

Limits and Regulatory Approaches to Freedom of Expression in the Private Governance of Digital Platforms

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Abstract: Digital platforms build their own private governance systems. As entities that set rules, monitor user behavior, and determine and handle violations, these platforms pose new challenges to systems designed to protect freedom of expression. This paper examines the logic behind the formation of digital platforms' private governance powers, analyzes the current state of governance and its shortcomings, and discusses the necessity of public law regulation in light of these platforms' role in constitutional processes in China. Using a comparative approach, the paper identifies the practices from the EU, the US, and Germany. It also offers recommendations based on the EU Digital Services Act, including establishing specialized regulatory bodies within administrative agencies and conducting prior reviews of platform terms. These measures aim to clarify the boundaries of platforms' private powers while balancing the need to maintain online order with the protection of freedom of expression.

Keywords: Freedom of Speech; Private Governance of Digital Platforms; Limits of Power; Fundamental Rights.

1. Introduction

The widespread use of the Internet and social media has made digital platforms the primary arenas for public discourse in contemporary society. A 'platform' refers to a trading platform and ecosystem operated by companies and supported by various basic services [1]. Digital platforms build their own systems of governance through user agreements, community rules, and platform management procedures. They undertake functions related to content moderation and account management, which are essentially forms of quasi-public governance. However, these platforms operate under the guise of agreements between private parties. In

reality, they function as managers of online platforms with certain quasi-public powers. As commercial entities, platforms exercise managerial authority. Around the world, there are numerous instances of platforms improperly restricting citizens' freedom of expression, with citizens having little recourse. At its core, this reflects the ongoing debate over the nature of platform governance. There is no clear legal framework or judicial guidance regarding the scope and limits of these powers. Although there is now consensus in China regarding the private governance aspects of digital platforms through public-private cooperation, governance still primarily relies on private laws such as the Civil Code, the E-Commerce Law, and the Cybersecurity Law. There is also an emphasis on platform regulation from a public authority perspective, as well as on implementing responsibilities and addressing harmful online content. However, there is still room for further research regarding how private governance practices should not unnecessarily restrict users' legitimate speech, and how to define the boundaries of private powers of digital platforms. The power boundaries of online private entities, which have characteristics of quasi-public powers, neither fall under the scope of public law regulations nor are fully covered by private law. This issue requires attention from both legislative and enforcement authorities.

2. An Overview of Freedom of Speech and Platform Governance in the Digital Age

2.1 The Logic behind the Emergence of Platform Privilege

Firstly, it's necessary to consider whether platforms can be regarded as subjects of power. In the past, 'power' was generally associated with 'public institutions' and 'government agencies.' Private entities were not considered subjects of power in a legal sense [2]. Theoretically, Jürgen Habermas introduced the

concept of 'communicative power,' arguing that legitimacy does not arise from the sovereign or the external forms of law, but rather from the communicative actions of citizens. When those who abide by the law can also be seen as law-makers, and when all citizens reach a consensus through rational discussion, legitimacy is established. Thus, the legitimacy of such entities becomes self-evident. In practice, in China, 'internet platforms' are defined as 'commercial organizations that enable interdependent bilateral or multilateral parties to interact under rules established by a specific platform, thereby creating value together [3].' At the same time, the guidelines issued by the State Administration for Market Regulation have explicitly addressed the use of platforms and the exercise of their powers, whilst also adopting a positive stance towards their participation in certain aspects of public governance. Consequently, there is no longer any significant controversy regarding the status of platforms as entities exercising power in China.

As for the source of platform power, Chinese scholars generally agree that it stems from legal authorization. Through a combination of state-authorized or tacit approvals, user agreements that grant certain rights to platforms, and technological advancements that enable platforms to assert their own authority, platforms have gradually gained control over governance mechanisms and the ability to regulate users. This includes 'quasi-legislative power' to establish rules, 'quasi-enforcement power' to impose restrictions, and 'quasi-judicial power' to resolve disputes [4]. As long as these measures do not violate mandatory legal provisions, they are not subject to interference by public authorities. Supporters of the theory of social constitutionalism argue that power operates not only within political systems but also in other functional areas [2]. Platform power derives its legitimacy not from political decisions but from the functional logic of economic activities. Some scholars also believe that the rights granted to platform users constitute an important source of platform power [5].

