The regimes of power can be religions, tribes, governments or even underground societies. Obviously, states are the typical regimes of power. The USSR, some Arab countries, and other totalitarian states in history are generally structured as power-regulated societies. Pre-modern China is a typical example of one of the most powerful power-regulated societies.

A rights-regulated society refers to a society in which the social order is rooted in the private rights of its individuals. The scarce resources, such as lands and products of labor, are organized by the members of society through private rights such as ownership. The predominant way of acquiring the scarce resources is by trading in the market. The regime of power in a rights-regulated society aims to protect the private rights and maintain fairness in the market. It is also prohibited from interfering with the allocation of scarce resources under the title of private rights unless legally authorized. England was the first country in the world to

transform into a rights-regulated society in the seventeenth century. Today, nearly all of the developed and democratic countries in the world are rights-regulated societies. The United States is a typical example of one of the most powerful rights-regulated societies in the modern world.

The media power-controlled model refers to a society in which the media and expression are controlled or strictly regulated by the regime of power. The method of control or regulation may not be universal. It can take place through the regime's ownership and direct control over the media entities or through its license or grant of permission to a third party. Or a regime could retroactively punish a disobedient media entity or individual. A regime could also use a combination of the methods. In a power-regulated society, the policy regulating media is generally the media power-controlled model with direct or indirect censorship.

The free media model refers to a society in which media entities are independent and free from control or supervision of the state or any other regime of power. The regime of power cannot freely control or regulate the content of media of its own free will. Furthermore, the investment in or operation of media entities is independent from the regime of power. In a rights-regulated society, media regulation generally follows the free media model. It may only be restricted for the purpose of direct or indirect protection of private rights through a legitimate process authorized by law. Therefore, the key characteristic of the free media model is that it is free from a suppressive regime of power rather than from the protection for private rights.

In their book, *Four Theories of the Press*,<sup>3</sup> coauthors Fred Siebert, Theodore Peterson and Wilbur Schramm categorized four major approaches to communication: the authoritarian theory, the Soviet Communist theory, the libertarian theory, and the social responsibility theory. The first two theories are related to the media power-controlled model, whereas the last two theories are related to the free media model. As the scholars said,

Since the beginning of mass communication, in the Renaissance, there have been only two or four basic theories of the press—two or four, that is, according to how one counts them. . . . The *Soviet Communist* theory is only a development of the much older *Authoritarian* theory, and what we have called the *Social Responsibility* theory is only a modification of the *Libertarian* theory.<sup>4</sup>

Therefore, when we discuss the two media regulation models in this article, the characteristics described in the *Four Theories of the Press* can be taken as references accordingly.

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<sup>3</sup> SIEBERT ET AL., *supra* note 1.

<sup>4</sup> *Id.*, at 2.

In this article, besides the above four basic concepts, “network new media” refers to media based on digital technology and computer science, such as the internet. This differs from traditional media—which is based on tangible intermediaries—and broadcastings via analog technology. Network new media can be characterized as communication from end users to end users through borderless digital networks.

## B. *Competition and Institutions*

### 1. *Competition and Technology*

Foremost, the relationships between competition, technology, and institutions must be thoroughly explored. They are essential to understanding the potential driving forces and reasons that China has experienced institutional transformation and macroscopic societal evolution in the past two centuries.

According to Darwinism, all lives have two natural instincts: to survive and to reproduce.<sup>5</sup> British scholar Richard Dawkins further claimed that because all living creatures, including humans, need to survive and procreate, they are inherently selfish.<sup>6</sup> Therefore, when resources are scarce, the competition among organisms is unavoidable. According to Darwin’s theory of evolution, all species need to adapt to competition in order to survive.<sup>7</sup> Competition has always resulted in the survival of the fittest.<sup>8</sup> The process of evolution creates billions of different species, and we are just one of many evolutionary creations. A distinguishing characteristic of humans is our ability to create complex tools; these tools are technology. For survival in Earth’s competitive environment, humanity’s success has depended on our intellect and technology.<sup>9</sup>

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<sup>5</sup> See 1 CHARLES DARWIN, *ON THE ORIGIN OF SPECIES* 76 (new ed. rev. enl. 1864). Charles Darwin argued,

All that we can do, is to keep steadily in mind that each organic being is striving to increase at a geometrical ratio; that each at some period of its life, during some season of the year, during each generation or at intervals, has to struggle for life, and to suffer great destruction.

*Id.*

<sup>6</sup> See RICHARD DAWKINS, *THE SELFISH GENE* 87 (30<sup>th</sup> Anniversary ed., Oxford Univ. Press 2006). Richard Dawkins stated,

The vast majority of significant interactions between genes in the evolutionarily stable set—the gene pool—go on *within* individual bodies. These interactions are difficult to see, for they take place within cells, notably the cells of developing embryos. Well-integrated bodies exist because they are the product of an evolutionarily stable set of selfish genes.

*Id.*

<sup>7</sup> See DARWIN, *supra* note 5, at 76.

<sup>8</sup> See DAWKINS, *supra* note 6, at 66–67. Richard Dawkins explained:

Survival machines of different species influence each other in a variety of ways. They may be predators or prey, parasites or hosts, competitors for some scarce resource. . . . For reasons that we shall see, it is usually the males who compete with each other for females. This means that a male might benefit his own genes if he does something detrimental to another male with whom he is competing.

*Id.*

<sup>9</sup> JEREMY RIFKIN, *THE THIRD INDUSTRIAL REVOLUTION: HOW LATERAL POWER IS TRANSFORMING ENERGY, THE ECONOMY, AND THE WORLD* 187–88 (2011) (“The Social Darwinist’s view of nature as a battleground, where every creature is fighting with each other to grab as much of the Earth’s resources as

It is technology that helps humans succeed in the natural environment. Technology also threatens the lives of humans and other species, as well as the harmonization of natural environment.<sup>10</sup> Perhaps because of these factors brought by the development of technology, the regime in a power-regulated society is generally hostile to the skills and progress of technology, as seen in ancient China.<sup>11</sup> Regardless, technology has always had significance in the history of human civilization. The ability to use technology has often been the deciding factor in competition between different groups of humans. Competition and technology are the key distinctions between senior civilizations and junior civilizations. The development of society is ultimately driven by the progress of technology. As Douglass North said, “The industrial revolution was not the source of modern economic growth. It was the outcome of raising the private rate of return on developing new techniques and applying them to the production process.”<sup>12</sup> Therefore, competition has been driving the continuous development of technology for humans, and in turn the development of technology has been accelerating the intensity of competition between humans. This has caused some peril for society. Humans have been participating in this cycle for millions of years, and it is accelerating. Competition, technology, and institutions are the three fundamental factors for a society's progression.

## 2. *Competitions and Institutions*

The ability to construct institutions is another striking difference by which humans can be distinguished from other species. Humans mainly use institutions because of their power to help regulate competitive behavior.

By using technology to direct competition, humans have achieved tremendous advantages in evolution. But technology also greatly accelerates the intensity of other competitions among humans, resulting in such behaviors as robbery, kidnapping, killing, rape, and genocide from technological weapons. The intense—and even crucial—competition among humans causes great risk to the

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possible for itself and its progeny, has been taken up by nations and acted out on the grand stage of history in the form of geopolitics. . . . The new view unfolding in science, by contrast, sees the evolution of life and the evolution of the planet's geochemistry as a co-creative process in which each adapts to the other, assuring the continuation of life within the Earth's biosphere envelope.”)

<sup>10</sup> See FRANCIS FUKUYAMA, *THE ORIGINS OF POLITICAL ORDER: FROM PRE-HUMAN TIMES TO THE FRENCH REVOLUTION* 32 (2011) (“[T]he primary difference is that human beings are more deadly because they are able to use a wider and more lethal suite of weapons.”).

<sup>11</sup> See DAVID S. LANDES, *THE WEALTH AND POVERTY OF NATIONS: WHY SOME ARE SO RICH AND SOME SO POOR* 57 (1999). As David Landes described Ancient China:

The ingenuity and inventiveness of the Chinese, which have given so much to mankind—silk, tea, porcelain, paper, printing, and more—would no doubt have enriched China further and probably brought it to the threshold of modern industry, had it not been for this stifling state control. It is the State that kills technological progress in China.

*Id.* (quoting ETIENNE BALAZS, *LA BUREAUCRATIE CELESTE: RECHERCHES SUR L'ÉCONOMIE ET LA SOCIÉTÉ DE LA CHINE TRADITIONNELLE* 22–23 (1988)).

<sup>12</sup> DOUGLASS C. NORTH & ROBERT PAUL THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* 157 (1973).

lives and reproduction of members of society. The consequence of an uncivilized world or state of nature is a state of uncertainty.<sup>13</sup>

Humanity gradually developed norms to constrain some of the disruptive competitive behaviors among social members and save them from the dangerous state of nature. These norms became more complicated and comprehensive, necessitating the eventual formation of institutions. As Douglass North states, “Institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction. In consequence they structure incentives in human exchange, whether political, social, or economic.”<sup>14</sup> Nearly all the institutions, regardless of their level of formality, are meant to restrict competition for scarce resources.<sup>15</sup> Sex is one of the scarcest resources, so the harsh competition for sex needs fine-tuned institutions to regulate it. In advanced societies, norms or prohibitions related to sex are often complicated, sensitive, and redundant.<sup>16</sup> As scholar Francis Fukuyama describes, “Male reproductive strategy maximizes success by seeking out as many sexual partners as possible, while the female reproductive strategy involves harboring the resources of the fittest male for her offspring.”<sup>17</sup> Sunshine and air are also indispensable for the survival of humanity, but we could hardly find any rules, regulations, or norms about them in any civilization. The reason is obvious—they are not scarce. Therefore, no competition occurs to gather them, and no institutions are necessary to regulate them.

Complicated technologies and institutions are the two fundamental characteristics that distinguish humans from other species. All civilizations are composed of elements derived from these two basic essentials. Different attitudes towards—and abilities in using—technology and constructing institutions are remarkable cultural traits of nations. The inherent selfishness of life and the scarcity of resources cause competition for those resources. The competition stimulates development of technologies, the development of technologies accelerates the intensity of competitions, and the intensity of competitions requires the constraints of social behaviors. It is these constraints that drive the creation and innovation of institutions. American scholar Charles Tilly summarized, “War drives state formation and transformation.”<sup>18</sup>

State governments are the most prominent political institutions that regulate competition within their territories and, sometimes, in an international setting. The creation of a state shapes the society by using legitimate force to suppress illegitimate violence, but it also accelerates the intensity of competition between states. The formation of states accelerates such competition via the intentional

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<sup>13</sup> “The major role of institutions in a society is to reduce uncertainty by establishing a stable (but not necessarily efficient) structure to human interaction.” See NORTH, *supra* note 2, at 6.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> See *id.* at 1–3.

<sup>16</sup> See FUKUYAMA, *supra* note 10, at 36.

<sup>17</sup> *Id.*

<sup>18</sup> CHARLES TILLY, COERCION, CAPITAL, AND EUROPEAN STATES, AD 990-1990, at 20 (1990).



and systematic organization of human resources and intelligence. Therefore, some popular free market economists blame the creation of states as the source of all evils.<sup>19</sup> Arguably, it is the competition between states that tends to be irrational and destructive, because, so far, no ultra-state has had enough power to resist irrational competition. The massive globalization since the nineteenth century has forced China into direct competition with the Western world. Such global competition has driven the institutional transformation of China from a power-regulated society to a rights-regulated society.

Hence, competition, technology, and institutions are the three dominant variables used to analyze the formation and evolution of a society. For China, the harsh competition lasting for about five hundred years during the Spring and Autumn period and Warring States period—from 770 to 221 B.C.—drove the nation to advance technological ethics and then to form superior political institutions. The successful political institutions have maintained China's competitive advantage for more than two thousand years, which, rather non-intuitively, weakened the impetus for further development of technology and institutions.<sup>20</sup> Harsh competition with the Western countries since the mid-nineteenth century has forced China into the process of developing technology and forming a competitive institution once more.<sup>21</sup> Since institutional transformation is a process of organizing social members into a new form, media is a critical component of the process. As Charles Horton Cooley points out, "History may be regarded as a record of the struggle of man to realize his aspirations through organization; and the new communication is an efficient tool for this purpose."<sup>22</sup> Only by looking at all of China's history, can we perhaps understand China's current political structure and media policy.

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<sup>19</sup> See MURRAY N. ROTHBARD, *POWER & MARKET: GOVERNMENT AND THE ECONOMY* 279 (Ludwig von Mises Institute 4th ed. 2006) (1970) ("It is precisely *statism* that is bringing back the rule of the jungle—bringing back conflict, disharmony, caste struggle, conquest and the war of all against all, and general poverty. . . . The free market, therefore, transmutes the jungle's destructive competition for meagre subsistence into a peaceful *co-operative* competition in the service of one's self *and* others.").

<sup>20</sup> See LANDES, *supra* note 11, at 55–57. David Landes recounted:

The one civilization that might have surpassed the European achievement was China. At least that is what the record seems to show. Witness the long list of Chinese inventions: the wheelbarrow, the stirrup, the rigid horse collar (to prevent choking), the compass, paper, printing, gunpowder, porcelain. . . . The mystery lies in China's failure to realize its potential. One generally assumes that knowledge and know-how are cumulative; surely a superior technique, once known, will replace older methods. But Chinese industrial history offers examples of technological oblivion and regression.

*Id.*

<sup>21</sup> See *infra* Part II.A.

<sup>22</sup> CHARLES HORTON COOLEY, *SOCIAL ORGANIZATION* 90 (1909).

## II. POWER-REGULATED SOCIETIES VERSUS RIGHTS-REGULATED SOCIETIES

Humans gradually formed institutions to regulate the competition between individuals and organizations.<sup>23</sup> These institutions can be generally categorized, depending on their methods of force to regulate behavior, as either power-regulated societies or rights-regulated societies. In these two types of societies, the enforcement of regulations comes from different sources. As described by scholars, it is similar to the differentiation of a top-down society versus a bottom-up society.<sup>24</sup> China is in the process of transforming from a power-regulated society to a rights-regulated society and currently has features from both models. The characteristics of the two types of societies are compared in detail below with the goal of helping us understand China's current phenomena.

### A. *The Characteristics of Power-Regulated Societies*

Before the first rights-regulated state formed in England, most societies in the world were a form of power-regulated society or quasi power-regulated society. China, before the reform and open policy of 1979, and the USSR were prime examples of power-regulated societies. Ancient China was one of the most successful power-regulated country in the world—embodying nearly all the typical characteristics of this model.

First, a totalitarian regime is the most typical and successful political model in a power-regulated society. The order of society is structured upon power rather than private rights. If more than two sources of power overlap in a society, the risk of conflict and war between the powers would escalate to the extent that irrational competition among the powers could cause disorder in the society. We have many records throughout history supporting this hypothesis. One example is pre-modern Europe. Because several powers rooted in different secular states and several religious authorities overlapped in Europe for most of its history, there were many frequent and cruel conflicts, including the two devastating world wars in the twentieth century.<sup>25</sup> Alfred North Whitehead pointed to the Refor-

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<sup>23</sup> See NORTH, *supra* note 2, at 6 (suggesting that institutions were necessarily caused to address the uncertainty caused by competition).

