Introduction

2013 and 2014 witnessed one of the most volatile moments in the recent history of the Greater China region with large, lengthy, and well organized political protests sweeping Mainland China, Hong Kong and Taiwan. The protests were unprecedented and each challenged the core of the respective political system. In 2013, Xu Zhiyong led his New Citizens Movement (NCM) into street action in different cities in China. In a spirit of freedom, public interest, and love, NCM protesters, organized around dinner tables and coordinated through social media, demonstrated on the streets in small groups with home-made banners and cards to demand equal opportunities in education, freedom of the press, and disclosure of assets of Party and state leaders.¹

While Xu was organizing NCM activities, Benny Tai and his co-organizers in Hong Kong were designing one of the largest occupy movements that the world has seen, which he later referred to as: Occupying Central with Love and Peace. The three Occupy Central leaders announced their civil disobedience manifesto on 27 March 2013, while NCM protesters were rallying in different parts of China. Encouraged by the success of mass protests since 2003, Tai and his supporters were determined to use civil disobedience – through a potentially unlawful occupation of Hong Kong’s busiest business districts indefinitely – if the central government refused to offer a pathway to “genuine democracy” in the 2017 election of Hong Kong’s Chief Executive. The Decision of the Standing Committee of the National People’s Congress (NPC) on 31 August singularly failed the test and, faithful to his promises, prompted by student activists taking to the streets of Hong Kong, Tai activated the Occupy Central Movement (OCM) on 28 September 2014. The protesters who flooded out in response occupied streets near the business district for the next 79 days.²

Six months earlier, another social movement similarly shocked Taiwan’s political landscape. Protests arose against the alleged abuse of executive and legislative power and the corresponding lack of legislative oversight in attempting to pass a Cross-Strait Service Trade Agreement (CSSTA), as part of a series of economic cooperation agreements with Mainland China.³ The Sunflower Movement, as it came to be known, adopting a common floral motif for Taiwanese protest movements, lasted for 23 days, during which students and young activists initially occupied Taiwan’s Parliament between March 18 and April 10; and then attempted to occupy the executive office on March 23 and 24.⁴ Fearing economic dominance by the Mainland through

² Fu Hualing, “Political Protest in high-income societies: The case of the Occupy Central Movement in Hong Kong,” in Brian Christopher Jones (ed.) Law and Politics of the Taiwan Sunflower and Hong Kong Umbrella Movements (Routledge, 2017), 83-99.
trade and investment and potential political submission due to such economic dominance, the Sunflower Movement demanded democratic vigilance against any possible encroachment from the Mainland. Interestingly, Hong Kong served as a reference point for the Sunflower Movement in assessing the Mainland’s potential impact, sending a powerful statement that Taiwan did not wish to become the next Hong Kong.

In many aspects, all three movements shared a common objective in questioning and challenging the authoritarian political system on the Mainland, and also adopted similar strategies of using social protest to pursue legal and policy changes in their respective societies. Each movement, in its own unique way, reflected a primal fear unique to each society and targeted foundational political concerns: on the Mainland, the lack of political freedom and deepening political corruption on the Mainland, allied with a determination to catalyze incremental reform through emancipation and street action; in Hong Kong, the slipping away of economic prosperity, the rule of law, and Hong Kong’s high degree of autonomy, along with a resolve to maintain and entrench Hong Kong’s way of life through implementing genuine democratization; and in Taiwan, the young democracy facing the looming existential threat from the Mainland, coalescing around a collective effort to maintain Taiwan’s democratic vibrancy and resilience.

In all three cases, a populist movement took place because political institutions were seen to have failed to address these foundational political concerns and to meet public demands for reform or revitalization. Additionally, in response to a pending crisis which, as the protesters perceived it, threatened to shake the foundations of the political community, each movement bypassed established political institutions and took the development and implementation of their respective constitutions into their own hands. For the protesters, this was an occasion when significant swathes of the public came together in an assertion of their sovereign powers, bound together by their entitlement as citizens to take charge at that historical moment of their political future. Protest, seen from this perspective, was a direct exercise of the people’s sovereignty and evidence of popular or civic constitutionalism.

For organizing civil disobedience campaigns, protest leaders in all three jurisdictions were subsequently prosecuted for various offences. Yet the prosecution outcomes contrasted sharply between the three jurisdictions, reflecting the differences in regime type: on the Mainland, protesters were harshly suppressed through national security laws or criminal laws; in Taiwan, they were found not guilty and celebrated as the guardians of the constitution and democracy; while in Hong Kong they were found guilty for their “unlawful” activities but were sentenced with varying degrees of leniency. The focus of this article is on the different conceptualization of protest under the different political systems, and its impact in shaping protest laws and their implementation in street protests in the three jurisdictions. Our principal argument is that regime type is determinative of the laws and regulations surrounding protest and also its subsequent punishment the pre-protest regulations, the political meaning and significance of public protests manifested in assemblies, processions and demonstrations (referred to generically as protest in this article); and the subsequent punishment imposed on individuals. Different regimes assign drastically different political meanings and significance to public protests; empower or limit courts in offering different degrees of protection of the right to protest; and encourage or prohibit civil society organizations in their function of nurturing a society with the freedom to protest.
Regime, Law, and the Perception of Protest

Different types of regime face distinct political challenges and develop their own unique measures to manage political crises. Mainland China, Hong Kong and Taiwan, although linked by geography, history and similarly constituted populations, have markedly different political systems: China is a Party state that practices socialism with the leadership of the Communist Party at its core. Taiwan is a democracy that entrenches human rights protection and the separation of powers but struggles to achieve a constitutional order grounded in the rule of law, distinguished by such features as judicial independence and credibility. Hong Kong is a consultative democracy with entrenched beliefs in the rule of law and judicial independence. It is a free, tolerant, and orderly society with strong aspirations for full democracy.

Authoritarian states generally regard protest as a political threat and prioritize its preemption and repression (if preemption fails). On the contrary, democracies commonly embrace protest as an integral part of the political process, with the state facilitating and supporting protest and citizens passionately participating. In between these views, a more legalistic approach to protest can be found, in which formal legal rules are rigidly applied and followed and where law and its institutions purport to maintain a high degree of autonomy independent of the political process. Below we articulate these in much more detail.

