A Comparative Study of Laws of Assembly in China: 
Historical Continuity or Political Departure?

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I. INTRODUCTION

On January 11, 1988, the Legislative Yuan of Republic of China (ROC or Taiwan) promulgated the “Law of Assembly and
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Procession during Mobilization to Suppress Disorder”\(^2\) [hereinafter ROC Assembly Law]\(^3\) to pave the way for the eventual democratization of Taiwan. On October 31, 1989, the National People’s Congress (NPC) of the People’s Republic of China (PRC or China) passed the “Law of People’s Republic of China on Assembly, Procession and Demonstration”\(^4\) [hereinafter PRC Assembly Law] to


avoid the reoccurrences of June 4, 1998 in adopting measures to enhance government accountability and channel public opinion. For the first time in both nations’ history, the police were given revisions regarding “People’s Republic of China Assembly, Procession, and Demonstration Law (Draft),” presented on October 30, 1989 to the Seventh NPC standing Committee, Tenth Meeting [hereinafter Summary Report]. Id. at 1493-1494. For an authoritative and comprehensive treatise on the official interpretation of the PRC Assembly Law, see ZHONGHUA RENMIN GONGHEGUO JIHUI YOUXING SHIWEI FA [PRC ASSEMBLY, PROCESSION, AND DEMONSTRATION LAW] (1990) [hereinafter PRC Assembly Law Treatise].

Such public pronouncement of the utilities of rights to citizens (air grievance) and law for government (supervising officials) might obscure the true intended purposes and real unintended effects of such laws such as restricting free personal expression and limiting spontaneous public gathering. See generally, Judy Polumbaum, In the Name of Stability: Restrictions on the Right of Assembly in the People’s Republic of China, 26 AUSTRALIAN JOURNAL OF CHINESE AFFAIRS 43-64 (July 1991).

The PRC Assembly Law is a first for the nation. However, it is not the nation’s first attempt to regulate public gathering, at the local level. Like the PRC Assembly Law, the earlier forms of Assembly Law resulted from (local) officials concerned with run away student activism in 1986. On December 5, 1986, students at University of Science and Technology in Hefei protested against the lack of power to elect university candidates to the People’s Congress. The demonstrations spread to Wuhan, Beijing, and Shanghai. To forestall students’ plan to hold larger demonstrations on December 26, the birthday of Mao, the Shanghai (Dec. 26) municipal government and then Beijing (Dec. 26) and Nanjing (Dec. 28), passed new regulations requiring prior application for demonstration. These regulations included providing 60 to 72 hours of notice, details (name, addresses, occupations) of organizers, off limits from certain areas, e.g. Zhongnanhai and Diaoyutai. Julia Kwong, The 1986 Student Demonstrations in China: A Democratic Movement?, 28:9 ASIAN SURVEY 970, 972 (1988). From 1986 to 1989, eight provinces, autonomous regions, and municipalities directly under Central Government, (Beijing, Shanghai, Guizhou, Jiangxi, Guangdong, Ningxia, Guangxi, Xinjiang) and nine provincial cities (Hefei, Changsha, Guangzhou, Lasa, Changchun, Hangzhou, Taiyuan, Xian, Jilin) promulgated various local assembly, procession, and demonstration laws and regulations. See Clarifications, supra note 4, at 1487; PRC Assembly Law Treatise, supra note 4, at 2-3. For representative local assembly laws, see, e.g., “Beijingshi Guanyu Youxing Shiwei de Rugan Zhanxing Guiding” promulgated by the Beijingshi Eighth People’s Congress, Standing Committee, 33rd meeting on December 26, 1986. See ZHONGGUO FALU NIANJIAN [Law Y.B. of China] 420 (1989). “Taiyuanshi Qunzhong Youxing Shiwei Zhangxing Guiding” [“Temporary Taiyun Municipality Mass Procession, Demonstration Guidelines”] promulgated by the Taiyuanshi, Eighth People’s Congress, Standing Committee at
administrative regulations to guide their discretion in managing public demonstrations,\(^8\) and citizens were provided laws to protect their assembly rights.

The promulgation of the Assembly Laws was a landmark legal, as well as political, event for both nations. Legally, it moved the two countries to a more predictable rule of law regime and away from whimsical party dictatorship and unaccountable police discretion.\(^9\) Politically, the laws helped transformed the relationship between the state and the people, empowering citizens and protecting their rights in the process.\(^10\)

A cursory review of legal\(^11\) and Asian studies\(^12\) literature in English\(^13\) shows that there was few reported investigations into (1) the

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\(^10\) In spite of incremental steps towards political liberation and democratization, under the tutelage of Deng, China’s reform miracle remains to be more economic than political. Steven M. Goldstein, *China in Transition: The Political Foundations of Incremental Reform*, 144 *CHINA Q.* 1105-1131 (1995).