<sup>24</sup> Some scholars, such as G. William Skinner, portray a country's society by two sets of central-place hierarchies. The first one was constructed largely from the bottom-up—emerging from exchange—and the second one was imposed mainly from the top-down—resulting from imperial control. See TILLY, *supra* note 18, at 127. The latter's nested units comprised a hierarchy of administrative jurisdictions. *Id.* The top-down system uses spatial logic of coercion, whereas the bottom-up system uses spatial logic of capital. *Id.*

<sup>25</sup> See *id.* at 128. Charles Tilly stated,

In a pamphlet published in 1637, Jesuit Giuldo Aldeni reported that his Chinese friends asked Europe: "If there are so many kings, how can you avoid wars?" He replied naively or disingenuously, "The kings of Europe are all connected by marriage, and therefore live on good terms with one another. If there is a war, the Pope intervenes; he sends out envoys to warn the belligerents to stop fighting. This in the middle of the frightful Thirty Years' War, which eventually drew the vast majority of European states into the blood-letting.

mation as an example of “a popular uprising, [which] for a century and a half drenched Europe in blood.”<sup>26</sup> Similarly in China, the Spring and Autumn period and the Warring States period lasted for more than five hundred years after the collapse of the Zhou Dynasty—the sole legitimate authority of political power in the territory at the time. The wars and conflicts among many states independent from Zhou’s regime brought chaos and harm to society.<sup>27</sup> Only the Qin Dynasty dispelled all other regimes of power and unified all the states into one.<sup>28</sup> This unification was the start of the totalitarian period of China, which lasted for more than two thousand years, until the Xinhai revolution led by Sun Yat-sen in 1911.<sup>29</sup> The two thousand years of totalitarianism contributed to China’s culture. Literature and a measurement system were unified and disseminated.<sup>30</sup> China became a major cultural hub that was preserved in the inner society and defended from foreign competition.<sup>31</sup> Compared to Europe, war was much less frequent throughout these two thousand years.<sup>32</sup> American scholar Kenneth Lieberthal highly commends the political achievements of China in history:

The traditional Chinese state was an awesome political achievement, the most advanced such governing body in the world. Featuring a centralized bureaucratic apparatus begun over two thousand years ago by Qin Shi Huangdi (r. 221–210 b.c.), the first emperor of the Qin dynasty (221–206 b.c.), China’s system of governance evolved through the rise and fall of various dynasties until the early 1900s.<sup>33</sup>

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*Id.* (citations omitted).

<sup>26</sup> ALFRED NORTH WHITHEAD, *SCIENCE AND THE MODERN WORLD* 2 (1925).

<sup>27</sup> See WOLFRAM EBERHARD, *A HISTORY OF CHINA* 51 (E.W. Dicks trans., 3d ed. 1969). Wolfram Eberhard described:

The period following that of the Chou [Zhou] dictatorships is known as that of the Contending States [, from 480 to 222 B.C.]. Out of over a thousand states, fourteen remained, of which, in the period that now followed, one after another disappeared, until only one remained. This period is the fullest, or one of the fullest, of strife in all Chinese history.

*Id.*

<sup>28</sup> See KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM* 5 (2d ed. 2004).

<sup>29</sup> See *id.* (describing China’s centralized system of government which began approximately two thousand years ago and lasted until the early 1900s).

<sup>30</sup> See *id.*

<sup>31</sup> See *infra* Part IV.A.

<sup>32</sup> See BERTAND RUSSELL, *THE PROBLEM OF CHINA* 12 (1922). As Bertrand Russell observed, The Great War showed that something is wrong. . . . The Chinese have discovered, and have practiced for many centuries, a way of life which, if it could be adopted by all the world, would make all the world happy. We Europeans have not. Our way of life demands strife, exploitation, restless change, discontent and destruction.

*Id.*

<sup>33</sup> LIEBERTHAL, *supra* note 28, at 5.

Since 1949, communist China has successfully resumed the power-regulated model of governance, adopting the USSR's political paradigm.<sup>34</sup>

Second, power-regulated societies are generally morally disciplined—so called “morality competition” or “glory competition” societies. The criteria for morality may stem from religion, the political regime, or even culture. Competition for morality or glory has two key functions in power-regulated societies. One key function is the regime of power's counteraction to inherent selfishness of individuals by introducing morals benefiting the regime. Therefore, filial piety, patriotic devotion, collectivism, and nationalism were established as the core moral criteria of Chinese society and other East Asian nations historically influenced by China. In other regions of the world, like Europe, religious beliefs have nearly the same function of counteracting individual selfishness. The second key function of morality competition in power-regulated societies is the constraint on the regime's power. Since legitimate power serves as society's main method of regulating the potential negative competition between members in a power-regulated society, no other forces are available to constrain the legitimate force itself. As British scholar Lord Acton said, “Power tends to corrupt, and absolute power corrupts absolutely.”<sup>35</sup> The politicians of ancient China also clearly knew that power needed to be constrained and, therefore, had strict rules and penalties for bureaucratic officers.<sup>36</sup> Furthermore, power was valued and constrained by a set of moral principles.<sup>37</sup> For instance, the posthumous name system of giving honorary names to royalty after their passing served as an evaluation of an emperor's life achievements and performance.<sup>38</sup> This system caused emperors to be morally conscientious of their actions. As Derk Bodde remarked:

[The Chinese] are not a people for whom religious ideas and activities constitute an all-important and absorbing part of life. . . . It is ethics (especially Confucian ethics), and not religion (at least not religion of a formal, organized type), that provided the spiritual basis in Chinese civilization.<sup>39</sup>

Third, China has long been a society with a strong foundation in family ethics, which has had an impact on China's culture that continues to this day. If we analyze the structure of China's society, we see that all of China's society can be

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<sup>34</sup> See generally, Satya J. Gabriel, *The Structure of a Post-Revolutionary Economic Transformation: The Chinese Economy from the 1949 Revolution to the Great Leap Forward* (Sept. 1998), <https://www.mtholyoke.edu/courses/sgabriel/economics/china-essays/3.html>.

<sup>35</sup> Letter from Lord Acton to Bishop Mandell Creighton (April 5, 1887), in *HISTORICAL ESSAYS AND STUDIES* (John Neville Figgis & Reginald Vere Laurence eds., Macmillian & Co. 1907).

<sup>36</sup> See generally, THE EDS. OF ENCYCLOPÆDIA BRITANNICA, *Chinese Civil Service*, ENCYCLOPÆDIA BRITANNICA (Apr. 7, 2008), <https://www.britannica.com/topic/Chinese-civil-service>.

<sup>37</sup> See FUNG YU-LAN, *A SHORT HISTORY OF CHINESE PHILOSOPHY* 3–4 (Derk Bodde ed., 1948).

<sup>38</sup> See, Ulrich Theobald, *Terms in Chinese History: Names of Persons and Titles of Rulers*, CHINA KNOWLEDGE.DE (Sept. 23, 2011), <http://www.chinaknowledge.de/History/Terms/titles.html>.

<sup>39</sup> FUNG, *supra* note 37 (quoting Derk Bodde, *Dominant Ideas in the Formation of Chinese Culture*, 62 J. OF AM. ORIENTAL SOC'Y (1946)).

viewed as a pyramid, with the emperor at the summit and servants on the lowest tier. Each layer of the pyramid consists of family-based groups in competition with each other, which cultivated China's unique ethical culture. Before the British industrial revolution, Ancient Chinese economics were predominantly a family-based agricultural model.<sup>40</sup> According to Ronald Coase's transaction cost theory, the main function of enterprises is to reduce the cost of transactions in the market.<sup>41</sup> Family based on blood relations was the most economic and efficient business organization in the agricultural society before the emergence of collective agriculture based on modern techniques.<sup>42</sup> Therefore, family became the basic operating and competing unit in China; all family members contributed to their family.<sup>43</sup> As a community, members each lived according to their different roles in which their happiness, lives, values, and security were enclosed.<sup>44</sup> The success or failure of an individual in the society was closely connected with the whole family's fate.<sup>45</sup> The derivative of family based ethics today is relationship culture, called *Guan Xi*. As Fung Yu-lan described:

The family system was the social system of China. Out of the five traditional social relationships, which are those between sovereign and subject, father and son, elder and younger brother, husband and wife, and friend and friend, three are family relationships. The remaining two, though not family relationships, can be conceived of in terms of the family.<sup>46</sup>

*Guan Xi* serves as a structure for society's social network, by which the members can benefit from the competitions. Any such relationship, including classmates, military mates, and colleagues, can be called *Guan Xi*. The credit system of China's society is mainly based on such *Guan Xi* networks.<sup>47</sup>

Fourth, social members' competitive behaviors are aimed at obtaining power, because power is typically proportionate to control over scarce resources. Power in power-regulated societies is attached to social status. Therefore, power-

<sup>40</sup> *Id.* at 21.

<sup>41</sup> See generally R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* (n.s.) 386 (1937). In the article, Prof. Coase argued that, although production could be carried out in a completely decentralized way by means of contracts between individuals, the fact that it costs something to enter into these transactions means that firms will emerge to organize what would otherwise be market transactions whenever their costs were less than the costs of carrying out the transactions through the market. *Id.*

<sup>42</sup> See FUNG, *supra* note 37, at 21–22.

<sup>43</sup> See *id.* at 21.

<sup>44</sup> See *id.* at 21–22.

<sup>45</sup> See RUSSELL, *supra* note 32, at 60. Bertrand Russell explained:

It is useless to deny that the Chinese have brought these trouble upon themselves, by their inability to produce capable and honest officials. This inability has its roots in Chinese ethics, which lays upon a man's duty to his family rather than to the public. An official is expected to keep all his relations supplied with funds, and therefore can only be honest at the expense of filial piety.

*Id.*

<sup>46</sup> FUNG, *supra* note 37, at 21.

<sup>47</sup> See RUSSELL, *supra* note 32, at 60.

regulated societies are centered on status. The rules of competition are decided by the regime of power that controls the scarce resources. For instance, in ancient China, the regime of power was generally in favor of literate knowledge and skills, such as poems, paintings, calligraphies and history, rather than those related to technology and natural sciences.<sup>48</sup> Thus nearly all the intellectuals put their energy and minds to the study of these literatures, which had the effect of stifling the development of technology and natural sciences.<sup>49</sup> This policy can explain the lack of many Chinese scientific and technological contributions in the last three hundred years. Even though China invented paper, the printing press, gunpowder, and the compass—three of which were claimed to change the world by renowned scholar and scientist Francis Bacon<sup>50</sup>—later dynasties placed little or no emphasis on further developing these technologies. China has had a staggering number of technological innovations, such as harnessing the power of rushing water in streams and rivers—twelve hundred years before Europeans—creating the world's first suspension bridge, inventing stirrups, creating the seismograph, and inventing hang gliding and parachuting.<sup>51</sup> The advantages of ancient Chinese technology, however, were continuously reduced because of policy aimed at stifling competition. This reduction lasted until the Self-Strengthening Movement (1861–1894) at the end of the Qing Dynasty.<sup>52</sup>

In summation, for more than two thousand years until 1979, China was a typical power-regulated society. Today, the culture, political system, and order of Chinese society still embody strong characteristics of such a society. For most of the time since the unification of the Qin Dynasty, power-regulated China created a strong and stable nation in the open land of eastern Asia, cultivated a unique and continuous Chinese culture, and kept society in order. If the fundamental purpose of an institution is to keep humanity organized by regulating their competitive behaviors, China's power-regulated society was successful before globalization placed China in direct competition with the Western world. As Tao Xisheng, a well-known Chinese historian, commented, "The [Chinese] totalitarian system made the country rich, maintained the military strong and ruled the people

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<sup>48</sup> *Id.* at 48–49.

<sup>49</sup> It is said that the natural sciences and technology was discouraged by the power of regimes in China's history because natural sciences and technology would increase the competition and difficulties of keeping the society in order. A similar attitude for new technology can also be found in the Christian world. For instance, the crossbow was initially prohibited by the pope when it was first introduced into Europe by ancient China due to its destructive capability. See generally H. J. SCHROEDER, DISCIPLINARY DECREES OF THE GENERAL COUNCILS: TEXT, TRANSLATION AND COMMENTARY 195–213 (1937) (Canon 29 of the Tenth Ecumenical Council of 1139 forbids the "God-detested art of stingers and archers" against Christians and Catholics).

<sup>50</sup> "We should note the force, effect, and consequences of inventions which are nowhere more conspicuous than in those three which were unknown to the ancients, namely, printing, gunpowder, and the compass. For these three have changed the appearance and state of the whole world. . . ." ELIZABETH L. EISENSTEIN, THE PRINTING PRESS AS AN AGENT OF CHANGE 43 (1979) (quoting FRANCIS BACON, NOVUM ORGANUM, at Aphorism 129 (1620)).

<sup>51</sup> See DAVID CURTIS WRIGHT, THE HISTORY OF CHINA 64–66 (2nd ed., Greenwood Press 2001).

<sup>52</sup> See Jason Qu, *Self-Strengthening Movement of Late Qing China: an Intermediate Reform Doomed to Failure*, 8 Asian Culture and Hist., no. 2, 2016, at 150.

easily.”<sup>53</sup> Compared with the characteristics of rights-regulated societies, illustrated below, a power-regulated society maintained very different mores.<sup>54</sup> Liang Shuming pointed out, “For China, the past success is just the failure today; the past advantages of hers are just the shortcomings today.”<sup>55</sup> The remarkable and inertial culture of China’s historic power-regulated society has hindered the institutional transformation of China today, which needs a strong driving force that will drive the transition gradually and safely.

### B. *The Characteristics of Rights-Regulated Societies*

The United States is undoubtedly the most powerful and typical rights-regulated society in the world today. Using the United States as an example, the main characteristics of a rights-regulated society are discussed below and compared to those of a power-regulated society.

First, in a rights-regulated society the scarce resources are labeled and held by the members of the society as private rights. The order of society relies on the private rights through which the members of the society compete for scarce resources. The legitimate method of competition is trading. This is different from power-regulated societies, in that the wealth of a rights-regulated society can be measured by the dollar amount and frequency of its members’ trades. Historically, England was the first nation to successfully transform into a rights-regulated society.<sup>56</sup> Today, the United States is the most typical and successful rights-regulated society. The power to enforce social order is rooted in the people’s power to elect government representatives, who serve as the regime of power.

Second, in a rights-regulated society, the regime of power serves to protect the interests of private rights and the market of trading. Therefore, a healthy rights-regulated society needs a government with integrity that does not interfere with private rights, except to protect them, as its fundamental purpose. To ensure honesty in the government, the most popular political structure in a rights-regulated society is democracy and the rule of law. In a healthy rights-regulated society, competition for scarce resources is shaped by private rights, which provide protection from robbery, murder, fraud, rape, and other harms. The regime of power and private rights coexist as two layers; rule of law and the democratic

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<sup>53</sup> TAO XISHENG (陶希圣), *ZHONGGUO ZHENGZHI SIXIANG SHI* (中国政治思想史) [THE HISTORY OF POLITICAL THOUGHTS IN CHINA] 225–227 (Encyclopedia Publishing House of China 2009).

<sup>54</sup> See *infra* Part III.B.

<sup>55</sup> LIANG SHUMING (梁漱溟), *XIANGCUN JIANSHE LILUN* (乡村建设理论) [Theory of Countryside Construction], in *LIANG SHUMING COLLECTIONS* 196 (Shandong People’s Publishing House (山东人民出版社) 2005).

<sup>56</sup> See NORTH & THOMAS, *supra* note 12, at 156. Douglas North discussed the transformation:

England, after an inauspicious start, by 1700 was experiencing sustained economic growth. It had developed an efficient set of property rights embedded in the common law. Besides the removal of hindrances to the allocation of resources both in the factor and product markets, England had begun to protect private property in knowledge with its patent law. The stage was now set for the industrial revolution.

*Id.*

process are the only formal connections between the two layers from the institutional point of view. Hence, the competition between political parties in a rights-regulated society, such as the partisan model in the United States, differs entirely from the competition for control in a power-regulated society. Competing behaviors in rights-regulated societies are controlled by legal frameworks that are grounded in private rights.

Third, rights-regulated societies use social ethical systems as the foundation of society, rather than individual morality or glory-seeking. In a rights-regulated society, members of the society compete for resources by trading instead of using glory or moral superiority to merit awards from the regime of power. In European history, this different ethos developed as a result of Martin Luther's religious reformation that challenged people to face God directly rather than relying on the hierarchical Catholic Church.<sup>57</sup> Thus morality became a personal issue instead of a social measurement judged solely by the Catholic Church.<sup>58</sup> Therefore, in rights-regulated societies, any restrictions on the freedom of behavior unsupported by private rights are called into question.<sup>59</sup> These restrictions are gradually reduced despite having long been supported from a moral point of view, including those on homosexual marriage, euthanasia, and pornography.

