

2022

The Right to Assembly Should Extend Online in China

Gracie Kreth

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/hrbrief>



Part of the [Human Rights Law Commons](#), and the [International Humanitarian Law Commons](#)

Recommended Citation

Gracie Kreth (2022) "The Right to Assembly Should Extend Online in China," *Human Rights Brief*. Vol. 26: Iss. 1, Article 4.

Available at: <https://digitalcommons.wcl.american.edu/hrbrief/vol26/iss1/4>

This Column is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Human Rights Brief by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

THE RIGHT TO ASSEMBLY SHOULD EXTEND ONLINE IN CHINA

by Gracie Kreth*

I. INTRODUCTION

Peng Shuai, China's star tennis player, logged onto the Chinese social media platform Weibo in November 2021 and posted a description of her relationship with Zhang Gaoli, a powerful Chinese leader and former Vice Premier of China.¹ Shuai alleged in her post that after a consensual relationship with Gaoli, he sexually assaulted her.² She described her feelings from the trauma and the suicidal thoughts that followed.³ Within minutes, the Chinese government scrubbed the post from the internet — but it was still quick to spread, battling the “Great Firewall.”⁴ Shuai's profile essentially disappeared online; along with Shuai in the real world. For weeks, tennis officials and fellow players attempted to contact Shuai with no success.⁵ Chinese internet users were unable to search for her online and the Great Firewall worked furiously to scrub the internet of all discussions

* Gracie Kreth is a second-year law student at American University Washington College of Law. She is a deputy editor on the *Human Rights Brief* and a junior staffer on the *Administrative Law Journal*. She received a B.A. in English and Media Studies from the University of Virginia, where she was also the Editor-in-Chief of *The Cavalier Daily*.

1 Raymond Zhong & Chris Buckley, *Why the International Concern over Peng Shuai?*, N.Y. TIMES (Dec. 20, 2021), <https://www.nytimes.com/article/peng-shuai.html>.

2 *Id.*

3 *Id.*

4 *See id.* (explaining that the Great Firewall is the nickname of China's massive internet censorship apparatus).

5 *Id.*

related to Shuai.⁶ Shuai disappeared from the public eye until the release of several pictures of a video call she had with the president of the International Olympic Committee, Thomas Bach,⁷ followed by a suspiciously controlled video of an interview with French sports newspaper *L'Equipe* a few weeks later.⁸ As a large outpouring of support grew in China and ballooned throughout the world for Shuai, the Chinese Great Firewall worked hard to quell China's citizens freedom of assembly of online and, with it, their freedom of speech rights⁹

II. BACKGROUND

China is notorious for its government-controlled internet censorship machine which prohibits online forums, such as Facebook, Twitter, and WhatsApp, within its Great Firewall. In 2000, the Ministry of Public Security launched the Golden Shield Project to censor and surveil content and users online — creating the Great Firewall.¹⁰ Throughout the years, the Great Firewall grew stronger, taller, and thicker, as users lost more ways to circumvent the massive mechanism with tools such as virtual private

6 Paul Mozur, Muye Xiao, Jeff Kao & Gray Beltran, *Beijing Silenced Peng Shuai in 20 Minutes, Then Spent Weeks on Damage Control*, N.Y. TIMES (Dec. 8, 2021), <https://www.nytimes.com/interactive/2021/12/08/world/asia/peng-shuai-china-censorship.html>; *see also* Amy Chang Chien & Alexandra Stevenson, ‘Where is **?’: Fans in China Elude Censors to Talk About Peng Shuai, N.Y. TIMES (Dec. 2, 2021), <https://www.nytimes.com/2021/12/02/world/asia/peng-shuai-china-tennis.html> (news articles reporting Shuai's mysterious disappearance).

7 Zhong, et al., *supra* note 1.

8 John Leicester, *Peng Shuai Emerges at Olympics, Gives Controlled Interview*, ASSOCIATED PRESS (Feb. 7, 2022), <https://apnews.com/article/peng-shuai-controlled-interview-olympics-36722c749b176f228a1db8f39678cc2f> (*L'Equipe* reported that it submitted questions to Shuai before the interview, and in the video, in the presence of a Chinese Olympic Committee official for translation, Shuai told *L'Equipe* that the situation was an “enormous misunderstanding”).