\(^11\) A key word search on legal search engine Lexis-Nexis (using the terms: Taiwan demonstration, Taiwan Constitution, Chinese Law, Chinese Constitution, Law of Assembly) uncovered no law journal articles on PRC or ROC Assembly Laws.

\(^12\) A key word search in Asian studies and political science (JSTOR Political Science Journals) uncovered one article on PRC Assembly Law, Judy Polumbaum, *In the Name of Stability: Restrictions on the Right of Assembly in the People's Republic of China*, 26 *AUSTRALIAN JOURNAL OF CHINESE AFFAIRS* 43.
subject of China demonstration and assembly law in general, and (2) comparative studies of PRC versus. ROC Assembly Laws in particular. This paper is a first attempt to fill this literature gap. This paper is organized as follows. After this brief “Introduction,” Section II will state the “Research Focus.” Section III outlines the “Research Methodology.” Section IV, “Freedom of Speech in Imperial China?,” addresses two related issues of whether there is a right and freedom to speech in imperial China. Sections V through VII is the heart of this research. Section V reports upon “Constitutional Rights to Assembly.” Section VI describes “Constitutional Limitations and Legal Restrictions’’ to the exercise of those rights. Section VII, “Assembly Laws in Action,” describes and discusses interpretation issues and application problems. Finally, Section VIII, “Summary and Conclusion,” notes the textual similarities of the two laws and puts the comparison of ROC and PRC Assembly Laws in a broader historical and political context.

II. RESEARCH FOCUS

This paper is a comparative study of the law of assembly between the People’s Republic of China (PRC) versus the Republic of China (Taiwan or ROC). It is an exposition of law in local context\(^\text{14}\) (1991). A few articles mentioned the ROC Assembly Law in passing, mostly in the context of ROC political development, i.e. moving towards democratization under President Chiang Ching-kuo. Teresa Wright, *Student Mobilization in Taiwan: Civil Society and Its Discontents*, 39:6 ASIAN SURVEY 986-1008 (1999); Ming-min Peng, *Political Offences in Taiwan: Laws and Problems*, 47 CHINA Q. 471 (1971); Bruce J. Dickson, *China’s Democratization and the Taiwan Experience*, 38:4 ASIAN SURVEY 349 (1998); Ramon H. Myers, *Political Theory and Recent Political Developments in the Republic of China*, 27:9 ASIAN SURVEY 1003 (1987).

\(^\text{13}\) There is much more Chinese literature on the subject. Their content, however, is not very rich, diverse, or new. Mostly, they follow official statements and common analysis. GU LINFANG, *ZHONGGUO JINGCHA FALU FAGUI GUIZHANG SHIYI DAQUAN* (1993) (Beijing); ZHONGHUA RENMIN GONGHEGUO JIHUI, YOUXING SHIWEI FA JOANJIE [INTRODUCTION TO LAW OF ASSEMBLIES, PROCESSIONS AND DEMONSTRATIONS] (Liu Chenhe ed., 1990); JIHUI, YOUXING SHIWEI FA JIANGHA [SIMPLIFIED LAW OF ASSEMBLIES, PROCESSIONS AND DEMONSTRATIONS] (PRC ed., 1990).

\(^\text{14}\) Linda Hantrais, *Comparative Research Methods*, 13 SOCIAL RESEARCH UPDATE (Department of Sociology, University of Surrey) at section “Approaches to cross-national research,” par. 5 (1995) at
and about local content.\textsuperscript{15} The comparison is achieved by looking at how these two Chinese societies controlled the exercise of police powers during assembly, procession, and demonstration (collectively, “public assembly”). Particularly, this paper looks at the constitutional mandate and institutional limitations on the exercise of police powers in the management of public gatherings, e.g. what are the roles and functions, and powers and limitations of the police in dealing with public assembly application and conduct.

This comparative project is conducted with a view to understand the relative development in police powers in the two Chinese societies, once linked by history and culture and now divided by geography and ideology.\textsuperscript{16} It is assumed that in order to achieve a political “unification” of the two societies under a “one country, two systems” formula,\textsuperscript{17} or any other viable political settlement, some understanding of how the two legal systems work is important in breaching their differences.\textsuperscript{18}

\textsuperscript{15} KAM C. WONG (EDITED), \textit{Presidential Address, Policing in the 21st Century (Proceedings)} (AAPS 2002) (H.K.). Asian police studies have been dominated by western perspective and literature. Improvement can be achieved by promoting research with local content and in local context.

\textsuperscript{16} The relationship between China (PRC) and Taiwan (ROC) is not unlike that of East and West Germany, posing similar issues if not identical problems of unification. ANDREAS GLAESER, \textit{Divided in Unity: Identity, Germany, and the Berlin Police} (2000).