Rights-regulated societies need social ethics far more than power-regulated societies because the holders of private rights need to trade with each other to exchange resources. Therefore, social ethics and behavioral norms develop from socially cooperative societies. Such mores include teamwork, responsibility, credibility, respect for queuing, and honesty in trading—all of which are favored in rights-regulated societies such as the United States. On the contrary, Chinese society has a system of etiquette based strongly on social status.<sup>60</sup> Less cooperative cultures, such as chaotic traffic and bad service from public institutions, can be found nearly everywhere even today.<sup>61</sup>

Fourth, the culture of a rights-regulated society is a type of business culture characterized by equality, freedom, and cooperation—or put simply, an arm's

<sup>57</sup> See MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 40 (Talcott Parsons trans., Routledge 2001) (1930).

<sup>58</sup> See *Id.* Max Weber argued:

The conception of the calling thus brings out that central dogma of all Protestant denominations which the Catholic division of ethical precepts into *precepta* and *consilia* discards. The only way of living acceptably to God was not to surpass worldly morality in monastic asceticism, but solely through the fulfillment of the obligations imposed upon the individual by his position in the world. That was his calling.

*Id.*

<sup>59</sup> See MICHAEL J. SANDEL, *JUSTICE: WHAT'S THE RIGHT THING TO DO?* 62 (Farrar, Straus and Giroux 2009) (citing ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974)). Michael Sandel claims that individuals have rights "so strong and far-reaching [that] they raise the question of what, if anything, the state may do." *Id.* He concludes that "only a minimal state, limited to enforcing contracts and protecting people against force, theft, and fraud, is justified. Any more extensive state violates persons' rights not to be forced to do certain things, and is unjustified." *Id.*

<sup>60</sup> See *supra* Part II.A.

<sup>61</sup> See generally, Min Ding & Jie Xu, *The Chinese Way* 16 (2015); Shanti Hitton, *Social Culture in China*, USA TODAY, <http://traveltips.usatoday.com/social-culture-china-16258.html> (last visited Feb. 15, 2017).



length culture. By enforcing social equality, members can choose to do business with freewill rather than being coerced by higher powers. With this freedom, members can sell scarce resources to the most competitive trading partners. By cooperating, members can decrease the transactional cost of trading and have a more profitable win-win result. The remarkable differences between the two types of societies can be easily witnessed in real life—outside of academic study. China's culture is that of a typical family-based, power-regulated society, so we can find that the members of the society only establish trust through relationships. They are generally indifferent to strangers and less cooperative without enforced order or supervision from some legitimate power.<sup>62</sup>

Members in rights-regulated societies compete to increase trading capacity. This differs from a power-regulated society, in that entities in a rights-regulated market economy are directly competing to increase trading capacity with consumers. As discussed earlier, humans acquire competitive advantages via technology.<sup>63</sup> The development of technology is the fundamental force by which humans meet competitive requirements. Therefore, by competing in trade, the enterprises use their capital and human labor on research and development of new technologies, resulting in an increase of technological output.<sup>64</sup> This competitive cycle for technological advancement was nonexistent in ancient China, which discouraged and even stifled the innovation of technology.<sup>65</sup>

A society that encourages the development of technology is one that increases its ability to compete with the world and seize resources from it. This practice makes social members rich but has negative repercussions on other humans and the Earth. By encouraging the development of technology, a rights-regulated society acquires extraordinary advantages when competing with eastern Asian countries, such as pre-modern China, which was contemptuous of technology. This especially holds true in the nineteenth century, when the Chinese were using spears against the Westerners' firearms.<sup>66</sup>

In summation, rights-regulated societies regulate competition through private rights. By competing for trade, the members of the society contribute their wis-

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<sup>62</sup> See RUSSELL, *supra* note 32, at 220–21. Bertrand Russell recalled:

Shortly before I left China, an eminent Chinese writer pressed me to say what I considered the chief defects of the Chinese. With some reluctance, I mentioned three: avarice, cowardice and callousness. Strange to say, my interlocutor, instead of getting angry, admitted the justice of my criticism, and proceeded to discuss possible remedies.

*Id.*

<sup>63</sup> See *supra* Part II.B.2.

<sup>64</sup> See MANIFESTO OF THE COMMUNIST PARTY, <http://marxists.org/archive/marx/works/1848/communist-manifesto/ch01.htm#007> (last visited Feb. 15, 2017) (“The bourgeoisie, during its rule of scarce one hundred years, has created more massive and more colossal productive forces than have all preceding generations together. Subjection of Nature's forces to man, machinery, application of chemistry to industry and agriculture, steam-navigation, railways, electric telegraphs, clearing of whole continents for cultivation, canalization of rivers, whole populations conjured out of the ground—what earlier century had even a presentiment that such productive forces slumbered in the lap of social labour?”).

<sup>65</sup> See DENG YINKE, ANCIENT CHINESE INVENTIONS, 7 (2011).

<sup>66</sup> See *generally* SAROLTA TAKACS, THE MODERN WORLD: CIVILIZATIONS OF AFRICA, EUROPE, AMERICAS, MIDDLE EAST AND SOUTHWEST ASIA, ASIA AND THE PACIFIC, 725 (2015).

dom, energy, and capital to the development of technology; this process is directly or indirectly facilitated by institutions. The entire culture, ethical system, and political structure of a rights-regulated society stems from a model of competition that is quite different from that of a power-regulated society. The institutional transformation of China from a traditional power-regulated society to a modern rights-regulated society requires reform on all levels of society, from culture and politics to theories of competition and behavioral paradigms. Furthermore, because Chinese traditional media and new network media have quite different backgrounds, they compete and interact with each other in a way that exposes the complexities of institutional transformation.

### III. THE CHARACTERISTICS OF MEDIA REGULATIONS IN THE TWO TYPES OF SOCIETIES

Above, we have discussed and compared the two types of societies in human history. The common purpose of these different societies is to maintain lawful order based on their own parameters. All institutions need to create, maintain, and protect a form of competition. Institutions must legitimize competition and prevent it from running astray. Taking these as universal parameters, we will see that these different types of societies, though both moral and legitimate, have completely different media regulation policies and content.

#### *A. Media Policy in Power-Regulated Societies*

First, the purpose of media regulation in a power-regulated society is to protect the regime's authority to enforce social order. If the authority of power cannot maintain order, then other potential competing secondary powers will likely emerge to compete for the power of the primary authority. Therefore, the central policy of media regulation in a power-regulated society is to help the regime to counter any secondary powers that could potentially compete with the primary power. Media thus becomes the instrument of the regime, used to rule the majority. The earliest use of power to regulate speech occurred during the Warring States period, which unified China and created the Qin Dynasty. The emperor of the Qin Dynasty accepted reformer Li Si's advice to burn poems and books that proclaimed adversarial laws, thus becoming the first restriction on free speech.<sup>67</sup> Later, the prime minister of the Qin Dynasty, Han Fei, also claimed that to limit offenses, the best policy should restrict the thoughts of the people<sup>68</sup>; the mediocre policy was to restrict the expressions and the inferior policy was to directly re-

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<sup>67</sup> See Mo Zhang, *The Socialist Legal System with Chinese Characteristics: China's Discourse for the Rule of Law and a Bitter Experience*, 24 *Temp. Int'l & Comp. L.J.* 1, 20–21 (2010).

<sup>68</sup> See, Jason P. Blahuta, *Fortune and the Dao* 181 (2012).

strict the behaviors. Since then, restrictions on thoughts and speech have been a main national policy in China for more than two thousand years.<sup>69</sup>

Second, power-regulating regimes have the power to designate media according to their own standards. Content that complements the authority is permitted, and even encouraged, and the critical content is restricted and sometimes prohibited. The function of media in a power-regulated society is to unify the masses into a common consciousness that accepts and maintains the social order approved by the regime. That is to say, “[c]orrect political orientation’ determines a publication’s life or death.”<sup>70</sup> This characteristic of media regulation can be found in nearly all power-regulated societies, such as in Catholic society, pre-modern China, France, and Japan. This type of media policy still exists today in regions of the Middle East, North Korea, and China—especially before the reform and open policy.<sup>71</sup> American political philosopher Hannah Arendt observed that truth and politics “are on rather bad terms with each other.”<sup>72</sup> She stated that power threatened truth, particularly “factual truth,” because “facts and events—the invariable outcome of men living and acting together—constitute the very text of the political realm.”<sup>73</sup> Arendt’s observations are correct in that regimes of power select what truths to disseminate to the general public and competitors. The regime prefers to publicize facts that buttress its competitive strategy and hide facts that threaten or criticize its power. The regime in power needs to convince the masses that unfiltered truth is not an innate born principle or value society must follow. Therefore, the different attitudes towards truth of power-regulated societies and rights-regulated societies stem from different policies and rules for competition. In a power-regulated society, the authority of power may inhibit truth telling to enhance advantages in competition. In a rights-regulated society, the enterprises or individual may hide the truth by so-called “right of privacy” or trade secrets for competitive advantage. When the target of competition is changed, the regime of power will develop different attitudes towards truth. For instance, when states compete in matters of national security, they will favor secrecy and discretion, rather than open communication and truth.<sup>74</sup>

Third, media entities are generally controlled by the regime of power in a power-regulated society—that is, the media power-controlled model. In the traditional media market, publishers control the content transmitted from authors to consumers because of the scarcity of the media resources. This means that pub-

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<sup>69</sup> See HE QINGLIAN, *THE FOG OF CENSORSHIP: MEDIA CONTROL IN CHINA* 31 (Paul Frank trans., 2008). “The ambiguity of propaganda discipline works greatly to the government’s advantage by making journalists fear accusation for anything they write. The goal is to make news workers keen to understand what the higher authorities expect of them and to exercise greater ‘self-discipline.’” *Id.*

<sup>70</sup> *Id.* at 16.

<sup>71</sup> See *infra* Part IV.A.

<sup>72</sup> HANNAH ARENDT, *BETWEEN PAST AND FUTURE* 227 (1968).

<sup>73</sup> *Id.* at 231.

<sup>74</sup> See generally Philip Bump, *U.S. Government Charges NSA Leaker Edward Snowden With Espionage*, *NAT’L JOURNAL* (June, 21, 2013), <https://www.yahoo.com/news/u-government-charges-nsa-leaker-edward-snowden-espionage-202141515.html?ref=gs>.

lishers serve as the sole intermediaries for any author wanting to communicate their works to the public. Therefore, without any exceptions, the publishing entities in China are all state-owned or state-controlled.<sup>75</sup> For the same reason, the publishing industry is also strictly prohibited from foreign investment.<sup>76</sup> By controlling ownership rights, the government tries to control the content created or communicated by these entities. As E.H. Carr said, “It is significant that the nationalization of thought has proceeded everywhere *pari passu* with the nationalization of industry.”<sup>77</sup>

Fourth, the content of media in a power-regulated society has characteristics of competition rooted in society-specific morality and glory. To conciliate the inherent selfishness of social members, power-regulated societies build up moral competitions for the members and reward the winners or the most obedient competitors. During the organization of such competitions, media is the most important tool. Without media, such competition cannot be widely organized. Therefore, to maintain and protect social ethics—while preventing the decline of moral standards—one main function of the regime of power is to regulate and review the content of media by filtering offensive, vulgar, or pornographic information.<sup>78</sup> As David Curtis Wright points out, “[c]ensorship is mostly political but occasionally can assume a puritanical streak and be directed against the overtly sexual written word.”<sup>79</sup>

As seen in the USSR or pre-modern China, media in a power-regulated society is the regime’s propaganda tool.<sup>80</sup> By using propaganda, the regime can selectively broadcast censored content to the public that upholds the favorable moral competition. Public debate and discussion are stifled in order to separate the masses into horizontal and isolated groups. There was no such theory of free speech because of the threat that certain ideas could harm the authority of the regime or bring chaos to society. The regime collects information on society via

<sup>75</sup> See Hongsong Song, *Dancing in Shackles: Copyright in China’s Highly Regulated Publishing Market*, 60 J. Copyright Soc’y 285, 287 (2013).

<sup>76</sup> *Id.* at 289.

<sup>77</sup> FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 153 (1944) (emphasis omitted).

<sup>78</sup> See generally Full text of Hu’s report at 18<sup>th</sup> Party Congress, CHINA DAILY, [http://europe.chinadaily.com.cn/2012-11/18/content\\_15939542.htm](http://europe.chinadaily.com.cn/2012-11/18/content_15939542.htm). Specifically, Hu’s report stated:

We should promote the development and flourishing of cultural activities of ethnic minorities. We should carry out public cultural activities and guide the people to express, educate, and serve themselves in the course of developing culture. We should launch reading programs for the general public. We should improve the contents of online services and advocate healthy themes on the Internet. We should strengthen social management of the Internet and promote orderly network operation in accordance with laws and regulations. We should crack down on pornography and illegal publications and resist vulgar trends.

*Id.*

<sup>79</sup> WRIGHT, *supra* note 51, at 6. David Curtis Wright recounted:

In May 2000 the Chinese Communists banned the novel *Shanghai Baby* (*Shanghai Baobei*) because of its striking depictions of sexuality and drug abuse in Shanghai. The novel sold 80,000 copies before it was banned, but underground copies of it were widely available to anyone, including curious foreigners, who wanted to read what the government had proscribed and confiscated.

*Id.*

<sup>80</sup> See generally Jack Linchuan Qiu, *Virtual Censorship in China: Keeping the Gate between the Cyberspaces*, 4 Int’l J. Comm. L. & Pol’y 1 (2000).

different channels, such as internal reporting lines. The access by the public to true information is controlled and accessible only in varying amounts according to the respective positions in the pyramid of power.<sup>81</sup>

To summarize, the characteristics of media policy and regulation in a power-regulated society are determined by the political structure so that the policy supports institutional requirements. Therefore, such policy is rational and justified from the power-regulated society's point of view. China's media regulation policy, especially policies toward traditional media, is influenced by two thousand years of totalitarian culture and politics. During the institutional transformation, these characteristics have been harshly criticized by international institutions and also domestic scholars.<sup>82</sup>

### B. *Media Policy in Rights-Regulated Societies*

First, the purposes of media in a rights-regulated society are to serve holders of private rights and to monitor the regime of power. As we have discussed above, a rights-regulated society needs strong government—an authority of power to maintain a national defense and to protect private rights from the exploitation of the members of the society. Thus, one function of the political structure of a rights-regulated society uses the organization and optimization of such a government. So far, the democratic political structure and rule of law have been considered the most successful and popular social structures for a rights-regulated society. The scholars in *Four Theories of The Press* said, "Democracy from the beginning has defended the rights of men to disagree—with each other, with their government, with religions. Democracy has developed in such a path that free men are often unable to agree on common objectives, or even on the amount of freedom men should have."<sup>83</sup>

This is correct when looking at the superficial phenomena, but we should not forget that democracy actually stands on laws created from mutual agreements, not disagreements. Therefore, if social members show their disagreements by unlawful methods, they will be punished according to the law.<sup>84</sup>

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<sup>81</sup> See HE, *supra* note 69, at 68. He Qinglan argued,

To enable the state apparatus to function normally, the Chinese government has to give its officials access to relatively accurate information that tells them what is going on in this vast nation. It has, therefore, established a stringent system of "internal documents" and a series of all-encompassing laws and regulations regarding the secrecy of information.

*Id.*

<sup>82</sup> See ISABELLA BENNETT, *MEDIA CENSORSHIP IN CHINA* (2011), <http://sites.asiasociety.org/asia21submit/wp-content/uploads/2010/11/Media-Censorship-in-China-Council-on-Foreign-Relations.pdf>.

<sup>83</sup> SIEBERT ET AL., *supra* note 1, at 107.

<sup>84</sup> See Carey L. Biron, *U.S. Prison Population Seeing "Unprecedented Increase,"* IPS (Feb. 4, 2013), <http://www.ipsnews.net/2013/02/u-s-prison-population-seeing-unprecedented-increase/>. The article quoted several relevant figures:

Over the past 30 years, according to a new report by the Congressional Research Service (CRS), the federal prison population has jumped from 25,000 to 219,000 inmates, an increase of nearly 790 percent. Swollen by such figures, for years the United States has incarcerated far more people than any other country, today imprisoning some 716 people out of every 100,000.

Second, media content in a rights-regulated society is typically unfiltered truth as opposed to pro-government propaganda. In a rights-regulated society, members compete for trading advantages by innovating better products via technological development. Truth and knowledge are indispensable for the development of technology and healthy markets. This differs from power-regulated societies which disseminate acceptable speech but censor unacceptable speech. In rights-regulated societies, ethics and common practice dictates the communication of uncensored information to the public.