Finally, there's the issue of defining the nature of platform power. Some scholars point out that the concept of platform power encompasses two aspects: de facto power and legal power. De facto power refers to the coercive influence that platforms wield over users, stemming from their dominant market position, technological

advantages, and access to information [6]. Since this type of power falls within the framework established by law, it's relatively easier to regulate. In contrast, legal power, which arises from contracts agreed upon by both parties, isn't subject to public law constraints. This creates the risk of unclear boundaries regarding the scope of such power.

2.2 Modern Manifestations of How Digital Platforms Affect Freedom of Expression

Freedom of speech is the primary form and foundation of freedom of expression [7]. It serves as the core element that underpins all other forms of expression. In the digital age, freedom of expression represents an extension and innovation of this concept as stipulated by the constitution. Some scholars argue that the new form of 'expression' should be based on freedom of communication—that is, it should not only protect the speaker's right to express themselves but also ensure that their words are protected as they are transmitted through various platforms. This ensures that both listeners and speakers have sufficient information to understand, analyze, and express their opinions [8]. As discussed above, private platforms' practices of content censorship and algorithmic filtering of citizens' speech do not constitute state authority in the traditional sense. Therefore, any filtering, removal, or modification of speech carried out for private purposes or technical reasons undermines the traditional concept of freedom of expression in the digital age. These restrictions do not entirely stem from constitutional provisions [9]. This is a key aspect of how private governance operates on digital platforms today.

In the author's view, digital platforms influence users' freedom of expression in three main ways, through algorithms, big data, and other modern technological means. At each of these stages, there are issues related to the boundaries of digital platform governance. At the frontend, when users choose to use a platform and are forced to sign the standard contract provided by the platform, they thereby relinquish certain rights in exchange for access to the platform's services. This user agreement outlines the platform's rights to take actions such as suspending accounts, deleting content, and banning users from the platform [10]. It also defines how the platform will handle 'illegal or inappropriate content.' During use, as stipulated

in the 'iQiyi PPS User Service Agreement,' 'iQiyi and PPS have the right to delete or remove any content stored or posted by users on their services, for any reason. They do not need to give notice before taking such actions, and they bear no responsibility to users or third parties [11].' Additionally, some scholars have analyzed the current situation regarding digital platforms like Baidu, rednote, and WeChat, it becomes clear that these service providers only provide indirect support for protecting freedom of expression through provisions related to personal information protection and regulation of advertising practices. They do not directly address issues related to protecting users' freedom of expression and communication [8]. As a result, after users grant certain rights to these digital platforms, they receive no protection of their freedom of expression as promised in the contracts. This means that the platforms' self-regulation regarding the exercise of these rights is likely inadequate. On the backend, when platforms use standard form contracts with users to delete comments or content, ban accounts, or impose restrictions, users have little recourse. These actions are often carried out using algorithms and other technical means, making it extremely difficult for users to gather evidence. This, in turn, makes it much harder to hold the platforms accountable for any violations of rights.