\textsuperscript{17} In 1983, the People’s Republic of China (PRC), in order to secure the political integration of Taiwan, was willing to give Taiwan a high degree of autonomy as a special administrative region (ASR) of the PRC, including the powers to make domestic law and the maintain its military. \textit{See} the policy of “one country, two systems” as advocated by Deng in his speeches of June 26, 1983, October 22, 1984, October 31, 1984, September 2, 1986, May 16, 1989, and September 15, 1990. \textit{The Selected Works of Deng Xiaoping Volume III} (1982-1990) (The Bureau for the Compilation and Translation of Works of Marx, Engels, Lenin and Stalin Under the Central Committee of the Communist Party of China trans., 1993). For a discussion, \textit{see} LO CHI KIN, \textit{Relations Across the Taiwan Straits}, \textit{China Review} at ch. 4 (1993).
In a still larger context, this research rides the tide of comparative policing.\(^{19}\) It exposes and explicates how police in the two closed societies of ROC (Confucianism) and PRC (Socialism) behave to (1) confront social protests,\(^{20}\) (2) deal with political challenges,\(^{21}\) and more broadly, (3) to balance the forces of reform and control\(^{22}\) with the use of law.

\(^{18}\) The PRC Social Science Research Fund has funded a project entitled \textit{Yiguo Lianzhi Falu Wenti Yanjiu} [Research into legal issues of “One Country, Two Systems”]. \textit{YIGUO LIANZHI FALU ENTI YANJIU} (1997). This research resembles and complements the aforesaid research project with the following differences – theirs is a contemporary and practical project and mine is a historical and intellectual exercise.


\(^{20}\) MPS data showed that there is a dramatic increase in public demonstrations ranging “from peaceful small-group petitions and sit-ins to marches and rallies, labor strikes, merchant strikes, student demonstrations, ethnic unrest, and even armed fighting and riots . . . the rate of demonstrations increased from 8,700 in 1993 to 32,000 in 1999. During January-September 2000, “China witnessed 30,000 mass incidents.” The protests are getting more organized. Chinese seems to think” [that] “[m]aking a great disturbance produces a great solution. Small disturbances produce small solutions. Without a disturbance, there will be no solution.” Murray Scot Tanner, \textit{China Rethinks Unrest}, 27:3 \textit{WASHINGTON QUARTERLY} 138, 146 (2004).


\(^{22}\) Murray Scot Tanner, \textit{Chinese Government Responses to Rising Social Unrest} (Testimony presented to the US-China Economic and Security Review Commission on Apr. 14, 2005), (RAND Corporation Testimony Series 2005)(PRC try to management social unrest by establishing legal channel for complaints);
III. RESEARCH METHOD

The comparison is done by a textual analysis and comparison between the provisions of PRC Assembly Law and the ROC Assembly Law. Assembly Law is chosen as a research site for the following reasons. First, the comparison of the assembly laws provided a unique opportunity to investigate how societies that have similar cultural roots, but divergent political ideologies, deal with an identical socio-political challenge. The study of assembly laws facilitates comparative research, because while both the ROC and PRC assembly laws make provision for procession and assembly rights, they were informed by different political philosophies and led to different police practices.

Second, the study of assembly laws helps to clarify concepts and frame issues in matters under investigation, i.e. the balance of state authority and citizens’ rights during public assembly. The assembly laws put in sharp focus and clear contrast the inherent tension and irreconcilable differences between police powers, citizens’ rights, social order, and communal well-being.

Third, this study provides a way to view the police-public relationship in a new context. The assembly laws in Chinese societies


*23 ROC Police Research I, supra note 8, at 12. The ROC considers the freedom of assembly as people’s fundamental right in a democracy.*

*24 The CCP, as labor organizers and as political underdog, have long advocated the right to free speech, assembly, association, and demonstration as early as July 1922. ZHONGGONG ZHONGYANG DANGXIAO, ZHONGHUA RENMIN GONGHEGUO XIANFA TONGSHI [COMPREHENSIVE INTERPRETATION OF THE PRC CONSTITUTION] 86 (1993) [hereinafter Comprehensive Interpretation].*

*25 “The benefits of comparative law begin with the attainment of knowledge of another legal system in order to enhance the understanding of one's own system. The knowledge of alternative answers to common legal problems inevitably provides novel ways to understand and solve problems in one's own legal system. More importantly, scientific standards of law cannot be reconciled with study limited in scope to one nation.” Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT’L L.J. 331, 335 (1998).*
presented a radical departure from past legal jurisprudential qua political philosophical tradition and a re-definition of traditional police-public qua state-citizen relationship.

Finally, the promulgation of the PRC and ROC laws in close temporal proximity – ROC (Jan. 11, 1988) and the PRC Assembly Law (October 31, 1989) – allows for a controlled study of the two societies’ philosophy, policy, and practices toward police powers and citizens’ rights. Thus this study provides a historical comparison of the state of police powers and control between the PRC vs. ROC in the late 1980s; and not of the current time.