A fundamental component of a rights-regulated society's media is investigation and communication of the truth, while opinions fall into a separate category not defined by the usual criteria of factuality. By clearly separating opinions from fact, the rights-regulated society can be much more tolerant towards even the most unpopular opinions. As the United States Supreme Court held in *Snyder v. Phelps*:

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.<sup>85</sup>

The pursuit of truth naturally generates a marketplace of ideas because such a marketplace is the only way to discover and examine truths. As Justice Holmes stated in his dissenting opinion of *Abrams v. United States*:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweeping all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.<sup>86</sup>

Third, media industries in a rights-regulated society that exist independent of and without input from the regime of power are referred to as the “free media”

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*Id.*

<sup>85</sup> 562 U.S. 443, 460–61 (2011).

<sup>86</sup> 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

model. Because scarce resources are distributed according to private rights instead of power, enterprises are the institutions created to minimize the transactional costs of private rights, according to Ronald Coase's transaction cost theory.<sup>87</sup> Media industries also follow the doctrines of the market economy in a rights-regulated society. Media industries that operate independent of the regime of power, however, are a relatively new phenomenon; historically, media industries have not had this independence. For example, in Great Britain, media industries faced two main obstacles. One was the administrative monopoly controlled by the royal family that gave media licenses to a limited number of businesses, conditional on the business's willingness to report favorable information about the regime.<sup>88</sup> Another obstacle was the difficulty of entering the market—high costs and limited niches acted as a constraint on potential media enterprises. With the development of press technology and increasing demand for books,<sup>89</sup> these obstacles gradually decreased, putting great pressure on the administrative monopoly from capitalists who were now able to enter the market. As a result of such capitalistic competition, a typical competitor emerged in the form of the penny paper, which could undercut the competition by selling at low prices.<sup>90</sup> Today, in rights-regulated societies, the independence of media enterprises from regimes of power is commonplace—the United States is a perfect example of this freedom.<sup>91</sup>

Fourth, as opposed to being an instrument of upholding moral competition, as in power-regulated societies, media in rights-regulated societies utilize market-oriented content and vulgarity. In a rights-regulated society, media enterprises compete for popularity to gain profits; this differs from the business model of media entities in power-regulated societies. In a rights-regulated society, the social members are liberated from moral competition and earn livelihoods through market trading. Human nature leads them to consume content that caters to their interests rather than content shaped by the regime of power. Therefore, the content of media becomes unavoidably vulgar. For instance, the penny newspapers in Great Britain and the United States experienced a period of filthy or vulgar content when the newspapers were independent from governmental or political subsidies, operating only in public markets.<sup>92</sup>

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<sup>87</sup> See *supra* Part III.A.

<sup>88</sup> See generally, Roger Parry, *The Ascent of Media: From Gilgamesh to Google via Gutenberg* (2011); Dan Meyer, *Upside Down: How We Can Avoid Becoming the United States of China* (2016).

<sup>89</sup> See generally, Sarah Niblock, *Journalism: A Beginner's Guide* (2010).

<sup>90</sup> See generally MICHAEL SCHUDSON, WHY DEMOCRACIES NEED AN UNLOVABLE PRESS 43 (2008) (In the United States, "[b]eginning in the 1830s, a new breed of urban paper, the so-called 'penny press,' discovered that one could make money by printing local news as well as national political news, by hawking newspapers on the street and not selling by subscription only and by lowering the price of a copy from 6 cents to a penny or two.").

<sup>91</sup> See generally SIEBERT ET AL., *supra* note 1, at 92 ("In the most democratic societies, the chief instrument of control is the judicial system. In the United States the courts are paramount since they not only apply the law of the land to the press but also determine when the other branches of government are overstepping their authority in imposing restrictions which might contravene constitutional protections.").

<sup>92</sup> See JAMES CURRAN, MEDIA AND POWER 92 (2002). James Curran explained the shift toward vulgarity:

The content of network new media in China has been inevitably vulgarized by the driving force of the market, which has caused concerns from the regime of power. The vulgar media content negatively impacts the regime's upheld moral standards and drives the media to compete for popularity within the market regardless of moral popularity. This issue of emerging media network endangers the legitimacy of the regime. In addition to bringing about the change in content and competition, network new media also provokes the public to demand more freedom of expression. Therefore, the regime of power in China seeks to weed out lewd and vulgar content on the Internet with the content purity campaigns.<sup>93</sup> During institutional transformation, the battle for content between online enterprises and the regime of power is actually between the natural path of media—in a rights-regulated society—and the moral requirement of the regime of power—in a power-regulated society. For this purpose, content purity campaigns can be viewed as speed bumps on the road towards transformation—their function is only to slow down progress rather than changing its direction entirely.

Finally, in a rights-regulated society, the content of media is generally not enamored by the regime of power. In a rights-regulated society, the regime of power is just a public service provider rather than the sole allocator of resources. That is, the regime provides national defense and a fair system of competition for resources, but not the resources themselves. The regime of power is not inherently fair and just, which necessitates control and regulation by the public through the democratic process and the rule of law. Therefore, the questions of what the regime does and will do are of interest to the public. Scandals, in particular, will garner attention from the public. In a rights-regulated society, the media industry's main revenue stream is created by the consumption of newspapers and subscriptions along with the popularity of their news content. Specifically, the more traffic a media company gets to its media outlet, the more ad space or commercials they can sell. Therefore, for its own interests, the media industry will put significant resources into discovering scandals within the regime of power. As Michael Schudson points out:

Some of the greatest service the media provide for democracy lies in characteristics that a few people regard as very nice or ennobling about the press. These features of journalism—and perhaps these features more than others—make news a valuable

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[The] publisher of the *Poor Man's Guardian*, *Destructive* and *London Dispatch*, announced the change with characteristic aplomb, promising his readers "all the gems and treasures, and fun and frolic and news and occurrences of the week. . . . Police Intelligence, Murder, Rapes, Suicides, Burnings, Maimings, Theatricals, Races, Pugilism, and all manner of moving accidents by flood and field. In short, it will be stuffed with every sort of devilment that will make it sell. . . . Our object is not to make money, but to beat the Government."

*Id.* (citation omitted).

<sup>93</sup> See generally *China urges Websites to filter all vulgar contents under threat of site shut-down*, XINHUA NEWS AGENCY (Feb. 3, 2009), [http://news.xinhuanet.com/english/2009-02/03/content\\_10753160.htm](http://news.xinhuanet.com/english/2009-02/03/content_10753160.htm).



force in a democratic society, and this means that—if all goes well—we are saddled with a necessary institution we are not likely ever to love.<sup>94</sup>

In summation, government autonomy and controversial content are distinguishing characteristics of a free media model in a rights-regulated society. These traits are determined by market competition and political structure. These characteristics have unavoidably emerged and blossomed in China's new media, emerging in the newly competitive market economy and challenging the traditional media industry.

### C. Geopolitical Factors and Media Policy

Aside from the media policy differences between the two types of societies, geopolitics and security also influence these policy decisions. Geopolitical situations and sovereign security influence media policy through competition from international and domestic competitors. The creation of institutions is a result of the types of competition we have previously discussed; the varying intensity of competition definitely affects the structure of a country's institutions and media policies.

As a typical example of geopolitics affecting a state, Otto Hintze made a relevant distinction between Great Britain and the continental European states:

The different systems of government and administration found among the large European states can be traced back in the main to two types, one of which can be called the English and the other the continental. . . . [The principal difference between them] consists in the fact that on the continent military absolutism with a bureaucratic administration emerges, while in England. . . .the older line of development continues. . .and leads to what we usually term parliamentarism and self-government. What then is the cause of this pronounced institutional differentiation? . . . The reason lies above all in the fact that on the continental compelling political imperatives held sway which led to the development of militarism, absolutism and bureaucracy, whereas such pressures were not present in England. . . . It was above all geographic position that had its effects.<sup>95</sup>

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<sup>94</sup> SCHUDSON, *supra* note 90, at 73.

<sup>95</sup> THOMAS ERTMAN, BIRTH OF THE LEVIATHAN: BUILDING STATES AND REGIMES IN MEDIEVAL AND EARLY MODERN EUROPE 11 (1997) (quoting OTTO HINTZE, MACHTPOLITIK UND REGIERUNGSVERFASSUNG (1913)).

While many factors are related to the development of Great Britain and the formation of its unique institutions, it is still true that the English Channel has played a key role in its national security.<sup>96</sup>

Ancient China did not have such naturally occurring defensive infrastructures, because China is not an island. Therefore, according to Otto Hintze's judgment, China would have a natural tendency to form into an absolutism state.<sup>97</sup> As Thomas Ertman pointed out when he analyzed Otto Hintze's argument:

[T]he greater the degree of geographic exposure to which a given medieval or early modern state was subjected, the greater the threat of land warfare; and the greater the threat of land warfare, the greater the likelihood that the ruler of the state in question would successfully undermine representative institutions and local self-government and create an absolutist state backed by a standing army and a professional bureaucracy in order to meet that land threat.<sup>98</sup>

The mutual trust between ruler and public was poor in an absolutist state because the defending the ruler required efficiency in power and resource collection—leaving no time to negotiate with the leaders of the public. The regime would fear that compromise and the uncertainty of the negotiation might threaten their regime and defenses. Therefore, freedom of speech in an absolutist society had more deficiencies than merits.

Mutual trust between a nation's ruler and the public promotes freedom of speech. Rulers would not have an interest in segregating small blocks of society in order to limit the flow of information because secrecy would be replaced with transparency. Compared with continental European states, Great Britain has historically been such a state.<sup>99</sup> As David Landes commented:

To begin with, Britain had the early advantage of being a *nation*. By that I mean not simply the realm of a ruler, not simply a state or political entity, but a self-conscious, self-aware unit characterized by common identity and loyalty and by equality of civil status. Nations can reconcile social purpose with individual aspirations and initiatives and enhance performance by their collective synergy.<sup>100</sup>

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<sup>96</sup> S. Stephen Acott, *MPSC: The Saga of Sandy Clyburn* 33 (2013).

<sup>97</sup> See ERTMAN, *supra* note 95, at 11–12.

<sup>98</sup> *Id.*

<sup>99</sup> See LANDES, *supra* note 11 at 219.

<sup>100</sup> *Id.*

Similar to Great Britain, the United States has a great geopolitical advantage in the modern world, which provides unmatched confidence and space of development for the American people and their government. As former Secretary of State Henry Kissinger said:

[T]he European powers fought innumerable wars to prevent potentially dominant powers from arising. In America, the combination of strength and distance inspired a confidence that any challenge could be overcome *after* it had presented itself. European nations, with much narrower margins of survival, formed coalitions against the *possibility* of change; America was sufficiently remote to gear its policy to resisting the *actuality* of change.<sup>101</sup>

The lack of competition from the outside world for nearly three hundred years strongly influenced the social climate towards freedom of speech and press in the United States. This afforded more confidence toward the regime to compromise with the different forces in the country. Henry Kissinger also said:

America found that it would have to implement its ideals in a world less blessed than its own and in concert with states possessed of narrower margins of survival, more limited objectives, and far less self-confidence. And yet America has persevered. The postwar world became largely America's creation, so that, in the end, it did come to play the role Wilson had envisioned for it—as a beacon to follow, and a hope to attain.<sup>102</sup>

Therefore, when a nation faces a variety of strong competing pressures, its media and speech policy will be adjusted accordingly. For example, in *Schenck v. United States*,<sup>103</sup> the United States Supreme Court unanimously held that the defendants' criminal conviction was constitutional and their conduct was not protected under the First Amendment. The First Amendment does not protect speech encouraging insubordination, because, "[w]hen a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right."<sup>104</sup> Since the same country will have different criteria on free speech at different times, it is natural that other countries will also have different criteria too, considering their different experiences and culture.

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<sup>101</sup> HENRY KISSINGER, *DIPLOMACY* 31–32 (1994) (emphasis omitted).

<sup>102</sup> *Id.* at 55.

<sup>103</sup> 249 U.S. 47 (1919).

<sup>104</sup> *Id.* at 52.

For example, in Germany, which also upholds the freedom of speech as a constitutional principle, pro-Nazi speech is still banned. “Germany's constitution strongly and explicitly protects the freedom of speech. Still, the country's highest court has now said that—given the injustice and horrors of the Nazi regime—it is constitutional to make an exception that bans speech glorifying Hitler's ideology.”<sup>105</sup> As Anthony Lewis pointed:

The United States differs from almost all other Western societies in its legal treatment of hate speech. In Germany it is a crime, a serious one, to display the swastika or any other Nazi symbol. In eleven European countries it is a crime to say that the Holocaust did not happen, that Germans in the Nazi years did not slaughter Jews. So it is in Canada, and the Canadian Supreme Court has decided that Holocaust deniers can be prosecuted and punished despite that country's constitutional guarantee of free expression. In the United States, the First Amendment protects the right to deny the fact of the Holocaust.<sup>106</sup>

In summary, an ethical system faces constant pressures from geopolitics, leading to the development of technologies and institutions. The diversity of competing environments, technology and institutions cultivates different policies and cultures that affect the norms of speech and media regulation. Therefore, a nation can only build on its media policy and culture of speech from its historical experience. Roger Errera, a French legal scholar and jurist, observed that Europeans would not accept America's tolerance toward hateful speech,<sup>107</sup> as in *National Socialist Party of America v. Village of Skokie*.<sup>108</sup> “The American view must be based on ‘an inveterate social and historical optimism’—which Europeans could not be expected to share after their tragic experience at the hands of the Nazis and Communists.”<sup>109</sup>

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<sup>105</sup> Dietmar Hipp, *Germany's Nazi Exception: Constitutional Court Oks Curtailing of Free Speech*, SPIEGEL ONLINE (Nov. 18, 2009), <http://www.spiegel.de/international/germany/germany-s-nazi-exception-constitutional-court-oks-curtailing-of-free-speech-a-662031.html>.

<sup>106</sup> ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT* 157–58 (2007).

<sup>107</sup> *See id.* at 160.

<sup>108</sup> 432 U.S. 43(1977).

<sup>109</sup> *Id.*

## IV. THE SPECIFIC FEATURES OF MEDIA POLICY IN CHINA

A. *China's Institutional Transformation from a Power-Regulated Society to a Rights-Regulated Society*

In more than two thousand years of Chinese history, four periods of institutional transformation have proved revolutionary and have fundamentally changed China's society. The first was the unification of China by Qin Dynasty in 221 BC, which ended more than five hundred years of chaos among hundreds of states, and brought China under a totalitarian political structure.<sup>110</sup> The second was the Xinhai revolution in 1911, led by Sun Yat-sen, which formally established a republic that ended more than two thousand years of totalitarianism started by Qin Dynasty.<sup>111</sup> The third is the foundation of the People's Republic of China in 1949, by which China entered into a Soviet style communist system with a central-planned economic model.<sup>112</sup> The fourth was the reform and open policy in 1979, led by Deng Xiaoping, which caused China to transition from USSR style politics to a political structure based on a market economy and rule of law.<sup>113</sup>

The last three institutional transformations happened within one hundred years of each other, and they can be understood as the three stages of one whole institutional revolution—from a power-regulated society to a rights-regulated society. Therefore, the two thousand years of China's history since the Qin Dynasty could be divided into two distinct sections. The first era, from the Qin Dynasty until the Xinhai Revolution of 1911, could be defined as a power-regulated society. The second era, from 1911 to present, could be described as an ongoing institutional transformation from a power-regulated society to a rights-regulated society.

Competition is the fundamental force that drives institutions and technology to evolve and improve. The institutional transformation of China since the end of the Qing Dynasty was triggered by the competitive pressure of globalization, initiated by the Western European countries. As Douglas North said:

Since Charles Darwin, evolutionary theory has had a powerful influence upon our understanding of social survival. . . . The implications of the theory were that over time inefficient institutions are weeded out, efficient ones survive, and thus there is a gradual evolution of more efficient forms of economic, political, and social organization.<sup>114</sup>

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<sup>110</sup> See EBERHARD, *supra* note 27, at 317.