Protest and Authoritarianism: China

Protest abounds in China. While the Chinese authoritarian system recognizes, and to a lesser degree offers protection to individual rights, it strictly restricts their exercise through collective and organized action. What defines authoritarian law is not the deprivation of rights but their anti-solidarity nature. It is authoritarian because the legal system recognizes the legal rights of individual citizens on the condition that the claim-making and rights-asserting process is not organized and does not appear in a collective form.

Assemblies, processions and demonstrations are necessarily collective when they become the means of airing grievances and articulating demands. On the authoritarian Mainland, public protest is preempted and restricted precisely because of its collective and organizing manifestations. Indeed, the key external characteristic of assemblies and processions is that they involve a large enough number of people gathered together to engage in collective action, although the threshold number triggering the law’s attention varies considerably throughout different jurisdictions. In Taiwan, an illegal assembly can be constituted by as few as 3 persons in a procession; and in Hong Kong, where public space is even more limited, the equivalent

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number is 30 persons (although previous incarnations had set the legal threshold at 3).\(^8\) On the Mainland, there is no specification for the number of participants constituting an illegal a protest.

What is more dangerous for authoritarian leaders is a protest’s internal dimension. To qualify as a public protest, participants in the protest must have a common objective agreed to expressly or implicitly, and the degree of consensus in a protest necessitates a process of organization, coordination and deliberation. Historically, this has commonly depended on an active social sector to coordinate, and protest leaders to claim representation.; although this has declined with the advent of social media, which has made it possible to organize and coordinate public protests without any overarching NGO structure. On the Mainland, any such process of collective claim-making independent of the Party state is a political threat to the Party’s monopoly on power, something that the Party is deeply concerned about and tries to preempt.\(^9\)

In authoritarian regimes, protest is perceived as an indication of governance failure posing a clear danger to the regime’s stability, and order and stability are often a core key performance indicator in assessing the performance legitimacy of a local state. Protest, as a symbol of disorder and instability, undermines the performance of a local state and the legitimacy of the Party as a whole. The state therefore individualizes disputes to preempt public protest in the name of social harmony, social stability or national security. What defines China’s authoritarian system is not repression or violent crackdowns on protests, but preemptive action to disaggregate claims and prevent disputes from escalating into collective actions.\(^10\) According to Zhou and Yan, the effective preemptive strategy in China depends on three institutions: embedded police that can “deeply penetrate grassroots society” and monitor communities closely; effective on-line surveillance of protest-related information; and an intricate network of informants to identify and inform potential protest.\(^11\) All function together to send out a strong signal that public protest in any form or scale is politically offensive and therefore practically impermissible.

China’s political ecosystem precludes grounds to protest for precisely the same political concern. Protest in China is still at a pre-rights stage in the sense that dense politicization has effectively prevented protests from adopting a rights-based discourse on the Mainland. While the right to protest exists in law, there is not an independent court to safeguard the specific right to protest. This contrasts sharply, as discussed below, with Hong Kong’s protest society, and for that matter also Taiwan’s, which are both largely sustained by judicial protection. Indeed, Taiwan’s

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\(^8\) Public Order Ordinance, s.13(2)(b), POO (cap.245): “This section shall not apply to … (b) any public procession consisting of not more than 30 persons”; in relation to public meetings, the threshold for regulatory control is 50 persons, s.7(2)(a), POO. Participating in a procession or meeting exceeding these thresholds constitutes participation in an ‘unauthorised assembly’, an offence contrary to s.17A, POO. By contrast, 3 remains the threshold for an ‘unlawful assembly’, which gives rise to more serious offences, contrary to s.18, PPO.

\(^9\) Fu Hualing, “Politicized challenges, de-politicized responses: political monitoring in China’s transitions” in Fergal Davis, Nicola McGarrity and George Williams (eds.) Surveillance, Counter-Terrorism and Comparative Constitutionalism (Routledge, 2014), 296-312


\(^11\) Id.
constitutional court 12 and Hong Kong’s Court of Final Appeal13 have significantly enlarged the space for protesters against a backdrop of legislative restrictions of the right to protest.

Independent civil society organizations have historically been crucial for organizing protests, which is another critical ingredient that is missing on the Mainland. In liberal societies, NGOs have commonly been the driving force behind protest. Labor unions, human rights organizations, women’s groups, or consumer associations, acting as the representatives of sectorial interests independent of the government and credible at both the state and societal levels, are well endowed with political, organizational, and financial resources. However, the Chinese political system prohibits independent NGOs and places all organizations under tight political control. Cross-geographic and cross-professional alliances are prohibited, and the Government imposes severe restrictions in order to crackdown harshly on independent civil society forces. These restrictive and repressive measures have effectively limited the development of independent social organizations, and significantly diminished their capacity to effectively organize and mobilize. Protest, in order to be successful, has to be organized and coordinated, something which it is more difficult to do in the absence of organizations with a critical mass of resources, experience and professional support.14 The cases of Hong Kong and Taiwan demonstrate this reality. Alternatively, social media may provide a platform for communication and the organization of protest, but social media on the Mainland is strictly regulated and monitored, and this limits its viability as a platform for protest purposes.

It is in this political context that the constitutional rights to assembly, procession and demonstration 15 and more generally, protest legislation, must be understood. The Mainland Chinese government enacted the Assembly, Procession and Demonstration Law (APDL) in the aftermath of the 1989 Tiananmen bloodshed to establish a regulatory framework for lawful assembly and protest.16 This law ostensibly creates an approval system, according to which protest organizers can apply for permission from a public security organ. Reflecting the political significance of preemption, the Chinese APDL and the subsidiary legislation require the police, upon receipt of an application for assembly and procession to pursue concrete goals, to assist the applicants to solve their underlining problems, thereby rendering the proposed protest unnecessary.17

In practice, however, the political imperative for stability and order has rendered the regulatory regime virtually irrelevant. While there may be hundreds of thousands of protest rallies, assemblies and demonstrations annually, most relating to environmental and labor rights, virtually none has received police approval; primarily for the reason that protesters have not bothered to file an application at all. The protestors know perfectly well that not only will their

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12 Wen-Chen Chang, “The right to free assembly and the Sunflower Movement,” in Jones (ed.).
14 Teresa Wright, The Perils of Protest: State Repression and Student Activism in China and Taiwan (University of Hawaii Press, 2001).
15 Constitution of the People’s Republic of China, Article 35.
application be denied, but it will alert the police to a forthcoming mass gathering that may disturb the tranquility of the society. An application serves as an open invitation for police intervention that might not assist in resolving the issues that are the subject of the protest.