IV. FREEDOM OF SPEECH IN IMPERIAL CHINA?

China from antiquity was a well-ordered and highly structured society, defined by li (rites) and aspired towards ren (benevolence). As an ordered society, the idea of “freedom” of speech, as we come to know it in Western libertarian democracies, did not exist. As a “duty” (zeren) bound community, the “right” (quanli) to free

26 Scientifically speaking a control variable is “a variable that is held constant in an attempt to further clarify the relationship between two variables.” 

27 Controlling for time may not be as important as the controlling for economic and political development. Mao has observed that police power is a manifestation of class interest. Civil society advocates postulated that the control of police powers advances with political and social qua economic development.


31 D. S. Shwayder, The Sense of Duty, 7:27 PHILOSOPHICAL QUARTERLY 116-125 (1957) (To say some has a sense of duty is to say that he/she is doing what is right for the sake of it, irrespective of how he/she/others feels about it); To say that some one has a “duty” to do things is not the same as saying someone has an obligation to do that thing; duty is to self while obligation to us. This is an important
speech was not recognized. This is not to suggest that “bounded freedom” of speech did not find expression in China, especially with the elites. Nor does it mean that there is no “duty to tell the truth,” e.g. intellectuals and officials who risked their life to fulfill a higher moral calling as with the need to “speak truth to power.”

32 In Chinese “duty” is translated as “zeren” or “sense of responsibility “yingai.” PINYIN CHINESE – ENGLISH DICTIONARY 868R (1981) [hereinafter PYCED]. Morally, the Chinese do not distinguish between “zeren” and “ying gai” as in the saying, “Don’t mention it. We’ve only done our duty.” See “yinggai,” PYCED at 830R.

33 Contemporary Chinese translation of “right” is “quanli li” or authority “quan” to benefits “li.” PYCED, supra note 32, at 563R. However, if one were to look back in history, the term “right” did not exist. Wang Gungwu, Power, Rights and Duties in Chinese History, 3 AUSTRALIAN JOURNAL OF CHINESE AFFAIRS 1, 4 (1980).

34 Id. at 1-26.

A. **BOUNDED FREEDOM**[^36] OF SPEECH

In the West, freedom of speech, as with all other freedoms must be exercised within the boundary of law, as ameliorated by local custom and personal relationships. In (Imperial) China, speech as personal conduct and social activities was to be exercised within the strict confine of Confucianism.[^37]

B. **CONFUCIUS AND (FREE) SPEECH**

Confucius or his followers did not explicitly discuss free speech or rights of assembly in his writings. For that matter the

[^36]: The idea of freedom being bound appears to be contradictory in terms. After all, freedom means not to be bounded, or unrestricted, without our willing consent. Freedom is defined as: “the condition of being free; the power to act or speak or think without externally imposed restraints.” Princeton University, *WordNet: A Lexical Database for the English Language*, at [http://wordnet.princeton.edu/perl/webwn](http://wordnet.princeton.edu/perl/webwn). However, a minute’s reflection would reveal that freedom is always bounded, by cognition, by norms, by materials conditions. According to rational choice theory in behavioral economics, bounded rationality: “is used to designate rational choice that takes into account the cognitive limitations of both knowledge and cognitive capacity.” Sonderforschungsbereich (SFB) 504 Glossary, at [http://www.sfb504.uni-mannheim.de/glossary/bounded.htm](http://www.sfb504.uni-mannheim.de/glossary/bounded.htm). According to anthropologists, rationality are informed and bounded by culture. Robert Boyd et al., Norms and Bounded Rationality, in *BOUNDED RATIONALITY: THE ADAPTIVE TOOLBOX* 281–296 (G. Gigerenzer and R. Selten eds., MIT Press 2001). Finally, as argued by Marx material conditions of society define and determine the availability of freedom in any society: “But don't wrangle with us so long as you apply, to our intended abolition of bourgeois property, the standard of your bourgeois notions of freedom, culture, law, etc. Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all, a will, whose essential character and direction are determined by the economical conditions of existence of your class.” *KARL MARX & FREDRICK ENGLES, MANIFESTO OF THE COMMUNIST PARTY* 16 (1848).

[^37]: Chester Holcombe, *The Moral Training of the Young in China*, 14:4 *INTERNATIONAL JOURNAL OF ETHICS* 445-468 (1904) (The whole purpose of a Confucius education was to create a perfect, virtuous person in every respect. This educational philosophy denied Chinese youth and students any individuality or independent thought. They were taught to fit in the society by practicing the five relations (emperor/subjects, parents/children, husband/wife, brothers/sisters, friends/associates) and cultivate a virtuous self. Slight deviation from the moral percepts attached grave consequences, from isolation by people, rejection of family, expulsion from community, final banishment by law. Freedom of thought and action was nowhere to be found).
concept of freedom and liberty was never discussed. Confucius intellectual challenge is to design a perfect system of moral control, leaving nothing to chances. However, by a careful reading of his four books – The Great learning, The Doctrine of the Mean, Confucian Analects, The Works of Mencius - discerning readers should be able to understand the proper exercise of speech in Imperial Chinese society.