2.3 The Participation of Digital Platforms in Constitutional Relations and Their Impact

According to traditional constitutional theory, the main participants in a constitutional order are the state and citizens. Public law aims to restrict the state or government from exercising public power in ways that could undermine citizens' fundamental rights. The protection of citizens' rights and the prosecution of violations are governed by civil law and other judicial mechanisms. Therefore, can digital platforms be considered as part of the constitutional framework and subject to the same regulations as public authorities? Some scholars argue that platforms should be recognized as constitutional actors in the digital age, given their significant influence over state governance and citizens' rights, such as freedom of expression [1]. Others point out that, in digital governance, platforms wield considerable control over resources and have a dominant role as regulators. Thus, they require special legal frameworks that go beyond

those of traditional laws, in order to ensure proper checks and balances on power. This ensures that the allocation of constitutional rights is fully legitimate: citizens can establish a balance of power with platform governance through fundamental rights such as privacy, freedom of speech, and freedom of information dissemination. The relationship between public and private rights includes not only mutual restraint between public powers but also private rights' restraint on public powers. The boundaries between private and public rights are determined by the balance of interests established by the constitution and laws in specific situations. Moreover, the fundamental purpose of public powers is to facilitate the greater and better realization of private rights [9]. Additionally, the 'Opinions of China on Establishing a More Complete System for the Market-based Allocation of Factors' emphasize that the protection of information and data should fall under public law regulations. Thus, both from the perspective of the entities involved and the actions taken, the legitimacy of public law-based regulation and control over platforms' private powers within the constitutional framework has been established in both academic and practical circles.

A key aspect of digital constitutionalism is determining how to restrict the power of digital platforms through the constitution. Strategically, it aims to apply constitutional values and principles to the constitutionalization of the digital environment, thereby limiting the 'discretionary power' of digital private entities worldwide [5]. As Mr Wang Shuwen, a renowned constitutional scholar in China, said regarding how to derive obligations of digital platform private entities from the constitution: 'Since the constitution addresses fundamental issues in all aspects of national life, its direct legal effect is broader than that of ordinary laws, both in terms of its content and the entities it applies to—organizations and citizens.' From the perspective of the constitutional framework, constitutional obligations can be utilized to regulate digital platforms effectively. Unlike theories focusing on the private-law effects of the constitution, this approach does not rely on indirect applications of fundamental rights. Compared to theories of social constitutionalism, it has a clear constitutional basis. And compared to digital constitutionalism itself, it enhances the regulatory effectiveness of constitutional

obligations [5].

Therefore, private governance of digital platforms serves as a bridge between practices that affect citizens' fundamental rights and constitutional provisions. On the positive side, digital platforms provide the public with broader spaces for expressing opinions, as well as channels for exercising rights of oversight and offering criticism. However, in practice, since existing regulatory frameworks of public law, such as administrative law, cannot be directly applied to platform governance, platforms often abuse their editorial autonomy, thereby undermining the fundamental rights guaranteed by the constitution.

3. The Platform's Editorial Freedom and Its Impact on Users' Fundamental Rights

Taking the balance between platform editors' freedom of editing and users' freedom of expression as an example, this paper explores why it's urgent to establish boundaries for private governance of digital platforms. Article 39 of China's E-Commerce Law stipulates: 'E-commerce platform operators shall establish a sound credit evaluation system, make the rules for credit evaluation public, and provide consumers with ways to evaluate the goods sold or services provided on the platform. E-commerce platform operators shall not delete consumers' evaluations of such goods or services.' This raises two related theoretical questions: First, do digital platforms enjoy the same freedom of editing as print media, thereby allowing them to freely modify consumers' evaluations? Second, do legal anti-discrimination requirements unduly restrict digital platforms' editorial freedom? What is the rationale for this [12]? For instance, in the 'Tmall case' and 'JD.com case,' these companies adjusted consumers' credit ratings and deleted negative reviews posted by those consumers. After classifying consumers based on their ratings, the platform determines what kind of review rights they have. It also prevents the inappropriate deletion of reviews that are true but unfavorable to the platform. The well-known platform 'Meituan' allows quite extensive and flexible editing rules. For example, its platform rules state that reviews that 'violate the requirements and/or instructions of relevant regulatory authorities' will not be displayed. However, the platform doesn't clearly define the criteria used to determine whether a review

violates regulatory requirements, nor does it specify which level of regulatory authorities these requirements pertain to.