For organizers, the proposed protest has to be small, sudden and secretive, so that authorities are side-stepped in the planning stage and the police are caught by surprise. Organization is limited to people who know and trust each other and the identity of organizers often remains hidden to avoid surveillance and punishment.\(^{18}\) The overt use of social media is avoided due to censorship and surveillance. The operation aims to be quick, sharp and symbolic with a protest typically completed, and the protesters vanishing, before the police can respond. It is only through this complex process that public protests become possible, protest leaders remain safe, and the intended publicity impact is achieved. In authoritarian systems, there is a deeply felt animosity and distrust between the state and its protesters, as protesters have to evade detection and the preemptive power of the state.\(^{19}\)

There are other ways to bypass the regulatory and political prohibitions, and these avoidance tactics are common to protest in most authoritarian states. To protest without seeking police approval, protest organizers encourage residents to stroll collectively or take a walk together at a designated place and time. The subtlety of this indirect approach can effectively reduce the risk for the organizers and also the level of fear among participants. Environmental protests can often appeal to the rising urban middle class. Such was the case with a well-known demonstration against the construction of PX plants in Xiamen and Chengdu, whereby organizers invited residents of the city to take a stroll at a specific place and time. \(^{20}\)

Given the priority of stability and the preemptive measures to prevent protest, the principal objective of policing protest in authoritarian regimes is to end it swiftly after it starts. Protest, almost by definition, is unlawful and therefore subject to multiple police regulatory powers and a range of punishments. Demonstrators have no legal rights to proceed because of the lack of approval (which they will never get) and, for the police, the only question is to figure out a more cost-effective way to make such occurrences disappear. \(^{21}\)

Protest and Democracy: Taiwan

Taiwan’s protest history is a textbook example of political transition, democratic resilience and historical legacy. Assembly and procession is a constitutional right and in Taiwan and elsewhere it has been regarded as an integral part of the freedom of expression. Although assembly and procession are the subject matter in Article 14 of the Republic of China Constitution, according to the Constitutional Court it falls into the same category of the rights found in Article 11 of the Constitution, which forms part of a general right of expression including the freedom of

\(^{18}\) Teresa Wright, *The Perils of Protest: State Repression and Student Activism in China and Taiwan* (Honolulu: University of Hawaii Press, 2001)

\(^{19}\) Ibid.

\(^{20}\) H. Christoph Steinhardt, “Environmental public interest campaigns: a new phenomenon in China’s contentious politics” in Wright (ed.).

expression, academic research, writing and publication, as provided for in Article 14 of the Constitution. Often regarded as a negative/first generation political right, freedom of expression fulfills an important instrumental and normative role. As such, assembly and procession serve an important supplementary role to the freedom of expression in general. For people without access to mass media, and who are therefore limited in terms of expression, the streets and other public spheres play an indispensable alternative role.

The constitutional rights of association and assembly were suspended in Taiwan until 1987 when the Martial Law Decree was lifted. While the social and economic changes in Taiwan from the 1960s witnessed a surge of informal associations, assemblies and processions, they were unlawful and not legally protected. Taiwan’s protest law was made towards the end of uninterrupted Guomindang authoritarian rule and has largely survived the democratic transition. Taiwan passed the first law on assembly and processions in 1987 when the government began to lift martial law. Somewhat ironically, the law that was purportedly passed to protect the right to assembly and procession was entitled the Law of Assembly and Processions during the Period of National Mobilization for the Suppression of Rebellion. That law laid a foundation for legal regulation of protest in Taiwan during the decades of democratic transition. It was renamed, in 1992, as the Assembly and Procession Act (APA) without substantive changes.

Like the Mainland APDL, the Taiwanese APA requires a permit before protests can lawfully take place. Interestingly, Taiwan, in spite of its democratic transition that has made protest an essential part of political participation, had a high and tough threshold for assembly and procession. In spite of the regulatory caging of protest in Taiwan, the court has stepped in to compensate for the democratic deficit. Through two Constitutional Interpretations of the APA by the Constitutional Court and also in decisions on individual prosecution for violating the APA, the court in Taiwan has created a rich jurisprudence that has reshaped the contours of the APA and enlarged the scope of the freedom of protest substantively and procedurally.

Substantively, the Constitutional Court of Taiwan has ruled that any content control and any pre-constraints on protest on free speech are unconstitutional. In Interpretation No. 445, the Constitutional Court, while upholding the constitutionality of a permit system on the ground of the necessity for the police to maintain order, limited the scope of discretion in the review and approval process first by invalidating an article in the APA that prohibited assemblies or processions that advocated communism or the secession of territory – i.e. the advocacy of the independence of Taiwan. For the court, no content control is permissible in exercising the general freedom of expression and the police are not allowed to conduct any merit-based review. Secondly, and more significantly, the court also struck down another section in the APA that commonly appears in protest laws elsewhere on the ground that it was too vague to form a clear legal base for review. The invalidated sections of the law allowed the police to deny an application if an assembly or process was likely to endanger national security, social order, or

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25 Ibid.
public welfare, among others. In doing so, the court significantly altered the APA and limited police control to purely time, place and form of a protest relying on subsequent punishment regarding seditious content or disorder.

The court also questioned the time needed for the police to approve an application. Under the APA, organizers of assemblies or processions are required to apply for a permit six days before the event takes place; expedited review is possible in cases of natural disasters or other unforeseeable incidents, in which case the time for applications was shortened to 2 days. For the court, the expedited review was too long to pass a constitutional test, and instead preferred the legislature provide a proper revision to the law.