First, speech is an integral part of people’s personal conduct and social activities. It is governed by the moral universe Confucius was trying to create and promote. Thus, speech-conduct, as a species of human activities, was formed by Confucius’ basic philosophical postulates, moral percepts, ethical principles, and world view.

Confucius moral order is built upon the twin principles of li and ren. People were admonished to seek virtue, follow li and sought after ren as an unending quest of their life course. The journey to seek virtues started with “self-cultivation” and ended with acting in accordance with “propriety.”

38 At another level, Confucius instructed upon how to achieve freedom through harmony with self, others and the universe. George F. McLean, Kant and Confucius: Aesthetic Awareness and Harmony, in PHILOSOPHY AND MODERNIZATION IN CHINA - CHINESE PHILOSOPHICAL STUDIES XIII (Liu Fangtong, et al. eds., 1997), at http://www.crps.org/book/Series03/III-13/chapter_xvi.htm. “In this way, he could see freedom itself at the height of its sensibility, not merely as an instrument of a moral life, but as serving through the imagination as a lens or means for presenting the richness of reality in varied and intensified ways. Freedom, thus understood, is both spectroscope and kaleidoscope of being. As spectroscope it unfolds the full range of the possibilities of human freedom, so that all can be examined, evaluated and admired. As kaleidoscope, it continually works out the endless combinations and patterns of reality so that the beauty of each can be examined, reflected upon and chosen when desired. Freely, purposively and creatively, imagination weaves through reality focusing now upon certain dimensions, now reversing its flow, now making new connections and interrelations. In the process reality manifests not only scientific forms and their potential interrelations, but its power to evoke our free response of love and admiration or of hate and disgust.” Id.

39 The essence of Chinese cultural thoughts and key to Confucius teachings is that of “harmony” - individual obeying natural cosmic rules and following positive social norms, without question, still less dissent. Individuality is ruthlessly suppressed and personality actively transformed to make people conform to group expectations on way to be an integrated part of the collective whole, where the individual resided anonymously without a name and functioned silently without a voice. View in this manner, the Confucius man recalls the quintessential corporate (IBM) man; a negligible, if indispensable, part of a well oiled machine.
Self-cultivation required people to be internally driven and self-disciplined. As observed by this author into Confucianization of the law:

The cultured person who was expected to be self-controlled had to labor under a total control system which was unlimited in scope, policed internally, enforced punctiliously, sanctioned psychologically, seeking for the truth, probing of the mind, and never subject to a mistake. Self-control was thus a much more demanding and exacting form of social control than legal control.40

More significantly, there is no special “right” to act as one sees fit in particular instances but a general “duty” to conform to moral expectations under all circumstances, including making or not making speech. Yen Yuan asked about perfect virtue. The Master said: “To subdue one’s self and return to propriety, is perfect virtue…” 41

Acting proprietarily means that people are to follow existing and exacting rules of conduct. This also means that people do not have the freedom to act spontaneously and speak at will. Look not at what is contrary to propriety; listen not what is contrary to propriety; speak no what is contrary to propriety; make no movement which is contrary to propriety ….”42

In terms of duty to act, the highest duty in imperial China is that of “xiao” (filial piety) to ones family and “zhong” (loyalty) to the emperor. Together, Confucianism requires unquestionable obedience to superiors.43 In day-to-day application, people were asked to look towards their superior for guidance and approval.


41 YEN YUAN, THE FOUR BOOKS 278 (James Legge trans., 1993) (Book XII, Ch. I (1)).

42 Id. at 278-279 (Book XII, Ch.I(2)).
Confucius said, there are three errors to which they who stand in the presence of a man of virtue and station are liable. They may speak when it does not come to them to speak; - this is called rashness. They may not speak when it comes to them to speak; - this is called concealment. They may speak without looking at the countenance of their superiors; - this is called blindness...." 44

This means that people should avoid disrupting the relationship between senior and junior, authority and charges. This also means that people should not be a dissenter and protester.45

In making speech, people are admonished to be cautious. “Sze-man Niu asked about perfect virtue. The Master said, ‘The man of perfect virtue is cautious and slow in his speech.’”46 They should also avoid outlandish, slandering or startling statements Tsze-ehng asked what constituted intelligence. The Master said, ‘Ya, he with whom neither soaking slander, nor startling statements, are successful, may be called farseeing.’” 47 Such Confucius speech rules would likely deter people from open demonstration and public protest.

This understanding of speech exercise while true, is but one side the story. While the public might not have a right or freedom of speech, the emperor has an affirmative duty, as part of heavenly mandate,48 to listen to the people’s problems and concerns. In order to make sure the emperor was informed of public opinions, the emperors through the ages have set up imperial Censors to give them...

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44 *The Four Books*, supra note 41, at 368 (Book XVI. Ch. VI).