9 *See* Zhong, et al., *supra* note 1 (explaining that while domestic and international support grew for Shuai, China's censorship apparatus attempted to scrub all records to Shuai from the Chinese internet).

10 Yaqiu Wang, *In China, the ‘Great Firewall’ Is Changing a Generation*, POLITICO (Sept. 1, 2020, 4:30 A.M.), <https://www.politico.com/news/magazine/2020/09/01/china-great-firewall-generation-405385>.

networks (VPNs).¹¹ While simultaneously limiting access to foreign internet sources, Chinese users became entrenched in an informational bubble and thus more susceptible to government propaganda.¹²

Both in domestic law and international law, China recognizes the right to freedom of assembly. The Constitution of the People's Republic of China protects freedom of assembly in Article 35.¹³ The right of assembly was first codified in China in 1931 when it was written into the Chinese Soviet Republic Constitution.¹⁴ China's leaders passed the Law of the People's Republic of China on Assembly, Procession, and Demonstration to address problems that led to the 1989 Tiananmen Square protests.¹⁵ The law sought to enhance government accountability and allow the public a space to air their grievances.¹⁶ China's leaders passed the assembly laws and protections amidst an attempt to modernize and adopt Western ideals.¹⁷ China also ratified the Universal Declaration of Human Rights, which further binds the country to recognize freedom of assembly under Article 20.¹⁸

However, constitutional rights in China are not absolute. Constitutional rights in China are contingent on two factors: (1) balancing citizens' entitlement of a right along with the right's compatibility with the state and (2) the extent to which rights do not harm others' interests.¹⁹ Article 12 of the assembly law applies rights if the assembly passes a four-part test. The right to assembly will

11 *See id.* (noting the increasing difficulty in circumventing the Great Firewall and the growing danger in using VPNs as, for example, sellers of VPNs may face jailtime, while users could be fined).

12 *Id.*

13 XIANFA art. 35, § 1 (1982) (China) ("Citizens of the People's Republic of China shall enjoy the freedom of speech, the press, assembly, association, procession, and demonstration").

14 Kam C. Wong, *Law of Assembly in People's Republic of China*, 12 WASH. & LEE J. CIV. RTS. & SOC. JUST. 155, 163 (2006).

15 *Id.* at 155-56.

16 *Id.* at 156.

17 *Id.*

18 Universal Declaration of Human Rights, Dec. 8, 1948 G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) ("Everyone has the right to freedom of peaceful assembly and association.").

19 *See Wong, supra* note 14, at 165.

not be protected if it is "(1) against fundamental constitutional principles; (2) harming national unity, sovereignty, and territorial integrity; (3) inciting ethnic division; and (4) sufficient facts to indicate that the assembly, procession, and demonstration will cause direct harm to public safety or serious damage to social order."²⁰ In practice, this test is applied based on the discretion of the police to determine when to prohibit assembly, which only leads to massive inconsistencies and largely depends on the intent of the organizers and participants.²¹

III. LEGAL ANALYSIS

While China recognizes the right of assembly, the government makes broad use of the fourth part of the test to limit assembly.²² China argues that given its massive population, the country would not be able to handle any demonstration without risking the underlying social fabric.²³ China recognizes the freedom of assembly as long as it does not disrupt order, but any assembly could disrupt order, the government essentially claims.²⁴

However, the right to assembly is a foundational right in any society, necessary for the advancement and general health of a population. The founder of Communist China, Mao Zedong, stressed the importance of this human right, stating "[d]emocracy is practiced within the ranks of the people, who enjoy

20 *Id.* at 168.

21 *See id.* (noting that if police are given great discretion to enforce, inconsistencies will inevitably arise. Nonetheless, the PRC assembly laws make enforcement more predictable than before with guidelines for managing a demonstration.).

22 *See Amnesty International Report 2021/22: The State of the World's Human Rights*, AMNESTY INT'L 128-29 (2022), <https://www.amnesty.org/en/location/asia-and-the-pacific/east-asia/china/report-china/> (listing examples of prohibiting enforcement citing national security reasons or arbitrary enforcement of COVID-19 social distancing policies).