<sup>111</sup> *See Id.*

<sup>112</sup> See Mo, *supra* note 67, at 12.

<sup>113</sup> See generally *Changing China, In Depth: Deng Xiaoping*, B.B.C. [http://news.bbc.co.uk/2/shared/spl/hi/in\\_depth/china\\_politics/key\\_people\\_events/html/6.stm](http://news.bbc.co.uk/2/shared/spl/hi/in_depth/china_politics/key_people_events/html/6.stm) (a special report identifying key members of China's Communist Party which overseen the country's transformation from war-racked poverty in 1949 to emerging Asian superpower).

<sup>114</sup> NORTH, *supra* note 2, at 92.

Bertrand Russell, comparing culture and institutions between China and the Western world—especially Great Britain—said,

Unfortunately for China, its culture was deficient in one respect, namely, science . . . What makes us superior is Newton and Robert Boyle and their scientific successors. They make us superior by giving us greater proficiency in the art of killing. It is easier for an Englishman to kill a Chinaman than for a Chinaman to kill an Englishman. Therefore our civilization is superior to that of China, and Chien Lung is absurd.<sup>115</sup>

Before facing western pressures in the middle of the nineteenth century, China had no strong rivals in Eastern Asia for hundreds of years. Surrounding nations lacked superior technology or institutions, even though the military pressure from northern nomads had existed occasionally.<sup>116</sup> The first landmark of Western competitive pressure was the 1840 Opium Wars, which resulted in Hong Kong being ceded to the United Kingdom, resulting in a huge war indemnity and forcing China to open several of its ports.<sup>117</sup> With this first military conflict, the Chinese government started to realize the importance of technology—especially that of weaponry.<sup>118</sup> The Chinese regime changed their stifling technology policy to allow society to research and develop technologies, especially military technologies, for the purpose of national defense.<sup>119</sup> Therefore, modern educational institutions emerged in the beginning of the twentieth century; in these institutions, science and technology were taught and developed.<sup>120</sup> Scholars with knowledge of natural sciences and technology became the predominant intellectuals, like

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<sup>115</sup> RUSSELL, *supra* note 32, at 48–49.

<sup>116</sup> See generally NICOLA DI COSMO, ANCIENT CHINA AND ITS ENEMIES: THE RISE OF NOMADIC POWER IN EAST ASIAN HISTORY (2002).

<sup>117</sup> See generally EBERHARD, *supra* note 27.

<sup>118</sup> See *id.* at 298–299. Wolfram Eberhard explained:

in 1839, [Lin Tse-hsu] prohibited the opium trade and burned the chests of opium found in British possession. The British view was that to tolerate the Chinese action might mean the destruction of British trade in the Far East and that, on the other hand, it might be possible by active intervention to compel the Chinese to open other ports to European trade and to shake off the monopoly of the Canton merchants. In 1840 British ships-of-war appeared off the south-eastern coast of China and bombarded . . . it this first armed conflict with the West, China found herself defenseless owing to her lack of a navy, and it was also found that the European weapons were far superior to those of the Chinese. In 1842 China was compelled to capitulate: under the Treaty of Nanking.

*Id.*

<sup>119</sup> See LI CHIEN-NUNG, THE POLITICAL HISTORY OF CHINA 1840–1928 (Ssu-Yu Teng and Jeremy Ingalls trans. eds., D. Van Nostrand Co., Inc. 1956). “The last forty years of the nineteenth century may be considered an era when the Chinese slowly studied ‘foreign matters’ and copied Western methods. Nevertheless, China’s superficial imitation of the West could not produce an effect strong enough to resist foreign aggression.” *Id.*

<sup>120</sup> See *id.* at 101–02. “The earliest realization that China needed to imitate Western methods came after the conclusion of Opium War. . . . Because China suffered greatly from the Opium War, some Chinese became aware that their country could never control her invaders until she had mastered their superior knowledge of technology.” *Id.*

Qian Xuesen, who was fully honored and considered a hero in Communist China.<sup>121</sup>

Accordingly, at the end of the Qing Dynasty, both the regime of power and the intellectuals agreed that China should increase its technological skill in order to compete with the West.<sup>122</sup> After living under a power-regulated society for over two thousand years, the public was not yet ready to revolt against the Qing regime nor embrace democratic revolution. Li Hongzhang, the Prime Minister, encouraged the study of Western technology and research, while keeping the political regime unchanged; this was the so-called ethos of “China’s learning is essential, West’s learning is practical” or “learn from foreigners to compete with foreigners.”<sup>123</sup> But the war between China and Japan in 1894 seriously impaired the moral foundation of the Qing regime, which triggered the people’s desire for institutional reformation,<sup>124</sup> and overturned the minority-controlled power-regulated society, the Manchus. Unlike the Opium Wars, after this defeat, China realized that its weakness was not only because of inferior technology, but also because of government corruption and an obsolete political structure.<sup>125</sup> China’s military was stronger than Japan’s, because China had purchased superior weaponry from the West for decades.<sup>126</sup> Additionally, Japan had been subordinate to China, and it had even copied China’s culture and institutions before restoring imperial rule under Emperor Meiji in 1868.<sup>127</sup> Therefore, China’s defeat was a failure of the institution not the military. In 1895 and 1898, scholar K’ang Yo-wei gave a memoranda to the Emperor of China that explained why China needed radical reform.<sup>128</sup> Since then, China has continued its long march towards institutional transformation.

Institutional transformation is a complicated and dangerous process; hence different countries have had different transformations depending on their circumstances. Institutional reform has been attempted several times in China, but there have been severe setbacks.

The first attempt at institutional transformation, called the political regime-oriented transformation, occurred during the Xinhai revolution led by Sun Yat-sen, the “Father of the Republic.”<sup>129</sup> In this revolution, the Qing Dynasty was

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<sup>121</sup> “In China, Mr. Qian was celebrated as the father of Chinese rocketry, the leader of the research that produced the nation’s first ballistic missiles, its first satellite and the Silkworm anti-ship missile.” Michael Wines, *Qian Xuesen, Father of China’s Space Program, Dies at 98*, N.Y. TIMES (Nov. 4, 2009), <http://www.nytimes.com/2009/11/04/world/asia/04qian.html>.

<sup>122</sup> See FAN DAINIAN, CHINESE STUDIES IN THE HISTORY AND PHILOSOPHY OF SCIENCE AND TECHNOLOGY, 322 (1996).

<sup>123</sup> 11 *The Cambridge History of China: Late Ch’ing 1800-1911 Part 2* at 201 (John Fairbank & Kwang-Ching Liu eds., 1980).

<sup>124</sup> See generally, S.C.M. Paine, *The Sino-Japanese War of 1894–1895* (2003).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Jacques Gernet, *A History of Chinese Civilization* 290 (2d ed. 1982).

<sup>128</sup> EBERHARD, *supra* note 27, at 298.

<sup>129</sup> Sun Yat-sen designed three phases of development through which the Republic of China was to be cultivated. They were the phase of struggle against the old system, the phase of educative rule, and the

overturned and the Republic government was founded.<sup>130</sup> Even though the power-regulated regime collapsed, the rights-regulated society had no foundation to rise from, thus the competitive order of society was thrown into chaos.<sup>131</sup>

Sun Yat-sen faced a dilemma because even though the power of the Qing regime had been eradicated, private rights had not yet been cultivated.<sup>132</sup> The enforcer was uprooted but not replaced. Sun Yat-sen himself was forced to transfer the temporary presidency of the Republic of China to the biggest warlord, Yuan Shih-kai.<sup>133</sup> Yuan's regime was soon overturned by the united warlords of the southern provinces.<sup>134</sup> The vacuum left by the collapse of the incumbent power caused many small regimes to emerge and compete; warlords kept the nation in a state of civil war until the founding of the Communist Party's People's Republic of China in 1949.<sup>135</sup> The hundreds of wars among warlords and the weakness of the central government impaired China's national defenses and led to the fourteen-year Sino-Japanese war from 1931 to 1945.<sup>136</sup>

The bitter lesson learned from the Xinhai revolution was that the order in society could not be taken for granted, even though, for most of human history, society was in a disordered state of nature. Institutional transformation through revolution was risky and could cause serious side effects and unexpected consequences. As economist Douglass North said,

That the informal constraints are important in themselves . . . can be observed from the evidence that the same formal rules and/or constitutions imposed on different societies produce different outcomes. And discontinuous institutional change, such as revolution of military conquest and subjugation, certainly produces new outcomes. But what is most striking . . . is the persistence of so many aspects of a society in spite of a total change in the rules.<sup>137</sup>

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phase of truly democratic government. See WOLFRAM EBERHARD, A HISTORY OF CHINA 317 (E.W. Dickes trans., 4th ed. 1977).

<sup>130</sup> The educative rule phase was an authoritarian system with democratic characteristics, under which the people would be familiarized with democracy and would cultivate political growth for true democracy. See *id.*

<sup>131</sup> See *id.* at 315–16 (discussing the struggle between rival groups from 1912–1927 following the dissolving of class solidarity amongst the gentry).

<sup>132</sup> See *id.*

<sup>133</sup> See Wright, *supra* note 51 at 123. As Wright describes:

The collapse of Yuan's regime led to a decade of chaos and division in China. It produced a power vacuum that no regime could hope to fill, and China disintegrated into several geopolitical regions, all more or less dominated by military commanders dubbed 'warlords' by Western writers. The warlord period was so confusing that most foreign government simply chose to recognize whichever regime occupied Beijing as the legitimate government of China.

*Id.*

<sup>134</sup> *Id.* at 122–23.

<sup>135</sup> *Id.* at 123–24.

<sup>136</sup> LLOYD E. LEE, WORLD WAR II IN ASIA AND THE PACIFIC AND THE WAR'S AFTERMATH, WITH GENERAL THEMES: A HANDBOOK OF LITERATURE AND RESEARCH 27 (1998).

<sup>137</sup> NORTH, *supra* note 2, at 36.



Simply, the conditions of a democratic society cannot be brought about through revolution because only competition based on private rights in a market economy can create the desired cultural and political structure.

The 1966–1976 Cultural Revolution was the second attempt at institutional transformation. This can be called the culture-oriented institutional transformation. The establishment of the communist country in 1949 was not an institutional transformation, but merely the rebuilding and unification of the past power-regulated society that had been destroyed by the Xinhai Revolution in 1911. Therefore, Communist China was still a power-regulated society. Development of the military industry became a priority due to the past weaknesses of China's national defense. This was considered the direct cause of all the misfortunes since the first war with Great Britain in 1840. The ideology of Communism and the adoption of a Soviet political and economic model seemed like the right solution. The Korean War, the end of the three-year famine in 1963, and the successful nuclear bomb experiment in 1964 helped secure China's national defense and social stability.

Mao Tse-Tung inspired the second institutional transformation. At a young age, Mao Tse-Tung realized that the two millennia of authoritarianism in China could not sustain a democratic society.<sup>138</sup> His desire for a cultural revolution was systematically manifested in 1940, during the most difficult period of the anti-Japanese war.<sup>139</sup> Some intellectuals, such as Hu Shih and some former Chinese Communist Party leaders like Chen Tu-hsiu, significantly contributed to the introduction of Western democracy in China.<sup>140</sup> These efforts were called the Literary Revolution of the 1920s.<sup>141</sup> Mao was active among the leaders that contributed to the introduction of Western democracy in China. Therefore, when the social order had reached a permissible level of authority and national security was once again established, Mao began the institutional transformation from a cultural level.<sup>142</sup>

The importance of culture in social norms is one thing, but to change the culture cannot be done quickly or easily. As Douglass North said:

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<sup>138</sup> See generally MAO ZEDONG (毛泽东), XIN MINZHU ZHUYI LUN (新民主主义论) [On New Democracy] (Jan. 1940) in 2 MAO TSE-TUNG COLLECTIONS (Foreign Language Press (人民出版社) 1991).

<sup>139</sup> See *id.* at 662–711.

<sup>140</sup> See EBERHAND, *supra* note 27, at 319. “The journal ‘New Youth’ (‘Hsin Ch’ing-nien’), created in 1915 by Chen Tu-hsiu (1879-1942), was progressive, against the monarchy, Confucius, and the old traditions. . . . Hu Shih (1892-1962) gained greatest acclaim by his proposal for a ‘literary revolution’ published in the ‘New Youth’ in 1917.” *Id.*

<sup>141</sup> See *id.*

<sup>142</sup> See North, *supra* note 2, at 42. Some elite scholars, such as Douglass North and Elinor Ostrom, have discussed the effect culture has on institutional transformation. Douglass North emphasized that “[t]he way by which the mind processes information not only is the basis for the existence of institutions, but is a key to understanding the way informal constraints play an important role in the makeup of the choice set both in the short-run and in the long-run evolution of societies. In the short run, culture defines the way individuals process and utilize information and hence may affect the way informal constraints get specified.” See *id.*

Equally important is the fact that the informal constraints that are culturally derived will not change immediately in reaction to changes in the formal rules. As a result, the tension between altered formal rules and the persisting informal constraints produces outcomes that have important implications for the way economies change.<sup>143</sup>

Mao unified the mainland of China using military force under communist ideologies, and then he destroyed traditional Chinese culture through the Cultural Revolution.<sup>144</sup> If we accept Henry Sumner Maine's argument that "the movement of the progressive societies has hitherto been a movement from *Status to Contract*,"<sup>145</sup> then we can closely examine the Cultural Revolution. Two main features can be seen in the Cultural Revolution. The first feature is that nearly all social members or institutes with superior political or social status were targeted by the revolutionaries.<sup>146</sup> These people and institutes included founders of the regime, governmental organizations, government officers, intellectual scholars, and universities. The second feature was Mao's support and praise for riots under the presumption that "rebellion is reasonable."<sup>147</sup> The purpose of this slogan was to cultivate the ability of the Chinese people to rebel against any oppressive regimes such as authoritarianism. This effort was necessary because the main characteristics of China's traditional culture were subordination, fidelity, and self-effacement. The Cultural Revolution was another kind of liberalization by which the public attempted to free themselves from the burden of traditional authoritarian culture by destroying the pyramids of status and replacing it with egalitarianism. It also sought to replace the family-based ethical system with a more individualistic model.<sup>148</sup> In China's recent history, the Cultural Revolution stands as a major social and political event; much effort needs to be devoted to studying the revolution and its aftermath.<sup>149</sup> Obviously, the enormity of this issue goes beyond the scope of this article.

Aside from that, the Cultural Revolution was an institutional transformation of an old power-regulated society being culturally uprooted and changed into a modern rights-regulated society. The event might be considered a failure due to the social chaos and economic duress that followed, but time will tell if it was

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<sup>143</sup> *Id.* at 45.

<sup>144</sup> See LIEBERTHAL, *supra* note 28, at 290–293.

<sup>145</sup> HENRY JAMES SUMNER MAINE, *ANCIENT LAW* 100 (1960).

<sup>146</sup> See LIEBERTHAL, *supra* note 28, at 290–293.

<sup>147</sup> *Id.*

<sup>148</sup> See WRIGHT, *supra* note 51, at 162.

<sup>149</sup> See *Id.* As David Wright points out:

The Cultural Revolution was a complex phenomenon, and making sense of it is not an easy task. Indeed, several scholars who have devoted their careers to plumbing its depths have not been able to come to full grips with its causes and the course of its development. The Cultural Revolution was more or less officially launched in mid-1966, but after that it seems to have assumed a momentum and meaning all its own, quite apart from what Mao originally foresaw or intended.