In addition, laws and regulations such as the Cybersecurity Law and the Regulations on the Administration of Internet Information Services have established a regulatory framework that focuses on platforms rather than users. On this basis, certain regulations, like the Provisions on the Governance of Online Information Content and the Regulations on the Administration of Micro-blog Information Services, require social platforms to actively review user-generated content [13]. Failure to do so incurs corresponding consequences and liabilities. However, this has led to excessive censorship of user content by platforms. Article 15 of the Regulations on the Supervision and Administration of Online Transactions states that if consumer reviews contain information prohibited from being posted or transmitted by laws, administrative regulations, or other rules, online transaction operators may take technical measures to remove such content in accordance with the law. In practice, this directly affects consumers' ability to express themselves and make decisions, as well as the reputation of businesses operating within these platforms and the development of social credit systems. It involves significant public interests [12]. However, the vague wording of these regulations contributes to the frequent occurrence of such issues. As a result, the platform-centered regulatory framework fails to effectively protect users' fundamental rights at minimal cost, nor does it have a meaningful legal impact on platform operations.

Similar issues exist outside of these regions as well. The Digital Services Act, Title 7072, and HB20 enacted by the EU and the United States all stipulate that standards and rules for content censorship must be established for digital content. These laws prohibit the censorship, blocking, or suppression of legitimate content, and require digital platforms to refrain from discriminating against information posted by consumers. However, the constitutionality of these laws still needs to be determined by courts. Additionally, the Consumer Review Fairness Act enacted in 2016 failed to effectively address the issue of editorial freedom on digital platforms.

In the U.S. case of *Murthy v. Missouri*, the Supreme Court dismissed the case on procedural

grounds related to 'standing.' The court held that the plaintiffs failed to demonstrate that the government's efforts to pressure social media platforms through frequent emails, phone calls, and meetings directly led to censorship of their posts on those platforms. Therefore, the plaintiffs lacked the standing to bring the lawsuit in federal court. Social media platforms have their own community guidelines and content review mechanisms. They may remove content for commercial reasons, rather than simply yielding to government pressure. Government officials have the right to express their views and even persuade private companies to take certain actions. As long as the government does not use legal coercion, such as threats of prosecution or fines, to force platforms to remove content, mere 'pressure' or 'persuasion' does not necessarily constitute a violation of the Constitution. In the case of *Moody v. NetChoice, LLC*, the focus of In the case of *Moody v. NetChoice, LLC*, the central issue was whether 'platforms' removal of posts and demotion of content constitutes "freedom of expression" protected by the First Amendment, or whether they should be regarded as "public carriers" subject to government regulation. In a unanimous decision led by Justice Elena Kagan, the Supreme Court held that social media platforms exercise 'editorial discretion' when curating, ranking and presenting content. Such actions are analogous to the editorial decisions made by traditional newspapers, and constitute 'freedom of expression' protected by the First Amendment; the government cannot compel private entities to publish content they do not wish to publish merely to improve or balance the marketplace of ideas. The Supreme Court recognised that platform content moderation and algorithmic recommendations fall within the platform's editorial autonomy and are rights protected by the Constitution.

In two recent cases in the United States, the balance between government power and platform autonomy was at issue. The government was not allowed to interfere with platform content moderation or state laws that restricted platforms' ability to remove reviews. These cases emphasized the need to delineate the boundaries between constitutional free speech and government regulation, as well as between platform editorial autonomy and user rights. In China, cases like those involving Tmall and JD.com involve the balance between

platform autonomy and users' basic rights. However, these issues stem from the expansion of platform power, lack of transparency in platform rules, unclear evaluation standards, and limited avenues for citizens to seek redress. There is a need for unified regulations to prevent platforms from arbitrarily restricting or removing legitimate consumer reviews.