23 *See Wong, supra* note 14, at 170 (citing an argument that the Chinese population is much too large, composed of too many "basic differences in individual interests," so that if one person protests, there would be no energy to "conduct economic construction, much less achieve political reform").

24 *Id.*

the rights of freedom of speech, assembly, association and so on.”²⁵ Assembly rights are important for holding the government accountable, and conversation and expression of ideas between citizens are essential to the marketplace of ideas. These are indispensable freedoms for a country’s citizens.

The legal definitions of the right to freedom of assembly easily extend into the online space. As people across the globe move more of their conversations online, the public forum has stretched itself into the virtual sphere — if not moved completely online. In Article 20 of the International Convention on Civil and Political Rights (ICCPR), the United Nations Human Rights Committee chose not to define assembly, leaving the term open and flexible for interpretation.²⁶ However, a number of scholars have given working definitions, including, “the contemporaneous common presence of at least two persons in a common space,” the “temporal seriality and coordination, bodily proximity, auditory range, coordinated vocalization,” or “[t]he act of bodily assembling . . . revolves around the construction of a situation of bodily density dominated by face-to-face communication.”²⁷ This right also protects assembly for people arriving and leaving the protest, as well as nonparticipants and journalists.²⁸

Furthermore, the right to assembly is transferrable to the online sphere. Platforms supporting millions of users, such as Facebook, Instagram, and Twitter, are forums in which the world communicates, and Chinese citizens should be able to join the virtual gathering. Freedom of assembly enhances freedom of speech. But China’s Great Firewall blocks its citizens from joining public forums, violating their right to assemble. China is severing its citizens’ right to online speech and any ability they may have to assemble

²⁵ *Id.* at 162.

²⁶ Michael Hamilton, *The Meaning & Scope of ‘Assembly’ in International Human Rights Law*, 69 INT’L AND COMPAR. L. Q., 521, 522 (July 3, 2020) (explaining that China has signed but not ratified the ICCPR. Nonetheless, the flexible definition of assembly gives insight into how international human rights leaders interpret the right. Therefore, while it is not legally binding, the document is still authority).

²⁷ *Id.* at 535.

²⁸ *Id.* at 542.

online.

In applying the four-prong test to prove assembly online does not disrupt the social order, the first prong considers if the assembly could be coherent with fundamental constitutional principles.²⁹ Allowing citizens to assemble and exchange ideas online is inherently constructive and essential for a society, which satisfies the first prong.³⁰ Second, online discussion does not endanger “national unity, sovereignty, and territorial integrity.”³¹ Even if discussion online is criticizing the government, the marketplace of ideas is likely pushing the nation forward by holding decisionmakers accountable and creating a space in which users may share and explore new opinions.³² The third prong concerns inciting ethnic division, which is a legitimate concern for governments. Most laws do have exceptions and limitations; assembly that incites ethnic division should be restricted. But this incitement speech is likely minimal in comparison with the total amount of online conversation.³³ China has been the center of immense criticism for its treatment of minorities, which has been partially fueled by online

²⁹ See Wong, *supra* note 15, at 168 (describing the first prong of the test, which is that assembly will not be approved if it is “against the fundamental constitutional principles”).

³⁰ See XIANFA art. 35, § 1 (1982) (China) (“Article 35 Citizens of the People’s Republic of China shall enjoy freedom of speech, the press, assembly, association, procession and demonstration.”).

³¹ See Wong, *supra* note 14, at 168 (describing prong two of the test, which is that assembly will not be approved if it harms “national unity, sovereignty, and territorial integrity”).

³² See Jason Kelley, *Government Needs Criticism—Now More Than Ever*, ELEC. FRONTIER FOUND. (Mar. 30, 2020), <https://www.eff.org/deeplinks/2020/03/government-needs-critics-now-more-ever> (arguing for transparency by the government and need for criticism of governments globally at the beginning of the COVID-19 pandemic outbreak).