Interpretation No. 718 was made on 21 March 2014 in the middle of the Sunflower Movement. It was about the legality of an urgent protest without making an application, in which the Constitutional Court struck down the expedited review as unconstitutional as it imposed a burden that is disproportionate and allowed “urgent or spontaneous assemblies” without applying for a permit.27 In this way, Taiwan is moving away from its rigid approval regime. There has also been repeated undertakings from the current ruling Party, the DPP, that Taiwan will eventually opt for a record system.

In comparison with Hong Kong, the number of assembly and processions applying for approval in Taiwan is not large. This is counterintuitive given the vibrancy of Taiwan politics and the large scope of anti-government demonstrations that defined Taiwan’s path to democracy. The annual number of approved/unapproved assemblies and those without making application is uneven and fluctuates greatly. In the years between 1999 and 2016, the number varied from the lowest of 1,265 in 1999, followed by 1,448 in 2003, to the highest of 14,751 in 2014.28 The size of assemblies and processions has generally been large. With the exception of 2017, when the number of participants declined to 608,540, the number had always been slightly over a million, reaching the height of near 12 million in 2004, indicating forceful mobilization of masses in direct political participation on the Island.29

Another unique feature of protests in Taiwan is the fact that a large number of protestors (approximately a third of the total number) went ahead without any approval. Possible reasons, according to interviews, include the inconvenience imposed by the dual application system and the deposit requirement; lack of police enforcement against peaceful, small-scale protests; and to a lesser degree, the democratic impulse among rights-demanding citizens. Here one sees some similarities in “spontaneous protest” between the Mainland and Taiwan. While it is principally the fear in the Mainland that drives protests underground, it is the spontaneous nature of protest in Taiwan that allows their Taiwanese counterparts to bypass the very inconvenient approval process.

What does protest embody and entail? In Taiwan’s new democracy, assembly and processions are no longer merely regarded as serving an expressive function, a negative freedom to be exercised by individuals without undue government restrictions. In fact, assembly and process

29 Ibid.
serve a constitutive function in building and solidifying democracy. Its political significance is best put by the Constitutional Court in its Interpretation No 445:

Based on the idea of people’s sovereignty, only when people enjoy the right of free discussion and full expression of their opinions can they discover truth, achieve consensus through democratic process, and then make law and policies accordingly. Therefore, the freedom of expression is a significant basic right for the implementation of democratic politics. 30

Freedom of expression is the cornerstone of a liberal society. The court has reiterated the rights and the corresponding duty of the government to protect and facilitate the exercise of the constitutional rights so that citizens can participate in protest “without fear”. Beyond liberal individual rights, the court also takes notice of the collective nature of assemblies and processions and their function as incubators of the democratic will. Assemblies and processions offer a platform on which citizens deliberate on significant issues and engage in dialogue with the government and with each other. That interactive, deliberative process makes democratic societies vibrant and resilient.

Protest and the Rule of Law: Hong Kong

Hong Kong possesses a mature and vibrant society, whose citizens exploit limited public space to air grievances and express popular demands. Public meetings and processions are an integral part of a broader process of public deliberation and interaction between society and the government. They serve a similar function as a prayer in a church, a newspaper commentary, a posting on social media, a call-in to a radio talk show or a vote in an election. It is a central feature of Hong Kong’s freedom. Protest has become so common, regular and taken for granted that those who air concerns and act out in public space are not regarded as extraordinary, radical or deviant. In Hong Kong’s political culture, protest has decisively become a middle class activity – involving journalists, religious leaders, university professors, doctors, and of course, lawyers. The participation of the middle class makes public protest mainstream and “respectable”. In recent history, Hong Kong, on average, experiences slightly over 1,000 processions per year in Hong Kong, with an increase from 1007 in 2008 to 1203 in 2017. The number of assemblies has increased sharply over the same 10 years, from 4,287 in 2008 to 10,608 in 2017. 31

Hong Kong has a well structured and enabling protest law, in spite of its narrow streets and high population density. Freedom of demonstration is also both accepted in Hong Kong’s political culture and strongly protected under the law. Rule of law concerns matter in regulating public protests and Hong Kong’s protest culture has been facilitated by the Public Order Ordinance (POO) which effectively governs assemblies and processions. The legal framework includes various offences relating to unlawful assemblies, riot and such like, but its central feature is a regulatory process that residents in Hong Kong well understand and comply with. There is no perceived overt political censorship in the approval process and the police historically remain

30 Judicial Yuan Interpretation No 445, Para. 3.
relatively neutral in the city’s public debate, committed more to managing than preventing protest. From the very beginning of colonial rule, legal rules has served to absorb complicated political contentions.\(^{32}\)

Hong Kong’s regulatory framework imposed considerable restrictions on public assemblies and demonstrations, partly due to its crowded and bustling nature and partly due to the experience of riots and disturbances in the 1960s. The current POO was enacted in the aftermath of those riots, although public order regulations date back to the 19th century.

The first of these was the Peace Preservation Ordinance 1884, passed to control the possession of firearms by the Chinese population with a sunset clause to limit its effect to the period through 1885.\(^{33}\) When the Ordinance was renewed in 1886, new sections were enacted to punish persons “found … unlawfully, riotously or tumultuously assembled to the disturbance of the peace and to the terror of Her Majesty’s subjects.”\(^{34}\) Emergency regulations were passed to control large scale economic strife in the 1920s.\(^{35}\) It was in the aftermath of the Second World War, Hong Kong enacted its first Public Order Ordinance. This law aimed to provide a regulatory framework for maintaining law and order during peacetime. As an immediate post-war piece of legislation intended to restore and maintain peace and order, the POO was short and broadly framed but also included draconian measures such as the power of the Governor to declare a curfew.