*Id.*

worse or better in the long run. It is possible that the revolution pushed China's society forward and planted the seeds of democracy. It is also doubtless that the Communist Party and Mao Tse-Tung himself were among the victims of the revolution, which maybe was an intended consequence of the revolution. Elinor Ostrom pointed out the layers of norms that affect the society:

All rules are nested in another set of rules that define how the first set of rules can be changed. This nesting of rules within rules at several levels is similar to the nesting of computer languages at several levels. . . . Whenever one addresses questions about institutional changes, as contrasted to action within institutional constraints, it is essential to recognize the following: 1. Changes in the rules used to order action at one level occur within a currently 'fixed' set of rules at a deeper level. 2. Changes in deeper-level rules usually are more difficult and more costly to accomplish, thus increasing the stability of mutual expectations among individuals interacting according to a set of rules.<sup>150</sup>

Without the Cultural Revolution, the reform and open policy might have taken much longer to come to fruition.<sup>151</sup>

The third attempt at institutional transformation was the reform and open policy in 1979. After the previous attempts at institutional transformation were not successful, the regime of China gradually began to realize that the institutional transformation from a power-regulated society to a rights-regulated society needed to begin from the grassroots<sup>152</sup>; the economic reformation needed to be followed by cultural reformation and culminate into a political reformation. The reform and open policy had remarkable differences from the previous institutional transformations. The reform started from the basic economic surface of agricultural reform in 1979, rather than political reform that had happened in the Xinhai revolution.<sup>153</sup> For industrial and market reform, the reform started from some testing points—such as Shenzhen, Zhuhai, and Shantou in the Guangdong province and Xiamen in the Fujian province—and later spread to more inland areas.<sup>154</sup> Thus far, the bottom-up method of reform has made impressive gains. In contrast

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<sup>150</sup> ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 51–52 (James E. Alt & Douglass C. North eds., 2003).

<sup>151</sup> See LIEBERTHAL, *supra* note 28, at 130. As Kenneth Lieberthal summarizes, one of the four main conclusions that informed Deng Xiaoping's specific reform efforts is:

Deng concluded that after the disillusionment of Mao's last years, ideological exhortations rang hollow, and that the Chinese people sought a higher standard of living. Events during the 1970s had so eroded the legitimacy of the Chinese Communist party that a new source of confidence in the party's right to rule would have to be found. Deng decided that source must be more and better resources for the populace, and argued that the party's only hope was the utilitarian principle that it could consistently "deliver the goods."

*Id.*

<sup>152</sup> *Id.* at 130–33.

<sup>153</sup> *Id.* at 136.

<sup>154</sup> *Id.* at 141.

to the Xinhai revolution, the reform and open policy still maintained the Communist Party in order not to destabilize social order.<sup>155</sup> As we discussed before, this was necessary. As Douglass North pointed out, “[o]rder is a necessary (but not sufficient) condition for long-run economic growth. It is equally a necessary (but not sufficient) condition for the establishment and maintenance of the variety of conditions underlying freedom of person and property that we associate with a consensual or democratic society.”<sup>156</sup>

At the same time, the gradual step-by-step improvement in private rights, such as privatization of property and the cultivation of a market economy, has built up the infrastructure of a rights-regulated society in China. As Francis Fukuyama says, “Contemporary conventional wisdom has it that democracy will not emerge without the existence of a strong middle class, that is, a group of people who own some property and are neither elites nor the rural poor.”<sup>157</sup> Therefore, because of the large population and unbalanced urban development, the cultivation of a substantial middle class and a progressive culture can take time to develop.

Modern China has many social and political phenomena that can be construed as unusual or controversial. This is the result of conflicting and inconsistent criteria for the performance of morality, politics, and culture. These different criteria, in turn, stem from differences between the old power-regulated society and the potential for a rights-regulated society. For instance, the Chinese Constitution acts as an institutional instrument for a rights-regulated society, but the Constitution is not fully implemented and obeyed even by the regime in power.<sup>158</sup> Whether China should have a judicial review system for its constitution is still under heated debate.<sup>159</sup> Another instance of conflict comes from China’s political structure in which there are institutionally parallel regimes of power where one heads the government and the other heads the Communist Party. There is the Communist Party of China—organized on the chart of the Party—but also the governmental regime—organized and structured by the Constitution and laws. So far these two conflicting groups are merged by the Communist Party. The relationship between the two parallel regimes is a sensitive political issue. It could be said that the two regimes are two representatives: one for the current power-regulated society and the other for the future rights-regulated society. What the Chinese society becomes in the future will be determined by the relations of these two regimes.

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<sup>155</sup> *Id.* at 166–67.

<sup>156</sup> DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 104 (2005).

<sup>157</sup> See FUKUYAMA, *supra* note 10, at 410.

<sup>158</sup> *Wultz v. Bank of China Ltd.*, No. 11 Civ. 1266 (SAS), 2012 U.S. Dist. LEXIS 161399, at \*15 (SDNY Nov. 5, 2012) (“Even China’s current constitution contains a number of apparently legally binding statements that are in practice not enforced by the courts”).

<sup>159</sup> See Thomas E. Kellogg, *Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China*, 7 INT’L J. CONST. L. 215 (2009).

The People's Congress, which is structured according to the Constitution,<sup>160</sup> is another example of conflicting principles in China. In a democratic country, the congress is the political organ by which the public supervises and controls the power of regime. Therefore, most of the members of congress should come from the public instead of from within the government. But in China, most members are already governmental officials.<sup>161</sup> They have dual status, being both the supervisors and the supervisees. This kind of congress is undoubtedly far from meeting the criteria and functionality of a democratic government. One columnist has commented that it is more like a political farce.<sup>162</sup> These comments are true to some extent from the democratic point of view. But from the institutional transformation point of view, these duplicate models of democratic political structures might be shortcuts to democracy and the cultivation of elites. This process goes from superficial to substantial, and from imitation to self-cultivation for democratic skills and cultures. As Kenneth Lieberthal pointed out:

Indeed, should a fully democratic system emerge in China by 2020, it is most likely to be the result of unmanageable popular demands having produced a breakdown of the political system at some point before that date. Given the vast complexity of the country and its political history, any democratic system growing out of this trauma is likely in 2020 to be institutionally weak and highly corrupt, with strong local forces testing the territorial integrity of the country around its margins. Political parties would more likely represent localities than national social groups.<sup>163</sup>

The current institutional transformation of China resembles things being transferred from an outdated basket to a new and appealing basket. The old basket has become shabby and no longer functions properly but most things are still in it; the new one is still being woven and is still quite hollow inside. During the transportation of the contents, an external power is needed to keep the old basket functioning and to weave the new one gradually as well as to move contents from

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<sup>160</sup> See XIANFA (宪法) art. 2, § 2 (1982) (China) ("The organs through which the people exercise state power are the National People's Congress and the local people's congresses at different levels.").

<sup>161</sup> According to the statistics of China Central Television, 34.88% of the 2,987 members in the Twelfth National People's Congress of China are governmental or communist party officials. *The National Party and Government Officials to Reduce the Proportion of Nearly Percent*, CNTV NEWS CHANNEL, Feb. 27, 2013, <http://news.cntv.cn/2013/02/27/ARTI1361930998440696.shtml>.

<sup>162</sup> George Ding, *Explaining China's National People's Congress*, VICE, Mar. 19, 2013, <http://www.vice.com/read/behind-the-two-meetings-china> ("[W]hen it comes to political theater, nobody does it better than the Communist Party of China. Sure, they lack the production values of the United States and the method acting of North Korea, but the CPC more than makes up for it in scale and grandiosity. . . . The 18th National Congress of the Communist Party of China held last November was a meeting of the CPC, where Xi was "elected" as the General Secretary of the Communist Party of China and the Chairman of the CPC Central Military Commission, the two posts in the party apparatus that actually matter. By contrast, the "two meetings," which ended their two-week run Sunday, are not meetings of the CPC, but of the actual Chinese government, which is controlled by the CPC. Confused yet?").

<sup>163</sup> LIEBERTHAL, *supra* note 28, at 335.

the old to new basket. This is what the Communist Party, as the sole authority in China, has been doing and should continue to do. Media is one of the critical tools used to weave the new basket and to carry things over to it.

### *B. Media Policy in the Process of Institutional Transformation*

Media is a key instrument in the formation of society because it can communicate necessary information, inspire cooperation, and facilitate collective actions. Whether the government or public controls the media, it has an implication on the wider political environment of society. In a power-regulated society, the government controls the content of media through the power-controlled media model. For a rights-regulated society, the public controls the media content. This is called the free media model. Since China was the most successful and typical power-regulated society, its media policy was a typical power-controlled media model, especially before 1979. The US is currently the most powerful and typical rights-regulated society and the American media policy is a typical free media model.

There are ideological differences between the two models of media. Scholar Fred Siebert has described the scenario of the media from the two extremes of the USSR and the United States meeting:

On the rare occasions when United States and Soviet newspapermen come together to discuss mass communication, the talk is apt to be both amusing and frustrating; for it becomes obvious in the first few minutes that the two frames of reference are incompatible. The American feels blessed with his free press, and is inclined to sympathize with his Soviet colleague who groans under state ownership, censorship, and propaganda. The Soviet representative, on the other hand, claims that *he* is blessed with the only true freedom of the press, whereas his unfortunate American colleague is compelled to serve a press that is venal, controlled by special interests, corrupt, and irresponsible.<sup>164</sup>

Which side is more persuasive? It depends. The argument between the American and USSR media workers was typical of conflicts, as described above, between the differing ideologies on both extremes of the spectrum. For the American side, the condition is that the mass public has enough ability and interest to oversee the media's behavior; if the media was too heavily influenced by special interest groups, media outlets would be punished by the public through boycotting or other reduced consumption.<sup>165</sup> For the USSR, the condition neces-

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<sup>164</sup> SIEBERT ET AL., *supra* note 1, at 105.

<sup>165</sup> *See id.*, at 60 ("The spread of objective reporting throughout American journalism was accelerated by the decline in political partisanship in the press and by the change of the newspaper . . . . The growth of

sitated that the regime of power was honest and integrated for the welfare of the whole society rather than for only self-interest. Neither of two conditions are easily met. Is it easier to find one good leader or to educate the population as a whole as rational citizen for private right holders? Different countries obviously have different answers in accordance to their different historical, natural, and geographic conditions.

Currently, China's media policy and regulation is in a dynamic position between the two poles. The dual features of both models of media policy exist in China's media regulations and they are sometimes at odds with each other, especially in the case of regulation of new network media.

### 1. *The Remarkable Features of Internet Enterprises in China*

The traditional media, including newspapers, journals, magazines, publications, and broadcasts, has been restricted and regulated by the Chinese government.<sup>166</sup> This practice has characteristics of a power-controlled media model but faces serious competing pressure from market forces. The network new media fundamentally differs from traditional media in ways that critically challenge the media policy in China. These differences stem from the transnational, user-generated, and independent nature of new network media. In China, the remarkable features of internet enterprises are their newness within the market economy environment and their financial independence from the regime of power.

The regime of power in China faces increased difficulty in restricting and regulating the network new media. Traditional media is generally regional; a country can exclude the content of tangible foreign media by means of customs or import bans. For example, in China, all tangible media products such as books, journals, newspapers, CDs, and films need government approval before entering China.<sup>167</sup> As for broadcasted content, the Chinese government has the ability to stop retransmission of the content by regulating and monitoring the reception of Direct-Broadcast Satellite antennas that receive the transmissions within China's territory.<sup>168</sup> The transnational characteristic of network new media makes the above measures of regulation much more difficult today. The massive amount of content available online coupled with the intricacy of the web makes blocking and supervising specific content nearly impossible. Furthermore, the public pressure against censorship is much higher today than ever before because any indi-

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advertising and the drive to increase circulations also contributed to the general acceptance of the ideal of objectivity.").

<sup>166</sup> Benia Xu, *Media Censorship in China*, COUNCIL ON FOREIGN RELATIONS (Apr. 7, 2015), <http://www.cfr.org/china/media-censorship-china/p11515> ("The Chinese government has long kept tight reins on both traditional and new media to avoid potential subversion of its authority.").

<sup>167</sup> Patrick Frater, *China Unveils Tough Controls on Foreign Media Activities*, VARIETY (Feb. 22, 2016, 5:08 AM PT) <http://variety.com/2016/biz/asia/china-controls-foreign-media-activities-1201711580/>.

<sup>168</sup> See Xu, *supra* note 166.

vidual can directly feel the information they are trying to access is being censored.<sup>169</sup>

The characteristics of independent online enterprises also contribute to the difficulty of content regulation in China. Aside from network new media, all traditional media enterprises in China are state owned.<sup>170</sup> The government can easily intervene to regulate the content of the traditional media through their financial and administrative power over the enterprise. Anyone who disobeys regulations could be removed from the enterprises.<sup>171</sup> Furthermore, senior managers at these enterprises are pressured to comply with the regime in order to keep their positions safe and have opportunities for advancement.<sup>172</sup>

Unlike traditional media enterprises, the management teams of the network new media enterprises are more sensitive to market profits than to awards from the regime of powers. Firstly, the final authority in a network new media company is its shareholders, not the government. Therefore, keeping profits as high as possible is the mission of the management teams for the network new media companies, rather than following the government's wishes.<sup>173</sup> This means that the competing rules of the private-rights-regulated societies play a much stronger role in such enterprises. The power of the market challenges the power of the government. The operators of network new media do not participate in the competition for glory or loyalty but, instead, they compete for market profit via guerrilla battles with the governmental supervisors.

Secondly, for state-owned enterprises, the desires of the regime can easily pass on to the enterprises by internal channels because nearly all the senior managers of state-owned enterprises are also part of the bureaucracy.<sup>174</sup> However, there are no such channels for new network media enterprises. Therefore, the regime of power needs to implement their desires through laws or regulations, even though such laws are still too general, simplistic, and allow too much discre-

<sup>169</sup> See Gary King et al., *How Censorship in China Allows Government Criticism but Silences Collective Expression*, 1 AM. POL. SCI. REV., May 2013, at 326 (2013). As Gary King points out:

Human expression is censored in Chinese social media in at least three ways, the last of which is the focus of our study. First is "The Great Firewall of China," which disallows certain Web sites from operating in the country. . . . Second is "keyword blocking" which stops a user from posting text that contain banned words or phrases. . . . Once past the first two barriers to freedom of speech, the text gets posted on the Web and the censors read and remove those they find objectionable.

*Id.* at 328.

<sup>170</sup> See Xu, *supra* note 166.

<sup>171</sup> See HE, *supra* note 69, at 44. As He Qinglian explained:

Journalists and editors must also have a good political record. If one of their news reports breaks a rule, they are liable to punishment commensurate with the seriousness of the offenses. The heaviest administrative penalty is dismissal or having entered into one's file the statement that "this person is unsuitable for cultural dissemination work."

*Id.*

<sup>172</sup> See *id.*

<sup>173</sup> For example, the Co-Founder, Chairman, and CEO of Baidu.com, Li Robin, has appeared on the richest people list in China for several years according to Forbes's annual compilations. *China Rich List*, FORBES, <http://www.forbes.com/profile/robin-li/?list=china-billionaires> (last visited Feb. 15, 2017).

<sup>174</sup> KENNETH LIEBERTHAL, *MANAGING THE CHINA CHALLENGE: HOW TO ACHIEVE CORPORATE SUCCESS IN THE PEOPLE'S REPUBLIC*, 50-52 (2011).



tion for the government to adjust the content through case-by-case review. The move towards controlling content via laws rather than internal and opaque channels is still a progressive step in Chinese society. The legislative procedure and context of laws and regulations are still distant from other nations' rule of law and regulation regarding new network media. As Francis Fukuyama pointed out:

The rule of law can be said to exist only where the preexisting body of law is sovereign over legislation, meaning that the individual holding political power feels bound by the law. This is not to say that those with legislative power cannot make new laws. But if they are to function within the rule of law, they must legislate according to the rules set by the preexisting law and not according to their own volition.<sup>175</sup>

But when the supervising government discusses and debates the legality and compliance of content surrounding regulations, it is a step towards a lawful political frame. This is particularly evident when considering that while the Christian world followed a near-universal biblical code, China never had any document that could provide such structure.<sup>176</sup>

## *2. Specific Characteristics of China's Media Policy in the Institutional Transformation Period*

This paper has discussed that three main factors are closely related to the regulation and policy of media for a country: the type of society, that is, whether it is a power-regulated society or a rights-regulated society; the geopolitical security for the country; and the competitive pressure from different powers internationally or domestically. All three factors center on the concept of competition. China is transforming from a power-regulated society to a rights-regulated society. China also has unique geopolitical features and faces enormous international and domestic pressure. Therefore, China's regulation and policy towards media has its own particular characteristics in which both the state-controlled media model and the free media model overlap. These models conflict and compromise with each other and the weight between them adjusts according to the progress of institutional transformation.