³³ See Wong, *supra* note at 15, at 168 (explaining assembly will not be approved if it incites ethnic division).

hate speech.³⁴ However, that conduct comes from the government, and social media companies and other platforms have largely stepped into the role of content moderators in reducing the amount of harmful speech online.³⁵ Lastly, the fourth prong is a concern the assembly will cause direct harm to public safety or serious damage to social order.³⁶ Assembly that would cause harm to public safety or serious damage is realistically only a minimal amount of speech online. The restriction should be applied more precisely to those instances, rather than implementing a blanket band on an entire platform such as Facebook, Twitter, or Instagram. In fact, some studies show that the ability to assemble online has a net positive impact on many communities.³⁷

There are two potential counterarguments to consider. First, critics may argue for the necessity of physically embodying a space to constitute assembly.³⁸ However, the online space is growing quickly and dominating interactions between people across the world. Additionally, it offers an alternative

³⁴ E.g., *China Responsible for 'Serious Human Rights Violations' in Xinjiang Province: UN Human Rights Report*, U.N. (Aug. 31, 2022), <https://news.un.org/en/story/2022/08/1125932> (identifying “patterns of torture, or ill-treatment, including forced medical treatment and adverse conditions of detention” as well as “allegations of individual incidents of sexual and gender-based violence”); See Gerry Shih, *Unfettered Online Hate Speech Fuels Islamophobia in China*, AP NEWS, (Apr. 9, 2017) <https://apnews.com/article/ap-top-news-international-news-islam-social-media-china-e3711d789c8d48589b77f6e269d424fa> (reporting a rise in hate speech online toward the Islamic population in China).

³⁵ See Miranda Sissons & Iain Levine, *A Closer Look: Meta's First Annual Human Rights Report*, META (July 14, 2022), <https://about.fb.com/news/2022/07/first-annual-human-rights-report/> (documenting Meta's impact on human rights and reporting what steps the company is taking to address its potentially harmful effects).

³⁶ Wong, *supra* note 14, at 168.

³⁷ See Dan Anderson, *Tech Experts Talk About Internet's Impact on Daily Life*, ELON UNIV. (June 27, 2018), <https://www.elon.edu/u/news/2018/06/27/tech-experts-talk-about-internets-impact-on-daily-life/> (describing the findings of a report that highlights several positive attributes of the internet which include providing life-saving assistance, connectedness, and promotion of innovation).

³⁸ See Hamilton, *supra* note 26, at 554 (reasoning that the close nature of an online space and the physical world would invalidate a counterargument that a gathering cannot be virtual).

to basic forms of communication. With spaces like the metaverse rapidly developing, especially following a period of intense social distancing and engagement online during the COVID-19 pandemic, it is time the law accommodates and keeps pace with technological developments. Therefore, recognizing an embodiment of a person in a virtual setting is important to protect the freedom of assembly.³⁹

The second potential counterargument may be a concern about the extended, if not indefinite, duration of assembly online. In a scholarly definition of assembly, an important component is the time element — how long people are able to gather for a specific purpose.⁴⁰ In contrast, when a user posts on the internet, the post may last forever, instead of dispersing like a physical assembly of people. However, regardless of the timing, the tweet and immediate response from users that follow the account is a form of assembly, as they come to the internet website for a specific purpose and gather through their discussion online. The perpetuity, or extended duration, of the post remaining on the internet even after the user and their followers log off, may be viewed as documentation or a record of the assembly. In an analogous situation, a protester may attend a protest where a journalist takes a picture for the local newspaper of the protester, which would last forever, which is similar to the post that may stay on the user's feed forever. Both forms of assembly should be protected.

IV. CONCLUSION

The right to assembly includes the right to assemble online. With its massive censorship apparatus, the Chinese government infringes on its citizens' human rights by blocking them from assembling and engaging on online forums. The solution is straightforward: it is time to tear down the Great Firewall. The Chinese government should work to protect their citizen users' fundamental human right to assembly, which in a modern world includes the right to assemble online. Shuai, her followers, and all

³⁹ See *id.* (explaining the potential counter argument requiring physical location to constitute an assembly).

⁴⁰ *Id.* at 535.

internet users have the right to gather online, to hear her story uncensored, and to assemble in both private and public virtual spheres and engage in a public forum — without the unconstitutional, notorious, and harmful Great Firewall.