A permission system for public protests was earlier put into place in 1932 in the Summary Offences (SO) Ordinance. Section 3 (16) made it an offence for a person who “in any public place organizes, equips or takes part in any procession without the permission of the Secretary for Chinese Affairs or a District Officer.”\(^{36}\) When the POO was revised in 1967 in response to the riot that took place that year, a licensing system was created, according to which, no public meetings or processions could take place without a license issued by the Commissioner of Police which was subject to the condition that they are “not likely to prejudice the maintenance of public order or be used for any lawful or immoral purpose”. An application for a license would be rejected whenever any person or society directly, indirectly, or likely to be associated with the meeting or procession had at any time contravened any Hong Kong laws.\(^{37}\)

This licensing system was subsequently liberalized, following a government undertaking to do so, when “Hong Kong was sufficiently stable (and its population sufficiently responsible) to accommodate less sweeping control over public meetings.”\(^{38}\) After a study by a working party, the POO was amended in 1980, and the licensing requirement for assemblies was replaced with an advance notification system. Under section 8 of the 1980s Amendment, individuals were required to provide the Commissioner of the Police with a written notice of a planned assembly 7 days prior to the meeting. The Police Commissioner could prohibit the holding of a public

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\(^{33}\) *Peace Preservation Ordinance* (No 22 of 1884).

\(^{34}\) Section 7, *Peace Preservation Ordinance* 1886 (No. 15 of 1886).

\(^{35}\) *Emergency Regulations Ordinance* 1922 (No. 5 of 1922); and *Illegal Strikes and Lockouts Ordinance* 1927 (No 10 of 1927).

\(^{36}\) *Summary Offences Ordinance* 1932 (No. 40 of 1932).

\(^{37}\) Section 7(2), *Public Order Ordinance* (No. 64 of 1967).

\(^{38}\) Hong Kong Hansard, 23 July 1980, 1065.
meeting, among other reasons, if it was likely to prejudice the maintenance of public order. Public processions, however, remained subject to licensing until 1995 when the POO was uniformly liberalized.

This was prompted by the enactment of the Bill of Rights Ordinance in Hong Kong, which had a significant impact on Hong Kong law, including its law on public order. Under Section 13(1) of the 1995 Amendment to the POO, the licensing system was replaced by a notice system for public processions, according to which the organizers of a procession had to notify the Commissioner of Police of their intention to hold a public procession, with the Commissioner entitled to object on a number of grounds.

In contrast to the authoritarian motherland, the policing of protest in Hong Kong is characterized not by vigilantly looking for ways to preempt strikes but rather by negotiation with the applicants regarding time, place and form. To do that effectively, protest organizers are required to submit adequate information during the application process to facilitate the decision-making process. In this sense, although the differing systems of permit, notice or no objection may impose different liabilities on protest organizers who fail to comply with the rules, it historically had little impact on the capacity of the police. Organizers had to inform the police of their protest intentions and their plans in detail, and the police retained the power to control the process and to disperse crowds regardless of the type of approval that may be required.

A stable legal system like Hong Kong’s offers a high degree of predictability: protesters apply in advance, police duly issue a no-objection letter, and the demonstration routinely takes place. Rules and conditions are clearly set, understood and complied with; protesting is largely self-regulatory and well-disciplined, with police usually playing only a minimum oversight function for most assemblies and processions. In general, there is a clear leadership structure to manage, and be responsible for, assemblies and processions, almost as if the police have entered into a contract and shifted the liability in relation to the protest to organizers. As a microcosm of Hong Kong society, protest in Hong Kong under this framework became normally well-organized, orderly and peaceful, with a high degree of trust between protesters and the police. Prosecution occurred from time-to-time against protests that have taken place without permission or violated conditions that had been negotiated with the police.

The on-going protest, initially triggered by an extradition bill, and now shifted to a demand for universal suffrage, is changing the protest ecosystem in Hong Kong.39 Hong Kong’s streets are

39 Ironically, these protests originated in an alleged murder of a Hong Kong woman by her Hong Kong boyfriend while in Taiwan. Having returned to Hong Kong before her body was discovered, making it legally difficult to
again ablaze with protest, bearing out the warning above. Four months of weekly confrontation between protestors and the police have made Hong Kong even more of a protest society, with the Hong Kong government seemingly incapable of finding a political solution, and direct armed intervention from the Mainland becoming a real possibility. Massive public demonstrations took place, with organizers several times claiming participation in the millions, broadly conducted within the legal framework outlined above and consisting of a wide cross-section of Hong Kong society. Radicalized groups of protestors, left frustrated after OCM and confronted with a tone-deaf unresponsive government, claiming to lack any other democratic means of pursuing their objectives, stepped forward, engaging in an increasingly violent campaign of confrontational activities. On a weekly, if not nightly schedule, black-clad protestors sporting helmets, gas-masks and umbrellas (the defining symbol of OCM), step out of the shadows of peaceful protests and, under the mantra ‘be water’, engage in spontaneous, short-term activities intended to disrupt. Employing the tactics of urban guerilla warfare, these protestors have stormed the Legislative Council building, police stations, shopping malls, and other public venues; defiled national symbols; and spontaneously and repeatedly blocked and closed down streets and transportation infrastructure, including Hong Kong’s international airport. Bricks, laser pens, and also petrol bombs have become the ‘weapons’ of confrontation with the police. For their part, the police have responded with a more confrontational stance, with large numbers of officers deployed in riot gear, armed with tear gas and other crowd-control weapons, and supported by water cannon vehicles. With public support for the violence seemingly staying strong, and the police increasingly characterized as the enemy, the Mainland authorities have taken on a more pro-active role than previously, speaking directly on several occasions about the protests, and their unlawfulness. For the time being, it is not at all clear how the impasse that has been reached will resolve itself. What seems clear, however, is that two protest movements are effectively taking place at the same time. One follows the traditional regulatory framework in Hong Kong, and remains primarily peaceful. But the other is radicalized, impassioned, and willing to engage in violence, just as predicted above.