45 The idea of “xiao” or filial piety to family and “chung” or loyalty to state was deemed a one of the most important quality of a subordinate. Michael Nylan, *Confucian Piety and Individualism in Han China*, 116:1 JOURNAL OF THE AMERICAN ORIENTAL SOCIETY 1-27 (1996).

46 *The Four Books*, supra note 41, at 278 (Book XII, Ch. II(2)).

47 *Id.* at 283 (Book XII, Ch. VI(2)).

feedback. Failing to listen to the people and accept criticism that might bring ruins to the state:

The duke then said: ‘Is there a single sentence which can ruin a country?’ Confucius replied, ‘Such an effect as that cannot be expected from one sentence.’ There is, however, the saying which people have -‘I have no pleasure in being a prince, but only in that no one can offer any opposition to what I say!’.”

“If a ruler’s word be good, is it also good that no one oppose them? But if they are no good, and no one opposes them, may there not be expected from one sentence the ruin of his country?” There was also one other group of individuals in imperial China that was required to keep the government, state, or employer advised and informed of problems and issues with the government. The intellectuals assumed a special role and unique relationship with the emperor, government and state. The intellectuals, as educated junzhi or shi were duty-bound to tell the emperor what was going on as “establishment intellectuals.” In doing so, the junzhi, consistent with Confucius teachings, was asked to conduct himself as the conscience of the people and monitor of the state.

C. SUMMARY

To conclude, the right to free speech, association and assembly is new to China. They imported foreign ideas and borrowed

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49 THE FOUR BOOKS, supra note 41, at 305 (Book XII. Ch. XV. (4)).

50 Id.

51 See CHINA’S ESTABLISHMENT INTELLECTUALS (Carol Lee Hamrin & Timothy Creek eds., 1986).

52 Teresa Wright, State Repression and Student Protest in Contemporary China, 157 CHINA Q. 142-172 (1999). Through the ages, intellectuals serve the nation and emperor by using their moral and intellectual judgment and not act subserviently. Id. at 144.
Western ideal.\textsuperscript{53} In imperial China free speech and public protest was not welcomed. \textsuperscript{54} People were only allowed to speak their mind when invited to and even then at their peril.\textsuperscript{55}

V. CONSTITUTIONAL MANDATE

The right to free speech, association and assembly is new to China. They were imported ideas, and they adopted foreign ideal and western concepts. In imperial China, new (unconventional) ideas, as with free (critical) speech and open (confrontational) assembly were not welcomed. People were only allowed to speak their mind if the speech fell within cultural expectations (i.e. acceptable to imperial Confucianism). For example, children should be respectful towards parents, citizens should be loyal to the emperor and intellectuals be devoted to Confucius teaching. Acting out of status and speaking out of turn is universally condemned; a disturbance of the cosmic order and heavenly peace.\textsuperscript{56}

\textsuperscript{53} Sun Fo & Raymond Gram Swing, Democracy in China, 13:9 Far Eastern Survey 76-77 (1944) (Dr. Sun Fu, son of Sun Yat-sen, made a speech before the Central Institute of Chingking wherein he observed that there was no democracy in China, freedom of speech was suppressed and opposition to the party is eliminated. While this was understandable given China’s wartime condition, this was not acceptable to China’s international friends, the likes of U.S.).

\textsuperscript{54} ZHU CHUNYU, TREATISE ON EARLY QIN, TANG, SONG, MING, QING MEDIA ENTERPRISE ["XIN QIN, TANG, SUNG, MING, QING CHUANPO SHIYE LUNJI"] 47 (1989). Confucius taught that sage emperors need as to be solicitous of people’s welfare and responsive in addressing their concerns; a testimony to Chinese indigenous democratic tradition. As early as the Zhou dynasty, there was system and procedure in place to allow people to express their opinions from presenting petitioning to lodging complaints to filing appeals.


\textsuperscript{56} That is not the same as saying that in imperial China and with Confucian teaching, the sage ruler would resent and reject public feedback and input to governance and administration. Philosophically and ideally, wise emperors were admonished to take heed of benevolent advice and invite constructive criticism to their rule. For example, through the ages, emperors have established “jian guan”
A. THE ROC ASSEMBLY RIGHTS

Originally assembly rights come to ROC by way of Dr. Sun Yat-sen, a British educated medical doctor who aspired towards American democracy. The ROC Constitution guarantees the people the right to the freedom of meeting (jihui) and association (jieshe). Dr. Sun’s democratic aspiration for China was never realized until the 1980s. The promulgation of ROC Assembly Law was part of a larger political reform process championed by President Chiang.