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<sup>175</sup> FUKUYAMA, *supra* note 10, at 246.

<sup>176</sup> *Id.* at 248–49. As Francis Fukuyama explained the superior authority of the Chinese Communist Party to any other institution in China:

A good example is the People's Republic of China. There is no true rule of law in China today: the Chinese Communist Party does not accept the authority of any other institution in China as superior to it or able to overturn its decisions. Although the PRC has a constitution, the party makes the constitution rather than the reverse. . . . Dynastic China did not have a rule of law any more than Communist China.

*Id.*

Firstly, modern China has moved away from its Soviet-style roots and has been progressing towards a rights-regulated society since the 1979 reform and open policy. Furthermore, China has begun the process of establishing a market economy and democratic political structure. Therefore, private rights have been under cultivation and have had greater and greater influence on the media regulations. For example, before 1990, China did not have a copyright legal system for nearly 40 years after the founding of the communist regime.<sup>177</sup> During that time, no copyright protection existed in China; even media frequently included copyrighted material without permission.<sup>178</sup> The authors were considered the employees of the government, or the organizations attached to the government, and were paid monthly salaries instead of royalties.<sup>179</sup> The independent authors, if they existed, had almost no channels by which to publish their works and thus could not make a living through the creation and sale of works. Therefore, in such a power-regulated society, private rights played no role in content regulation. Many countries with this model still exist, such as North Korea and Iran. Like China in earlier times, both North Korea and Iran are typical power-regulated societies. In North Korea, the content of the media is strictly controlled and regulated by the regime based only on the regime of power's volition.<sup>180</sup> In Iran, private rights, such as copyrights, also have very little function in the regulation of content.<sup>181</sup> Simply speaking, in such a political regime, the social members have no freedom to criticize the government, but have the freedom to freely use others' works.

Furthermore, copyright laws as a private rights regulation paradigm in China have been gradually created since 1979. The first copyright law of 1990 was created for the purpose of attracting foreign investment and the exchange of technology.<sup>182</sup> The competitive pressure from the international society forced China to open its doors and invite foreign investment and technology.<sup>183</sup> Foreign enterprises that held capital and technology, however, needed predictable and compa-

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<sup>177</sup> See generally SHEN RENGAN (沈仁干), BAN QUAN LUN (版权论) [ON COPYRIGHT] (Haitian Chu Ban She (海天出版社) 2001) (discussing the promulgation of the Copyright Law of China in 1990).

<sup>178</sup> Stephen McIntyre, *Trying to Agree on Three Articles of Law: The Idea/Expression Dichotomy in Chinese Copyright Law*, 1 CYBRARIS 62, 71–73 (2010).

<sup>179</sup> *Id.*

<sup>180</sup> *North Korea's Tightly Controlled Media*, BBC NEWS (Dec. 19, 2011) <http://www.bbc.com/news/world-asia-pacific-16255126>.

<sup>181</sup> Iran has not yet joined in the Berne Convention. See *WIPO-Administered Treaties Contracting Parties/Signatories Berne Convention*, WORLD INTELL. PROP. ORG., [http://www.wipo.int/wipolex/en/wipo\\_treaties/parties.jsp?treaty\\_id=15&group\\_id=1](http://www.wipo.int/wipolex/en/wipo_treaties/parties.jsp?treaty_id=15&group_id=1) (last visited Feb. 15, 2017).

<sup>182</sup> It was said that what triggered the promulgation of the Copyright Law of China in 1990 was the Sino-American Cooperation Agreement on High Energy Physics, signed in 1979, when Deng Xiaoping visited the United States. In the documents, the concept "copyright" appeared, which pushed China to study the copyright legal system and promulgate the law more than ten years later. See SHEN (沈仁干), *supra* note 177, at 259.

<sup>183</sup> Stephen McIntyre, *The Yang Obeys, but the Yin Ignores: Copyright Law and Speech Suppression in the People's Republic of China*, 29 UCLA PAC. BASIN L.J. 75, 127 (2011) ("Probably the most significant reason for the increased congruence between copyright and SHDF was foreign influence. From 1989 to 1996, the United States exerted concentrated pressure on China to improve its protection of intellectual property, and the two nations were in almost constant dialogue on the subject.").

rable laws. Therefore, a package of laws, including copyright laws, were drafted and promulgated.<sup>184</sup> The foreign investment enterprises in China were given special treatment as many of the laws and regulations were created specifically for their protection, rather than for domestic enterprises in China.<sup>185</sup> The start of private-rights regulation in China started in specific places such as Shenzhen<sup>186</sup> and later spread everywhere in China; the spread of private rights also moved from some specific markets, such as international business and investment, but progressively encompassed all business.<sup>187</sup> In 2001, after accession into the World Trade Organization (WTO),<sup>188</sup> the obvious gap between China's copyright laws and international copyright protection, if contextually analyzed through the law, was narrow. The special treatment for foreign copyright holders diminished in light of the fair play requirement of the WTO.<sup>189</sup> The development of copyright laws in China signifies the ways in which private rights became a source of order for content regulation. Since 2008, in which the National Intellectual Property Strategy was published,<sup>190</sup> the development of intellectual property (IP) law—including Copyright Law in China—has been following the market requirements of China rather than international pressure.<sup>191</sup> The need for private rights protection and domestic trade for Chinese authors and enterprises is becoming a driving force for the coming amendment of copyright laws.<sup>192</sup> The rights-regulated society model has been continuing to form in China.

<sup>184</sup> See *id.* at 110–15.

<sup>185</sup> *Id.*

<sup>186</sup> Mo Zhang, *From Public to Private: The Newly Enacted Chinese Property Law and the Protection of Property Rights in China*, 5 BERKELEY BUS. L.J. 317, 335 n.94 (2008) ("In fact, before the 1988 Amendment, several places in China such as Shenzhen, Fuzhou, Guangzhou, Xiamen, and Shanghai had adopted local regulations experimenting with the transferability of land use rights.")

<sup>187</sup> *Id.* at 335–37.

<sup>188</sup> *WTO Ministerial Conference Approves China's Accession*, WTO NEWS (Nov. 10, 2011) [https://www.wto.org/english/news\\_e/pres01\\_e/pr252\\_e.htm](https://www.wto.org/english/news_e/pres01_e/pr252_e.htm).

<sup>189</sup> See Summary of Dispute, WTO Legal Affairs Decision, China—Intellectual Property Rights (2014), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/1pagesum\\_e/ds362sum\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds362sum_e.pdf); see generally Panel Report, China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WTO Doc. WT/DS362/R, (adopted Mar. 20, 2009), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/1pagesum\\_e/ds362sum\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds362sum_e.pdf) (acknowledging China's right to prohibit some, but not all, foreign copyrights under the Berne Convention).

<sup>190</sup> Guojia Zhishichanquan Zhanlue Gangyao (国家知识产权战略纲要) [Outline of the National Intellectual Property Strategy] (promulgated by the St. Council, June 25, 2008, effective June 25, 2008) ST. COUNCIL GAZ., June 25, 2008, at <http://www.wipo.int/wipolex/en/details.jsp?id=859> (China).

<sup>191</sup> The Trademark Law has been amended three times since 2008. See Zhang Mao, *China's New Trademark Law*, WIPO MAGAZINE (Sept. 2014), [http://www.wipo.int/wipo\\_magazine/en/2014/05/article\\_0009.html](http://www.wipo.int/wipo_magazine/en/2014/05/article_0009.html). The Patent Law was being considered for a fourth amendment at the beginning of 2016. See Michael Lin, *China Release Proposed Amendments to Patent Laws*, IP WATCHDOG (Dec. 18, 2015), <http://www.ipwatchdog.com/2015/12/18/chinese-patent-law-amendments-proposed/id=63981/>. The Copyright Law is in the process of a third amendment. See Paolo Beconcini, *China: Draft of the Amendment to the Copyright Law*, MONDAQ, (July 25, 2014), <http://www.mondaq.com/china/x/33025/2/Copyright/Draft+Of+The+Amendment+To+The+Copyright+Law>.

<sup>192</sup> In the third amendment, the first and second drafts of the copyright law have been published for public comments and suggestions, and many scholars, copyright holders and enterprises joined the heated discussion and debate about some articles such as collective management of copyrights. This was not very common in China because for a long time, the legislation had closed doors, with little transparency and sometimes completely secret. The text of the second draft of the copyright law is available for public re-

Moreover, the right of privacy and reputation are much more complicated than copyright law. The reason for this is that personal interests in privacy and reputation are closely intertwined with the regime of power's interests. For instance, the Chinese concept of privacy was historically very weak except when it related to sex.<sup>193</sup> One main reason is that the protection for privacy could be an obstacle for the implementation of power by the rulers. Therefore, in a power-regulated society, no regime of power could tolerate such private rights existing. As this paper has discussed, in a power-regulated society, the information between the ruler and the public is transparent in only one direction.<sup>194</sup> Until 2008, when the Tort Law of China was promulgated, the right to privacy was a legitimate interest independently placed first on a list of private rights needing to be protected.<sup>195</sup> Before this law, the right to privacy was not an independent legal concept protected by law; the violation of privacy was not a legal cause for judicial remedy in China.<sup>196</sup>

Also, distinct from the right to privacy, the right to reputation has been protected by law since the beginning of the reformation and open policy in China.<sup>197</sup> One explanation for this is that human dignity and reputation were thrown into chaos during the Cultural Revolution. The strong protections for reputation and dignity of citizens given by the constitution and civil law, arguably, were meant to correct the wrongdoings of the past. But this logical application of corrective policy has not been consistently applied to the right of privacy. Specifically, privacy, as the core of human dignity, was also seriously violated in the ten years of

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views on the National Copyright Office Website. *Copyright Law of People's Republic of China (Bill to Amend the Second Draft)*, NAT'L COPYRIGHT ADMIN. OF THE PEOPLE'S REPUBLIC OF CHINA, (July 2012), <http://www.ncac.gov.cn/chinacopyright/contents/483/17753.html>.

<sup>193</sup> See Bo Zhao, *Posthumous Reputation and Posthumous Privacy in China: the Dead, the Law, and the Social Transition*, 39 BROOKLYN J. INT'L L. 269, 305–08 (2014).

<sup>194</sup> See *supra* Part III.A. To spy on an emperor was a serious offense in many power-regulated societies. In China, it was punishable by death.

<sup>195</sup> See Qin Quan Ze Ren Fa (侵权责任法) [Tort Law of the People's Republic of China], (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 23, 2009, effective July 1, 2010), <http://www.lawinfochina.com/display.aspx?lib=law&id=7846&CGid=>. Specifically, Article 2 of Chapter I states:

Those who infringe upon civil rights and interests shall be subject to the tort liability according to this Law.

“Civil rights and interests” used in this Law shall include the right to life, the right to health, the right to name, the right to reputation, the right to honor, right to self-image, right of privacy, marital autonomy, guardianship, ownership, usufruct, security interest, copyright, patent right, exclusive right to use a trademark, right to discovery, equities, right of succession, and other personal and property rights and interests.

*Id.* at chapter I, art. 2.

<sup>196</sup> The privacy in communications or correspondence is protected in the Constitution of China, but with some exceptions for implementation of powers. See XIANFA (宪法) art. 40, § 2 (1982) (China) (“The freedom and privacy of correspondence of citizens of the People's Republic of China are protected by law. No organization or individual may, on any ground, infringe upon the freedom and privacy of citizens' correspondence except in cases where, to meet the needs of state security or of investigation into criminal offences, public security or prosecutorial organs are permitted to censor correspondence in accordance with procedures prescribed by law.”) (translation provided by the author).

<sup>197</sup> See *id.* art. 38, § 2 (1982) (China) (“The personal dignity of citizens of the People's Republic of China is inviolable. Insult, libel, false charge or frame-up directed against citizens by any means is prohibited.”) (translation provided by the author).

chaos. Another reason for the differing treatments of reputation and privacy could be that the protection of reputation complies with the interest of a power-regulated society and the protection of privacy does not.

As this paper has discussed, a power-regulated society relies on a type of moral competition. By competing for glory in a market created by the regime of power, the selfishness of individuals can be minimized. The administration of society according to the volition of the regime was made easier by this enforced moral competition. Therefore, honor and reputation overlap and even form the two sides of the coin in a power-regulated society. The purpose and method of protection for reputation in a power-regulated society differs considerably from a rights-regulated society. In a power-regulated society, the protection of reputation exists for the purpose of maintaining the order of an honorable society. The more successful figures in the power-regulated society will be more honorable and their reputation will be more protected. In the judicial decisions related to the protection of reputation going back to 1979, public figures, such as governmental officials and celebrities, would get more protection in disputes relating to defamation or libel. For instance, in 1989, Xu Liang sued the Shanghai Culture and Art Newspaper Company for defamation.<sup>198</sup> Xu Liang was a one-legged war hero and a well-known singer in those years. In both the judicial decision of Shanghai High Court and the Judicial Response of the Supreme Court, neither mentioned the circumstance of Xu Liang as a public figure nor discussed the extent of the limited protection for his reputation during the trial.<sup>199</sup> In 2000, Zhao Zhongxiang sued *XinHua Newspaper* for defamation<sup>200</sup> The plaintiff Zhao Zhongxiang had been a well-known anchor on China Central Television.<sup>201</sup> Contrary to that of a private figure, his right to reputation should tolerate public comments. In the decision, the court hinted that as a public figure, Zhao Zhongxiang's reputation should be more protected than commoners' reputation.<sup>202</sup> In a rights-regulated society, freedom of speech is a fundamental principle and the protection of reputation is only an exception to the principle. Therefore, to uphold the fundamental principle, the protection of reputation is limited in some situations, especially with regard to the reputation of public figures.<sup>203</sup>

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<sup>198</sup> See Xu Liang Su Shanghai Wenhua Yishubao, Zhao Weichang Qin Hai Mingyuquan Jiufen An (徐良诉《上海文化艺术报》、赵伟昌侵害名誉权纠纷案) [Xu Liang v. Shanghai Culture & Art Newspaper Co. for Defamation Infringement & Zhao Weichang], 1990 SUP. PEOPLE'S CT. GAZ. 4 (Sup. People's Ct. 1989) (China).

<sup>199</sup> See *id.*

<sup>200</sup> See Zhao Zhongxiang Su Zhang Lin, Xinhua Ribao She Qin Hai Mingyuquan Jiufen An (赵忠祥诉张琳,《新华日报社》侵害名誉权纠纷案) [Zhao Zhongxiang v. Zhang Lin & Xinhua Newspaper for Defamation Infringement], PEKING UNIVERSITY LAW SCHOOL (Beijing Haidian Dist. People's Ct. 2000) (China), [http://www.pkulaw.cn/case/pfnl\\_1970324836980878.html?keywords=%E8%B5%B5%E5%BF%A0%E7%A5%A5&match=Exact](http://www.pkulaw.cn/case/pfnl_1970324836980878.html?keywords=%E8%B5%B5%E5%BF%A0%E7%A5%A5&match=Exact).