Judicial independence still stands firm as the guardian of the liberal rule of law in Hong Kong and ensures that police powers in managing public order are subject to judicial oversight. While the judiciary defers to police determination on matters relating to time and venue restrictions on meeting and procession, it is cognizant of its role and responsibility as the guardian of rights and freedoms of Hong Kong residents and stands ready to intervene when such rights and freedom are violated. The courts play a supervisory role in ensuring the legality of the application and approval process. When necessary, the courts have also been rigorous in protecting the right of expression through protest against occasionally overzealous police. Like the Constitutional Court in Taiwan, Hong Kong’s Court of Final Appeal (CFA) refused to invalidate the non-objection system itself for protest management. Further, the CFA has reduced the scope of police

return him to Taiwan due to the absence of an extradition or rendition arrangement, the Hong Kong Government seized the moment to introduce an extradition bill enabling his return to Taiwan. But this extradition bill equally applied to the Mainland, and public and business reaction was immediate and demanded withdrawal of the bill. Echoing the concerns which sparked the Sunflower Movement in Taiwan, the bill was portrayed as a major incursion into Hong Kong’s autonomy and freedoms and as undermining the notion of ‘one country two systems’. See, Albert H Y Chen, “A Prefect Storm: Hong Kong-Mainland Rendition of Fugitive Offenders,” (2019) 49 Hong Kong Law Journal 419-430.

K Kennedy, ‘Can Hong Kong turn away from violence and learn the lesson of democratic compromise?’, SCMP, 28 Aug 2019
discretion by invalidating *ordre public* as a legal ground for objecting to a protest, on the grounds of vagueness. But unlike the Taiwan court, the CFA confirmed the constitutionality of other statutory grounds for police objection, including national security and public order, which were declared to be unconstitutional by the Taiwan court.

Hong Kong’s treatment of protesters is thus defined by a regard for rule of law and the effective protection of rights and freedoms. At its core is a belief in the political neutrality of the police, and unbiased prosecution and judicial decisions, all rendered without considering the political motivation of actors. In dealing with OCM and its organizers and participants, the courts have maintained this perceived commitment to neutrality, professing to eschew consideration of motivation, and instead focusing on the essential ‘unlawfulness’ of alleged criminal conduct. From the injunction order initially forcing the occupiers to exit the streets to the initial prosecution of those initiating OCM to the eventual prosecution of participants in a series of unlawful assembly cases, and then the disqualification of pro-independence members of the Legislative Council, courts in Hong Kong have steadfastly reiterated their supposed political neutrality. In practical terms, this perceived commitment to political neutrality is grounded in a clear separation between lawful and unlawful protest, with a sharp and decisive focus on the unlawfulness of a protest. While Hong Kong’s Basic Law protects the freedoms of assembly, procession and demonstration, those freedoms are not absolute and ought not to interfere with the rights and freedoms of others. Lawfulness is claimed to be the only lens through which criminality is viewed. The following statement from the Court of Appeal captures the essence of the judicial attitude to unlawful assembly:

…this court is duty-bound to send a clear message to the public that when taking part in assemblies, processions, demonstrations or like activities, in the free exercise of their rights, participants must abide by the law and must not cause any damage to public order and public peace.

Judicial consensus also maintains that an unlawful assembly involving any violence, including “charging at or assaulting law-enforcement officers”, “will be met by a substantial sentence, otherwise there will be no social accord or social progress, and citizens’ rights and freedom as safeguarded by law may altogether vanish.”

“Lawfulness” thus serves as a starting point agreed upon by the courts at all levels, and it is on the basis of this common understanding that judges have claimed to exercise their discretion in sentencing and also given expression to the underlying values. One of Hon Yeung VPs’ open statements, quoted below at length, is representative of the purported judicial disregard for political motivations in sentencing:

In recent years, an unhealthy wind has been blowing in Hong Kong. Some people, on the pretext of pursuing their ideals of freely exercising their rights conferred by law, have

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42 Judicial Yuan Interpretation No 445.  
43 Secretary for Justice and Wong Chi Fung, Law Kwun Chung and Chow Yong Kang Alex (17 August 2017) (Court of Appeal) (English Translation)  
44 Para 17.
acted wantonly in an unlawful manner. Certain people, including individuals of learning, advocate “achieving justice by violating the law” and, under the slogan, they encourage others to break the law. These people openly flout the law. Not only do they refuse to admit their lawbreaking activities are wrong, but they even go as far as regarding such activities as a source of honour and pride.\(^{45}\)

To reverse the “unhealthy wind”, the Court of Appeal replaced community service orders, originally imposed by a Magistrate on three student leaders for the offence of inciting others to enter a restricted place, with substantial custodial sentences. Eventually, the Court of Final Appeal, in overturning this aspect of the Court of Appeal’s decision, makes the same legal point, but with a more moderate tone:

> The fact of a conviction of the offence will necessarily mean that the offender has crossed the line separating the lawful exercise of his constitutional rights from unlawful activity subject to sanctions and constraints. In such a case, there is little merit in a plea for leniency on the basis that the offender was merely exercising constitutional rights since, by definition, he was not doing so at the time when the offence was committed. \(^{46}\)

As the law stands in Hong Kong, motivation, however noble it is, is irrelevant in determining criminal liability and also carries little weight in the sentencing process. While judges can consider political motivations when imposing a sentence, the consideration is based entirely on pragmatic and utilitarian grounds rather than any normative or principled considerations.\(^{47}\) From a Hong Kong perspective, the mainland approach is politically repressive and legally unpersuasive; conversely, Taiwan’s democratic process has been so fast-moving, it has unleashed tremendous power and energy on both society and its institutions, and urgently needs consolidation in order to become rule-bound.

**The Politics of Protest**

Protesters in all three jurisdictions commonly frame and legitimize their street activities in terms of civil disobedience. Many emphasize the peaceful, non-violent nature of their resistance. By and large, they practiced what they preached and avoided confrontation with the authorities and counter-protesters. Yet, their protest took place in different political systems, challenged the respective systems to their core in different ways and received different treatments.