4. The Necessity and Methods of Public Law Intervention in the Private Governance of Digital Platforms

The development of digital platforms has challenged existing power structures, but they remain governed by the constitutional framework. The implementation of constitutional principles in digital governance is centered around protecting citizens' fundamental rights. As entities with special powers, platforms must comply with regulatory frameworks established through constitutional mechanisms like approval and review processes. The filtering, deletion, and review of content on platforms must strictly adhere to the rights-protection framework established by the constitution, without unduly restricting citizens' freedom of speech [9]. Article 35 of China's Constitution guarantees freedom of speech, while Article 51 stipulates that citizens may exercise their freedoms and rights without infringing upon those of others. Although citizens cannot directly invoke the constitution as legal basis in judicial proceedings, all laws and regulations must comply with the constitution. Therefore, whether it's the Civil Code or the Cybersecurity Law, their provisions and interpretations must not violate the aforementioned constitutional provisions. Therefore, the platform's editing rights should be applied to those comments that constitute infringement of the rights of specific individuals, such as comments that violate someone's privacy, reputation, or other legitimate rights. The law does not address other possible objects of infringement, such as comments related to products purchased on the platform. Since these comments do not constitute an infringement of any specific individual's rights, how should Chinese legislation regulate platforms' practice of arbitrarily deleting such comments [12]? If we consider judicial stability and the authority of the law, is it possible to regulate platform governance through public legal procedures? Professor Yang Dengjie suggests that the

constitution should be regarded as the fundamental law of a community that encompasses both a national constitution and a social constitution. This approach helps address the complexities of modern society and the diverse needs related to freedom and equality. In academic discussions about platform governance and the protection of fundamental rights, the prevailing view is that fundamental rights have only an indirect effect, not a direct one [6].

In the author's view, within the constitutional framework, the private governance models of platforms should strike a balance between maintaining corporate self-regulation and profit-making objectives. At the same time, sectoral laws should be utilized to reconcile these interests with the protection of users' rights. This represents an indirect application of public law, incorporating both the principle of proportionality and the principle of subsidiarity. The shortcomings of private law regulations can be addressed through the following approaches. For example, in 2019, Meta's Director of Governance and Global Affairs announced the 'Establishing Structure and Governance for an Independent Oversight Board.' This document outlined the structure of the oversight board, defined its powers, scope, and procedures. It helped Facebook address some of the most difficult issues related to online freedom of expression, such as determining what content should be removed or retained, and explaining why certain actions were taken. If users disagreed with Facebook's decisions, they could submit complaints to the oversight board, which would then review and make a decision. Germany's 'Network Enforcement Act' requires social media platforms to establish user-friendly procedures for handling complaints, to review them promptly and effectively, and to report regularly to the public on their activities.

It is necessary to establish criteria for judgment, record the number of complaints, document how they are handled, and keep track of information related to complainants and users. Additionally, specialized agencies should be set up to ensure that online platforms exercise self-regulation [14]. This approach could serve as a useful model for China. Currently, China lacks independent review committees like those in the United States. Instead, disputes are often resolved through litigation. However, these cases are similar in nature and numerous. If administrative agencies could establish

third-party oversight committees as a preliminary step to oversee and review disputes between parties involved in digital platforms, it would help conserve judicial resources. It would also enable digital platforms to exercise their 'freedom of editing' more responsibly, making content moderation practices legal. This could serve as a pilot approach for private governance of digital platforms. As for establishing external regulatory bodies in China, issues related to their structure, independence, staffing, and relationships with other departments can be addressed through regulatory documents and technical standards formulated by the cybersecurity authorities. This would transform abstract principles into practical guidelines, thereby implementing the provisions of the Personal Information Protection Law. Administrative agencies should oversee the establishment of such external bodies, ensuring their effective implementation through indirect means.