ROC constitutional scholars have interpreted this to mean that the people have a right to gather freely to discuss, express, and exchange ideas. The ROC Constitution does not provide for a specific freedom of procession (you xing). However, such a freedom is considered a necessary compliment and a natural extension to the right of assembly and association; the people should be able to discuss, express, or exchange ideas in a stationary meeting or at a moving procession. In this regard it has been argued that a procession is nothing more than a moving meeting. Constitutionally speaking,

57 See Sun’s THREE PRINCIPLE OF GOVERNANCE (San Min Zhuyi): The Principle of Mínzú (Min-tsu, "The People's Relation/Connection" or "Government of the People"): The Principle of Mínquán (Min-ch'üan, "The People's Power" or "Government by the People"): The Principle of Mínshēng (Min-sheng, "The People's Welfare/Livelihood" or "Government for the People").


59 Dickson, supra note 12, at 349-364.


62 ROC Police Research I, supra note 8, at 12.
“procession” is within the meaning of “meeting” with a broad reference (guangyi). People should be able to express themselves by showing their unity in a procession (youxing), i.e. engaging in symbolic speech. Thus interpreted, the right to the freedom of procession comes within the compass of ROC Constitution Article 22, which provides: “The freedom and rights of the people, if they do not harm the social order or public interests, are protected by the Constitution.” In as much as it is a given democratic principle in a free society that there is no harm in people gathering and moving around to express themselves, peaceful procession should be ipso facto constitutionally protected.

The ROC constitutional right to freedom of meeting and procession is currently protected by the ROC Assembly Law. The law in protecting such rights also set limits to their legal exercise. This is especially true in cases where the rights are not constitutionally provided, as in the case of “procession” or when they are not clearly defined, as in the case of “meeting.” For example, Article 2(1) of the ROC Assembly Law defines “assembly” as meetings, speech, and other group activities held in public place or where the public has access. Article 2 (2) further provides that “Procession as used in this law refers to procession conducted in the street, road, and alley, and any other public place where the public have access.” Both of these definitions interject a “public activities” legislative requirement that is not made explicit in the ROC Constitution.

The open-ended constitutional mandate invites the legislature, court, and especially the police to restrict the exercise of constitutional rights in public places, under the guise of Constitutional interpretation. In this regard, the Taiwan Provincial Government Police Department has taken the liberty to define the term “group activities” under Article 2(1) of ROC Assembly Law to include all group activities in public place, such as demonstration (shiwei), protest (kangyi), and sit-in (jingzuo). It further administratively decides that “group possession” in Article 2(2) of the ROC Assembly Law must meet two criteria: (1) A group must have three or more

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63 Id. at 26.
people. That is to say, two people cannot be a group. (2) They must have a common purpose to express their mutual interests.

B. THE PRC ASSEMBLY RIGHTS

Mao the founding father of Communist China has made clear that the people, as master of their own destiny, should enjoy unprecedented political freedom: “Democracy is practised within the ranks of the people, who enjoy the rights of freedom of speech, assembly, association and so on.” The PRC Constitution of 1982, Article 35 guarantees the citizens the freedom of assembly (jihui), procession (youxing), and protest (shiwei). The constitutional rights of assembly, procession, and protest was also found in earlier in the Common Program of 1949 (Art. 5); PRC Constitutions of 1954 (Art. 87); 1975 (Art. 28), 1978 (Art.45.)

The freedom of assembly means that the citizens are free to gather to discuss matters (taolun), express opinions (fabiao yijian), and voice desire (biaoda yiyuan). The freedom of procession means the right of the citizens to gather and move along in public thoroughfare and places to express their attitude (taidu), opinion (yijian), and requests (yaoqiu). The freedom of protest means that the citizens are free to gather in public place to march in procession (youxing) or sit in demonstration (jinzuo) to express a request, protest, or in support of a common cause (gongtong yiyuan). To the

64 See ROC Police Research I. For implementation regulations, see id. at 431.
65 Mao Zedong (Mao Tsetung), Speech In Commemoration of the 28th Anniversary of the Communist Party of China, June 30, 1949, in SELECTED WORKS, VOL. 5 at 411-423.
67 See ZHONGWAI XIANFA XUANPIAN 21 (1981); id. at 86, id. at 59, id. at 14.
68 Comprehensive interpretation, at 107.
69 Id.
70 Id.
Communist way of thinking, these constitutional rights are fundamental in nature, but also serving instrumental needs. The freedom of assembly is said to be a natural extension of the freedom of speech as it enhances and enriches free speech rights. And the freedom of procession and protest is seen as an extension and amplification of the freedom of assembly, i.e. one of the many ways to exercise assembly right.

VI. CONSTITUTIONAL LIMITATIONS AND LEGAL RESTRICTIONS

The Constitution, as a social contract and political compact, delineates the relationship and define the rights between the state and the citizens. Generally, fundamental rights are deemed important for the realization of personhood (natural rights) or to facilitate the smooth functioning of the political system (instrumental rights), e.g. freedom of expression allows for the realization of ones identity and keeps the government in check. However, constitutional rights are not inviolable, and certainly not unlimited. It was Justice Holmes of the U.S. Supreme Court who once said:

For a discussion of the functional utility of public assembly in PRC political and administrative structure, see PRC Assembly Law Treatise, at 28-29.