Civil disobedience has different meanings in different political systems. John Rawls has famously pointed out the internal irony of civil disobedience, stating that its problem “arise[s] only within a more or less just democratic state for those citizens who recognize and accept the legitimacy of the constitution”.\(^{48}\) Civil disobedience lies between an act of defiance, violent resistance against, and a radical break from a political community and submission to constituted authorities. It is thus a protest against the malfunctioning of a constitutional order, while also accepting the legitimacy of that order at a foundational level. It promotes evolutionary

\(^{45}\) Para. 6.

\(^{46}\) Secretary for Justice and Wong Chi Fung (FACC No. 9 of 2017) (Court of Final Appeal), para 70.

\(^{47}\) Ibid, para 76, citing Lord Hoffmann in Sepet v Home Secretary [20003] 1 WLR 856 at para 34.

improvement of the existing order rather than a revolutionary change of that order. It is thus “an act of loyalty.”

Defining civil disobedience in this way, Taiwan’s Sunflower movement, at first sight, is a typical example of civil disobedience in the liberal sense that it sought to undergird, not to undermine, Taiwan’s democratic process. Democracy, in Jones’ terms, is the endgame of the Sunflower Movement and converges perfectly with Taiwan’s constitutional design. For Yeh, the movement recognizes the limit of “formal institutions” in safeguarding democracy and offers a corrective mechanism to the democratic deficit within democratic institutions. The traditional oversight mechanisms, including constitutional review by the courts, periodic elections or the related parliamentary process, often fail to safeguard young democracies from backsliding into stagnation. On the one hand, “juristocracy” may lead to rigid constitutionalism and judicial absolutism, which necessarily stiffens the democratic process, as the Hong Kong case has well established – the rule of law can appear to be an obstacle to democracy. On the other hand, representative democracy may also functionally marginalize public participation in the day-to-day making of policy and effectively reduce the public to a merely passive audience – the trigger of the Sunflowers movement in Taiwan. Democratic institutions may actually work to damage the core values of democracy, with politicians and political parties hijacking the legislative process to advance their own interests. Periodic elections, as competitive as they may be, often fail to make the legislature democratically accountable. Legislature may be captured by special interests. For Yeh, the Sunflower Movement and the social forces it epitomized, referred to as civic constitutionalism, may have saved Taiwan’s democracy from degeneration and even collapsing. Civic constitutionalism refers to a process in which the “people”, replacing the legislature and the courts, understand, interpret and shape the meaning of the constitution so as to positively reinforce the judicial and legislative processes. Civic constitutionalism therefore does not challenge democracy as the endgame in Taiwan. On the contrary it boosts democracy by requesting the people to remain vigilant to democracy’s vulnerability and be ready to mobilize so as to maintain and enhance the democratic value of the political process. In Jones and Su’s formulation, the Sunflower Movement involves more than just “disobeying”. It is a “democratic contestation” that is “democracy-compatible”, and indeed democracy-promoting. It offers “a dueling vision of democracy.”

Some may argue that, the Sunflower Movement is not based on civil disobedience in a liberal sense because the protesters, who did trespass the Parliament, vandalize property during occupation, and obstruct and assault police officers, did not plea guilty or accept responsibility and punishment, as they were expected to do according to the liberal theory of civil disobedience. On the contrary, the DPP, upon winning the election, dropped all the charges laid against the protesters who attempted, in an aggressive if not violent manner, to break-in and occupy the executive office; and the courts then found those who had occupied the Parliament not guilty of any offences: no trespassing, no damaging of property, and no obstruction and assaulting of police officers on duty. The Sunflower protesters were either excused because of

49 Brad R Roth, “Democratic political obligation,” 196; in Brian Christopher Jones (ed.) Law and Politics of the Taiwan Sunflower and Hong Kong Umbrella Movement (Routledge, 2017). That explains the exception to the offence of seditious libel in common law. See, for example, section 9 of the Crimes Ordinance, Hong Kong.
the circumstances of the cases or justified because of their democratic motivation and aspirations.

Protest on the Mainland, smaller in scope and secretive in its operation, but “radical” in its impact, has significantly different political meaning and repercussions. The protest takes place within [a system] that cannot tolerate it or integrate it as part of the system. For the protesters in the NCM, the end game is not merely to hold the Party-state accountable to its own rhetoric and to improve governance under the existing political system. That is their mid-game, but their ultimate objective is to change the system from within. Their endgame is the replacement of the existing system targeted by their protest with a new liberal constitutional democracy. These two systems, in the eyes of protesters, are mutually exclusive and irreconcilable at a foundational level. While protest on the Mainland shares the same objectives as those in Taiwan and Hong Kong, the challenge it poses to the Mainland’s political system is a qualitatively different one and is in turn perceived and treated as such. Directly or indirectly, protesters are subversive in terms of their ultimate goal. Protest, because of a lack of ultimate legitimacy, is not civil disobedience in the liberal sense either.

The OCM in Hong Kong drew inspiration from both the NCM in the Mainland and the Sunflower Movement in Taiwan. Like NCM, the OCM in Hong Kong challenged the Chinese political system in an open, direct, and radical way: explicitly, that is “give us democracy as we define it or we will paralyze Hong Kong” which, implicitly, may lead to an uncertain cascade impact on the Mainland. The term occupying central in Chinese (占中) can be read differently and can, with some organizing, evolve into occupying China （中）. After all, the biggest occupying movement on earth happened in China in 1989. In that sense, the OCM was a rebellious movement that squared up to the central government, with its organizers openly threatening to use serious unlawful activities to force the central government to change its policy towards Hong Kong. In the eyes of the central government, organizers of the OCM were as dangerous as NCM organizers, and were treated as enemies of the state rather than mere adversaries.

This radical stance is more visible when OCM is seen as one episode in the long protest chain against central governments centred on Hong Kong. While protest in Hong Kong touches on a wide range of social, economic and political matters, the large protest rallies tend to aim at the central government. The largest protest of all, with participation of an estimated 1 million people in 1989, occurred in response to the Tiananmen massacre; and the annual vigil in Victoria Park, the biggest assembly each and every year since 1989, is organized to commemorate a historic event which Hong Kong has found it not possible to forget. Protest in relation to anti-patriotic education, high speed trains, interpretations of the Basic Law by the NPC Standing Committee, not to mention to protest against political prosecutions of lawyers and dissidents in the Mainland, have truly made Hong Kong a protest society.