From a legislative perspective, vague and imprecise regulations lead to ineffective oversight of social platforms' abuse of their power. For example, Article 9 of the 'Guidelines on Standard Contractual Clauses for Online Trading Platforms' states that social platforms do not need to disclose the algorithms and manual procedures actually used to review content. There are also no clear regulations regarding whether measures that reduce users' visibility of their content or deprive them of their earnings should be disclosed. Article 16 of the 'Regulations on the Governance of Online Information Content' requires platforms to establish efficient complaint and reporting mechanisms to promptly address users' concerns. However, these regulations merely reiterate existing practices and fail to impose requirements for due process and fair decision-making on social platforms. As a result, they cannot effectively address issues like lack of transparency and bias in dispute resolution. In contrast, the EU has established accountability mechanisms through the 'EU Digital Services Act' to restrict how social platforms exercise their power. Private power-related actions such as drafting service agreements, removing user content, and resolving platform-related disputes are directly regulated by public law [15]. Article 14 requires that the terms of service of digital platforms be written in clear, simple, and understandable language that is user-friendly

and free from ambiguity. They must also be made publicly available in a format that is easily accessible and readable by machines. Article 24 imposes additional transparency requirements on online platform providers, reflecting the legislative goal of ensuring that users have access to effective remedies when using platform services. Therefore, the EU's legal requirements regarding, for example, the criteria for deleting comments, serve as a useful model for China. In the field of administrative law, 'generalized authorization' should be prohibited. Platform service agreements must explicitly detail each case of user content deletion or removal, along with the reasons for such actions. Users' rights to appeal should also be protected, and no fees should be charged for users exercising their rights to appeal or seek review for a certain period. Additionally, the implementation of gatekeeper responsibilities should be elevated from non-binding guidelines or recommendations to legally enforceable regulations. Platforms must also provide clear reasons and legal basis for deleting or removing user content, turning theoretical provisions into enforceable rules.

Regarding oversight, the author believes that platform rules with universal binding force should be subject to review. The reason is that the agreements between digital platforms and users currently only offer two options: 'agree and use' or 'disagree and leave'. Thus, platform rules and decisions directly affect citizens' rights to freedom of speech under Article 35 of the Constitution, as well as their rights to criticize and supervise under Article 41. If platform rules are indefinitely treated as matters of private law and not subject to public law oversight, it could lead to platforms using their private governance powers to restrict users' fundamental rights. However, given that China's filing and review system currently applies only to regulatory documents such as laws, regulations, and judicial interpretations, oversight of platforms should differ from this traditional system. As some scholars have pointed out, specialized review of platform rules differs from the legislative review of laws and regulations in China. In essence, it represents the administrative authorities exercising their regulatory powers over platform rules. Administrative agencies, with their greater expertise compared to other state bodies, can incorporate platform regulations into the review

process [16]. This begins with expanding the scope of what needs to be filed for review. Ultra-large platforms should make user agreements, service terms, community guidelines, algorithmic governance, complaint procedures, and information disclosure mandatory for record-keeping. Additionally, platforms should establish mechanisms for reviewing major governance decisions on a case-by-case basis. This includes examining the rules, algorithms, and procedures behind actions that directly restrict or deny users' freedom of expression, or that unfairly prioritize or discriminate against certain user comments. Finally, review standards must be established with users' freedom of expression as the core principle. In this regard, we can draw on the practical approaches outlined in Articles 14, 20, and 24 of the EU Digital Services Act. Reviews should be conducted based on principles of legality and procedural fairness. It is necessary to determine whether any actions violate Article 35 and Article 41 of the Constitution, Article 39 of the E-Commerce Law, as well as the Cybersecurity Law and the Personal Information Protection Law. Any actions by platforms that go beyond their authorized scope should be corrected, revoked, and the responsible parties held accountable.

5. Summary

In summary, private governance of digital platforms represents a new form of governance arising from the development of the digital sphere. There are conflicts between the powers exercised by digital platforms and traditional fundamental rights. It is necessary to clearly define the boundaries of these powers by addressing legislative challenges, practical difficulties, and drawing on experiences from other jurisdictions. At the same time, given the challenges related to technological neutrality and private law autonomy, public law interventions should be utilized as appropriate to rectify any imbalances.

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