<sup>201</sup> See *id.*

<sup>202</sup> See *id.*

<sup>203</sup> For instance, in the United States, a typical private rights-regulated society, the fair comment defense protects expressions of opinion about the public performances of persons such as entertainers and

In the past three years, however, some judicial decisions in China regarding defamation have begun to consider the tolerance of public figures and leave more space for public comments and critiques. Some courts have used their discretion to limit the rights of public figures even without clear statutory authorizations. This trend can be considered progress towards greater freedom of speech and another step towards a rights-regulated society. For instance, in a 2011 case, Zheng sued JinLing and the *Nanjing Daily* Newspaper Group for harming Zheng's reputation.<sup>204</sup> Zheng was a well-known national football player in China and was accused by the defendants for being involved in illegal soccer gambling.<sup>205</sup> Zheng sued the defendants for defamation.<sup>206</sup> The defendants were two media enterprises that reported the public rumors of his gambling.<sup>207</sup> Both at the trial and the appeal, the courts held that Zheng was a public figure and should tolerate the reports of the newspapers for public concerns despite damage to his reputation.<sup>208</sup> His claim was rejected in both trials.<sup>209</sup> In the same year, another case emerged regarding a defamation dispute between Cai Jiming and Baidu.<sup>210</sup> Cai Jiming is a well-known professor and expert of social science in China. His proposal of a public holiday arrangement reform provoked a lot of debate among the public.<sup>211</sup> Some internet users opened a public bulletin board section ("BBS") section on Baidu.com under his name.<sup>212</sup> Users frequently wrote sarcastic, humiliating, and vulgar comments against Cai Jiming.<sup>213</sup> Cai Jiming sued Baidu for secondary liability of defamation and asked them to shut down the BBS under his name. Both in the first trial and in the appeal, the courts refused to uphold his request to shut down the BBS section titled with his name.<sup>214</sup> The courts reasoned that BBS was a channel for the public to address their opinions and comments on public affairs.<sup>215</sup> For purpose of public supervision and freedom of speech, the public

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politicians who voluntarily place themselves before the public. As this defense was expanded by the courts, it came to protect even hostile expressions of opinion so long as two qualifications were met: the expression had to be based on facts that were correct and accurate, and the expression had to be a critique of the person's public performance rather than her private life. See GENELLE BELMAS & WAYNE OVERBECK, *MAJOR PRINCIPLES OF MEDIA LAW* 145 (3d ed. 2015). In recent years, many states have eliminated these requirements, extending libel protection to all expressions of opinion that are clearly labeled as such, while allowing libel suits only for items that could be taken to be false statements of fact. See *id.*

<sup>204</sup> Zheng MouYu Nanjing Wanbaoshe He Nanjing Baoye Jituan An (郑某与金陵晚报社、南京日报报业集团案 ((2010)静民一(民)初字第2807号)) [Zheng Mou v. Jinling Evening Newspaper, Nanjing Daily News Paper Group], PEKING UNIVERSITY LAW SCHOOL (Shanghai Jing'an Dist. People's Ct. 2010) (China), [http://www.pkulaw.cn/case\\_es/pfnl\\_1970324837911381.html?match=Exact](http://www.pkulaw.cn/case_es/pfnl_1970324837911381.html?match=Exact).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> Cai Jiming Yu Baidu.com Qinhai Mingyuquan Xiaoxiangquan Xingmingquan Yinsiquan Jiufen An (蔡继明与百度公司侵害名誉权、肖像权、姓名权、隐私权纠纷案) [Cai Jiming v. Baidu.com], (First Interm. People's Ct. of Beijing, 2011) (China).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

should be allowed to express their voice by various channels unless they willfully attack and insults Cai Jiming himself.<sup>216</sup> In these two 2011 cases, the protection of reputation for public figures was overpowered by freedom of expression.

Additionally, the core interest of the regime of power is to maintain authority, reputation, and protection. Protecting the authority's power naturally restricts the freedom of expression. Similar to protecting private rights in a rights-regulated society, protecting power in a power-regulated society is essential. Both societies value the core interest that makes them strong—their interests happen to be on the opposite sides of the spectrum. This is why freedom of expression could destabilize the authority and can harm the power-regulated society's core interests.

In a rights-regulated society the government officials and the president can be criticized. The public can even vocalize their intentions to campaign against the president and even call for his resignation. For example, in the United States, the standard test used to gauge if a person has abused their freedom of speech is whether that speech causes “a clear and present danger.”<sup>217</sup> This standard was created in *Schenck v. United States*:

[T]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic . . . [t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.<sup>218</sup>

Justice Brandeis' concurring opinion in *Whitney v. California* further explained the test for a clear and present danger:

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech, there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. . . In order to support a finding of clear and present danger, it must be shown either that immediate serious violence was to be

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<sup>216</sup> *Id.*

<sup>217</sup> *Schenck v. United States*, 249 U.S. 47, 52 (1919).

<sup>218</sup> *Id.*

expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.<sup>219</sup>

Many media enterprises and citizens outside the United States admire the freedom of speech enjoyed by the American people and its media industry. But it is necessary to emphasize once more that freedom in the United States comes from its unique political structure, history, and geopolitics. Without the same conditions as America, China's freedom of expression could be in real danger—and even become a disaster. Because the resource of social order originates from different roots in different societies, the level of tolerance for clear and present danger will be totally different.

In a rights-regulated society, protecting private rights is the fundamental purpose of the institution, whereas, in a power-regulated society, protecting the regime of power is the fundamental purpose of the institution.<sup>220</sup> Currently, China cannot easily regulate content shown on new network media because the country is no longer a typical power-regulated society. Rather, it is a country undergoing an institutional transformation from a power-regulated society to a rights-regulated society; it has begun competing and working with other rights-regulated societies, such as the United States and European countries. Despite its transformation, China's strict regulation of media content reflects its primary interest in power. Currently, China still has more characteristics of a power-regulated society than a rights-regulated society.

The legal sources of content regulation to protect a regime of power are generally informal, temporary, and continuously readjusting. In 2000, the Regulation on Internet Information Services of the People's Republic of China (RIIS) was the administrative regulation that provided the legal basis for censoring content—distinct from the private rights such as copyright and reputation.<sup>221</sup> So far, RIIS is the most binding source of authority for content regulation. But its legal status is low according to the Law on Legislation of China because the People's Congress delegates the power to publish it to the State Council for temporary and experimental purposes.<sup>222</sup> Contextually, the RIIS is abstract, ambiguous, and discretionary.

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<sup>219</sup> *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

<sup>220</sup> For instance, in the Islamic world, Prophet Muhammad is the symbol of authority for the religious order. Therefore, when Danish cartoonists drew caricatures of the Prophet Muhammad and published them in European journals, justifying their publication under the principle of freedom of expression, it outraged people in the Arab world. See Charlene Gubash, *Why Muslims are Mad over Prophet Cartoons*, NBC NEWS, Sept. 11, 2016, [http://www.nbcnews.com/id/11164199/ns/world\\_news-mideast\\_n\\_africa/t/why-muslims-are-mad-over-prophet-cartoons/](http://www.nbcnews.com/id/11164199/ns/world_news-mideast_n_africa/t/why-muslims-are-mad-over-prophet-cartoons/) (“[T]he Danish Prime Minister Anders Fogh Rasmussen is reaching out to diplomats and leaders in the Arab world to try to explain the situation, but reiterating that his government cannot interfere with issues concerning the press. Everybody in the Muslim world, though, wants a clear-cut apology. They don't want the caveat of free speech, they want a clear-cut apology. So, maybe it won't go away until they hear those words, 'I'm sorry.'”).

<sup>221</sup> Regulation on Internet Information Services of the People's Republic of China (promulgated by the St. Council, Sept. 20, 2000, effective on Jan. 8, 2011) (Lawinfochina).

<sup>222</sup> See Legislation Law of the People's Republic of China (Order of President No. 31) (promulgated by the Nat'l People's Cong., March 15, 2000, effective July 1, 2000). Article 9 of the Order states:



In 2012, the Standing Committee of the National People's Congress promulgated the decision on Strengthening Information Protection on Networks (SIPN).<sup>223</sup> This decision is only composed of twelve articles, and among them, Articles V and VI are controversial and contested.<sup>224</sup> Article V requires that network service providers actively monitor the content of the network and delete illegal content promptly.<sup>225</sup> Article VI requires the network service providers to record the identity of people using their networks.<sup>226</sup> These Articles seriously threaten the network users' freedom of expression. In rights-regulated societies like the United States and European Union, such a regulation would have been debated extensively and even sent back through the legislature multiple times before being approved. But in China, the legislation was prompt, confidential, and unpredictable.<sup>227</sup> The content, legislative process, and technological expertise used in the SIPN regulation was totally different from the laws regulating private rights, such as copyright law and tort law. The function of such regulations is an authorization of government involvement rather than a limit on governmental power.

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If laws have not been enacted on the affairs specified in Article 8 of this Law, the National People's Congress or its Standing Committee has the power to make a decision to authorize the State Council to formulate, according to actual needs, administrative regulations first on part of those affairs, except for the affairs concerning criminal offences and their punishment, mandatory measures and penalties involving deprivation of citizens of their political rights or restriction of the freedom of their person, and the judicial system.

*Id.* at art. 9. Article 11 of the same Order states:

After the administrative regulations on an affair formulated under authorization have been tested in practice and when the conditions are ripe for making a law on the affair, the National People's Congress or its Standing Committee shall make a law on it in a timely manner. As soon as the law is made, the authorization with regard to that matter shall be terminated accordingly.

*Id.* at art. 11.

<sup>223</sup> National People's Congress Standing Committee Decision concerning Strengthening Network Information Protection (promulgated by the Standing Comm. Nat'l People's Cong, Dec. 28, 2012, effective Dec. 28, 2012).

<sup>224</sup> Laney Zhang, *China: NPC Decision on Network Protection*, THE LAW LIBRARY OF CONGRESS (Jan. 4, 2013), <https://www.loc.gov/law/foreign-news/article/china-npc-decision-on-network-information-protection/>.

<sup>225</sup> Article V states:

Network service providers shall strengthen management of information disseminated by users, where it occurs that information violated by laws or regulations is published or disseminated, handling measures such as ceasing the dissemination of the said information, deleting it, etc., relevant records are to be preserved, and the relevant controlling departments informed.

*Id.* at art. V.

<sup>226</sup> Article VI states:

Network service providers that handle website access service for users, handle fixed telephone, mobile telephone and other surfing formalities, or provide the information publication services to users, shall, when concluding agreements with users or affirming the provision of service, require users to provide real identity information.

*Id.* at art. VI.

<sup>227</sup> Typically, law proposals in China must be published by the State Council Legal Office for public comments before voting in the National People's Congress or its Standing Committee. Laws related to state secrets, security, or finance, however, are the exceptions to this requirement. Under this exception, SIPN has bypassed the Standing Committee and the usual law proposal requirements. The list of proposals published by the State Council Legal Office for public comments can be viewed at GUÓWUYUÁN FÀZHÌ BÀNGONGSHÌ (国务院法制办公室) [LEGIS. AFF. OFF. OF THE ST. COUNCIL P.R. CHINA], <http://www.chinalaw.gov.cn/article/cazjgg/index.shtml?44> (last visited Feb. 15, 2017).

Lastly, the regulations on content for the different types of information used by new network media enterprises, like Baidu and Sina, are very different. There are two groups of internet content that concerns the Chinese government. The first is content that offends privacy rights, such as intellectual property, privacy, and reputation. The second is content that offends the regime of power or public morality, such as the confidential information regarding national leaders, national security, public order, and pornography. Taking Baidu for instance, the company has two teams to supervise the content of its website.<sup>228</sup> The copyright protection team deals with the private rights content while the second team, called the “Huang or Fan” team—meaning “pornographic or antigovernment”—deals with the regime of power or public morality content.<sup>229</sup> The teams—made up of one hundred members and two hundred, respectively—adopt different standards of review.<sup>230</sup> The first team has review standards that are comparatively neutral and passive.<sup>231</sup> They follow so called “safe harbor” provisions and “notice and take down” procedures.<sup>232</sup> The second team, in charge of protecting the regime of power and public morality, has a higher standard of review.<sup>233</sup> The second group works around the clock, removing any offensive material, without notifying third parties.<sup>234</sup>

The criteria that the second team uses to categorize offensive material is an interesting and evolving set of parameters that changes with time and the regime’s whims. Private personal information about the members of the Standing Committee of the Central Political Bureau of the Communist Party is restricted and hidden unless it is voluntarily disclosed by the regime. This contrasts with the practice in rights-regulated societies, like the United States, where any news outlet can report on the personal lives of politicians.<sup>235</sup> Even though in recent

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<sup>228</sup> See Evan Woo, *Baidu’s Censored Answers to Wikipedia*, BLOOMBERG (Nov. 13, 2007), <https://www.bloomberg.com/news/articles/2007-11-13/baidus-censored-answer-to-wikipediabusinessweek-business-news-stock-market-and-financial-advice> (describing the internal censorship structure of Baidu compared to Sina).

<sup>229</sup> WeChat interview with Tan Jun, legal counsel, Baidu (Feb 16, 2017).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> Xinxin Wangluo Chuanbo Quan Baohu Tiaoli (信息网络传播权保护条例) [Regulation on the Protection of the Right to Network Dissemination of Information] (promulgated by St. Council, May 18, 2006, effective July 1, 2006), CN064 (WIPO), *English translation available at* [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=182147](http://www.wipo.int/wipolex/en/text.jsp?file_id=182147).

<sup>233</sup> Interview by Wu Weiguang, *supra* note 229.

<sup>234</sup> See generally Tao Zhu et al., *The Velocity of Censorship: High-Fidelity Detection of Microblog Post Deletions*, USINEX Security Symposium (2013), <http://www.researchgate.net/publication/235766144> (last visited Feb. 15 2017) (describing research regarding censorship.) The report stated:

Our research found that deletions happen most heavily in the first hour after a post has been made. Especially for original posts that are not reposts, most deletions occur within 5–30 minutes, accounting for 30% of the total deletions of such posts. Nearly 90% of the deletions of such posts happen within the first 24 hours of the post.

*Id.*

<sup>235</sup> See Cavan Sieczkowski, *The Obamas Escape It All By Heading To Richard Branson’s Private Island*, Huffington Post (Jan. 24, 2017, 3:33 PM), [http://www.huffingtonpost.com/entry/obamas-vacation-neck-island\\_us\\_5887aa76e4b0441a8f714db](http://www.huffingtonpost.com/entry/obamas-vacation-neck-island_us_5887aa76e4b0441a8f714db).

years China's government has become more tolerant to criticism from the media and public, the collective actions or expressions that are extorted by interest groups for bargaining leverage that can threaten the stability of the society and security of the regime are strictly prohibited and filtered online.<sup>236</sup>

## CONCLUSION

Since the reform and open policy of 1979, China has been building the foundation for a rights-regulated society using the market and private rights. Personal private rights, like the right to property, reputation, and dignity, have gained recognition and stronger protection. They now play a major role in China's developing media regulations. It is apparent that on the spectrum of media regulation, China has been moving from a power-regulated society to a rights-regulated society.

Some private rights in China have improved drastically over the past three decades and are close to Western standards. Private rights, like copyrights, that are not relevant to the security or interest of the regime have benefited. Despite the lagging statutory support, China's judicial system has also progressed towards a rights-regulated society by choosing to protect freedom of speech over the rights of public figures' reputation and privacy. This issue has not yet been finalized and remains on the front lines of battle through the institutional transformation. Information related to the core interests of the regime—like national security and confidential information on key leaders of the regime of power—however, remains censored and strictly regulated—regardless of any free speech rights. This illustrates China's political structure as a power-regulated society. The disclosure of highly controversial information related to the regime can ruin the legitimacy, authority, and ability of the regime to regulate the society and could damage the fundamental function and purpose of the government to provide a national defense and social order. But with the progress of institutional transformation thus far, the regime of power in China has become more tolerant of free speech. Since institutional transformation is a long process, we cannot expect a democratic version of freedom of speech and press to be fully integrated into Chinese society just yet.

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<sup>236</sup> See King et al., *supra* note 169, at 342. As Gary King explained:

The evidence suggests that when the leadership allowed social media to flourish in the country, they also allowed the full range of expression of negative and positive comments about the state, its policies, and its leaders. As a result, government policies sometimes look as bad, and leaders can be as embarrassed, as is often the case with elected politicians in democratic countries, but, as they seem to recognize, looking bad does not threaten their hold on power so long as they manage to eliminate discussions associated with events that have collective action potential—where a locus of power and control, other than the government, influences the behaviors of masses of Chinese people. With respect to this type of speech, the Chinese people are individually free but collectively in chains.

*Id.*

The formation of a society's political structure is driven by the history of its intense competition. The essential structure of an institution is to foster a healthy balance between competition and collaboration. Competing pressures, communication technology, geopolitics, and the availability of new energy are key variables that shape the formation of a specific institution and drive its progress. Ancient China's political structure was the most successful in the world, and, once again, it is transforming into a new world superpower. Media plays a critical function in that process because it shapes the new social consciousness and contracts. The Chinese media policy and regulation are halfway through a positive transformation. Therefore, it is baseless and potentially disastrous to attempt to copy a mature rights-regulate society's media policy, like the United States' First Amendment to the Constitution, onto China's unique political structure. China needs gradual change based on its own unique features, culture, and history in order to progress through its institutional transformation.