51 Wright, The Perils of Protest: State Repression and Student Activism.
The reunification to China and the arrival of a new political master redefined the protest landscape in Hong Kong. After all the celebrations and genuine efforts to finesse deeper fractures at a structural level, an adversarial relationship started to surface as Hong Kong came to the realization that at the end of the day it is China’s political system that makes Chinese democratic aspirations, as defined in Hong Kong, an impossibility. The incremental denial of Hong Kong’s democracy by the central government through political and legal actions, step by step, have absorbed most of Hong Kong’s political resources and naturally become the focal point of Hong Kong’s political protest. Anti-central government rallies and demonstrations have redefined the political landscape in Hong Kong in the post-handover era. The protest is both symbolic and expressive, intended to articulate political views, reconfirm political positions, and provide a moral compass to a society that has lost its direction, and instrumental aimed to push back against policy changes.

Different from the NCM and similar to Sunflower Movement, the OCM aims to maintain and solidify the high degree of autonomy in Hong Kong that is entrenched in the Chinese constitution and specified in the Basic Law. The OCM is thus internally contradictory in its objectives. One Country Two Systems (OCTS), meaning high degree of autonomy of Hong Kong under Chinese rule, is the endgame for Hong Kong and it is also a political and constitutional undertaking made by the central government; but genuine democracy is regarded as unattainable under the OCTS framework. The Party state has promised something that it is not able to deliver and Hong Kong has started to realize that eventuality. The OCM leaders and participants decided to protest knowing they were in violation of the POO; and they mostly pleaded guilty, as promised, and accepted punishment that was due. The frustration with the OCTS formula eventually led to the sudden emergence of a secessionist movement and it is the failure to achieve democracy that planted seeds for the advocacy of Hong Kong’s independence. OCTS was initially designed, in part, to lure Taiwan back to the motherland; but the structural fault in the design is pushing Hong Kong toward Taiwan.

The Future of Protest

The three systems generate three distinct perceptions of, and reactions to protest. On the authoritarian Mainland, protest is a sin to be preempted and suppressed if preemption fails; in Hong Kong’s liberal tradition, it is a legal right to be balanced against the rights and freedoms of others; and in Taiwan it is a democratic virtue and indeed a public duty of citizens to ensure democratic resilience. The protest, as exemplified in these three cases, attempts to challenge or reinforce the existing systems and has received drastically different treatments. But after all the protest and prosecution, what are the future prospects of public protest in these three jurisdictions? Could the NCM, OCM and Sunflower Movement happen again in their respective societies?

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55 Fu Hualing, “China’s Imperatives for National Security Legislation,” in Cora Chan and Fiona de Londras (eds.).
On the Mainland, political preemption and legal repression work to drive grievances underground. While the formal political and legal system allows assemblies, processions, and demonstrations, the political reality is such that any sign of public protest and collective action would be regarded as a political risk and continues to be prohibited and suppressed. The case of Xu Zhiyong and his co-organizers and supporters and many others illustrates both the determination and capacity of the Party state to prevent and crash any public protests that are deemed politically risky. But for civil society actors that have survived periodical crackdowns, streets (in both the real and virtual worlds) remain the best platforms and battle grounds to create meaningful input into the decision-making process and educating the general public. In authoritarian states, in particular, where institutional participation through the legislative process, judicial process, or mass media, is tightly controlled or entirely absent, public protest is the principal channel to making claims and making demands. Taking that revenue away without adequate institutional compensation, the society is left with no safety valve to let the steam off.

Taiwan faces a different predicament and its democracy may be under stress due to its own weight. The Sunflower Movement in 2014, as a rallying point, galvanized political forces and eventually delivered a crushing defeat to the Kuomintang-led government, in a similar way that the Wild Lily Movement, another iconic student movement that led to the liberalization and democratization in Taiwan, did in 1990. As a significant part of pan-DPP alliance, civil society actors, who led the civil society in Taiwan, were invited to join the government, and leading lawyers, well-known academics and powerful NGOs leaders felt duty-bound to join the government to further consolidate Taiwan’s democracy. Previously opposition forces, they are now part of the ruling coalition. While protest on social and economic issues have continued and even intensified in certain policy areas, civil society critique and supervision of the DPP government may no longer possess the vigor and challenge that it used to have. The DPP’s success may have hollowed Taiwan’s civil society from the inside out. But will the government, facing a dual challenge of a democratic crisis and imminent Mainland threats from the Mainland, be able to effectively coopt the vibrant civil society forces and in the process remove their critical, cutting edge that defines Taiwan’s democracy? And will Taiwan’s democracy continue to create and nurture independent social forces, a third force or otherwise to create further constitutional movements?

After the OCM and the subsequent crackdowns, the Hong Kong police forebodingly started to gear themselves up in preparation for possible future unrest. Political neutrality provides the foundation of trust in the Hong Kong police, and its effectiveness and legitimacy depend on its maintenance. The OCM, [opened up and exposed social divisions , pushed the police into violent confrontation with citizens and by doing so poses a direct challenge to the police’s ability to remain politically neutral, fair and effective. Will police in Hong Kong become more militant, politically biased and authoritarian? With the prospect of rising authoritarian legality on the horizon, civil society actors, who devoted themselves to the OCM, found themselves the subject of a massive legal crackdown. Hundreds of mostly young activists were prosecuted and

56 Wright, The Perils of Protest: State Repression and Student Activism.
mostly convicted, even though they have mostly received lenient punishment for their peaceful protest. Law is a double-edged sword. It can empower citizens to exercise their individual rights of protest; but it can also limit their advocacy to a narrow legal space. The legalistic approach that criminalizes any unlawful activity has had a powerful chilling impact, demonstrating that there is a stark price to be paid in Hong Kong for extralegal mobilization. But it remains uncertain whether legal repression in Hong Kong will, in the long run, tame the passionate youth, or simply radicalize them. The resilient protest on Hong Kong streets and the violent escalation tend to show that legal repression breeds radicalism and violence.