PRC Constitution 1982 Article 35 guarantees the citizens freedom of speech.

Comprehensive interpretations at 107.

Id.

For a discussion of foundation and ideas of social contact from Socrates to Thomas Hobbes, John Locke and Jean-Jacques Rousseau discussed, see http://www.utm.edu/research/iep/s/soc-cont.htm.


The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not protect a man from an injunction against uttering words that may have all the effect of force ... The question in every case is whether the words used are used in circumstances and are of such a nature as to create a clear and present danger ...”

Both the ROC Constitution and PRC Constitution sets forth well defined limits for the exercise of assembly, procession, and demonstration rights. These Constitutional limitations and legal restrictions while resembling those in western Constitutional jurisprudence are in fact based on distinctive Chinese culture tradition, e.g. Confucius teaching of duty before right, informed by dissimilar political ideology, e.g. Mao’s ideal of collective welfare over individual rights, and shaped by different social conditions, e.g. communal sharing vs. adversarial competition.

A. THE ROC CONSTITUTIONAL LIMITATIONS TO ASSEMBLY RIGHTS

In the ROC, constitutional rights are not unlimited. The state can constitutionally restrict the exercise of fundamental rights under the doctrine “xianfa xin de falu baoliu” (“constitutional reservation of rights by law” doctrine). This doctrine postulates that constitutional rights are protected to the extent that they do not infringe upon competing and equally important constitutional interests: state security, social stability, public order and individual rights. This constitutional law doctrine provides that the citizens’ fundamental rights can be limited by state law under limited and well define circumstances: (1) the exercise of such rights violates or interferes

79 Alfred Katz, Jibenquan de Xianzhi (Limitations to Fundamental Rights) in FAXUE CHONG KAN Vol. 34(4), 61, (1920).
with other people’s rights and freedom (fang ai taren ziyou); (2) the restriction of such rights is necessary to avoid an emergency (bimian jinji weinan); (3) the limitation of such rights is necessary to “maintain social order” (weichi shehui zhixu); or “promote public interests” (zhenjin shehui liyi).81

The “constitutional reservation of rights” doctrine is itself circumscribed by the following constitutional doctrine and principles: (1) limitations to constitutional rights cannot deny the citizens the enjoyment of the essence (benzhi) of the fundamental right (Wesensgehalt) granted by the Constitution;82 (2) limitations to constitutional rights cannot be particularized to apply only to a single case (Einzelfallverbot); and (3) limitations to constitutional rights must be appropriate and reasonable in promoting public interests, i.e. not over-broad and when other less intrusive alternatives are available.83

Generally, as a matter of constitutional principles, there are two broad types of limitations to the exercise of freedom of assembly in ROC:

First, freedom of assembly must not be used to destabilize the political regime.84 Thus, the ROC Assembly Law Article Four explicitly provides: “Assembly and demonstration must not violate the Constitution, promote communism or break up (fenlie) the state.”85 At least one practitioner/scholar has questioned the

81 XIANFA, Art. 22 & 23.

82 See Ward v. Rock against Racism, 491 U.S. 781 (1989) (“[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but … Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals," and may not be "substantially broader than necessary to achieve the government's interest…."


84 This is a common limitation to a citizen’s fundamental freedom of speech or assembly. The citizen must not use such constitutional freedom to destroy the political order, which protect the freedom of all others. For example, in the U.S. freedom of speech is protected to the extent it does not present a clear and present danger to the state. Linde, Clear and Present Danger Reexamined: Dissonance in the Brandenburg Concerto. 22 STAN. L. REV. 1163 (1970). Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L. Ed.2d 1356 (1957).
appropriateness of allowing the police, who is charged with protecting the political security of the state, to decide when to approve and protect a political assembly.\footnote{On Nov. 21, 1988, the Hualian county police bureau turned down the application of the People's Progressive Party (Minjin Dang) for a demonstration entitled “Peaceful reformation of a new country movement” citing ROC Article 4 as the reason. \textit{ROC Police Research I} at 367. Minjin Dang was at the time the minority party challenging the KMT the dominant party.}

Second, the exercise of the freedom must not pose a threat to public order or cause harm to individual rights.\footnote{For example in the U.S., the U.S. Supreme Court has held that a public speaker has no right to use “fighting words.” \textit{Chaplinsky v. New Hampshire}, 315 U.S. 568 (1942).} Thus, the ROC Assembly Law Article 1 makes clear that the assembly law was promulgated to protect the rights of the people to meet and demonstrate\footnote{In this regard ROC Assembly Law Article 5 specifically provides that legal assembly and procession is not to be interfered with by force, threat, or any other methods.} as well as to “maintain social order.”\footnote{ROC Assembly Law Article 1 provides: “This law is promulgated specifically to protect people’s freedom of assembly and procession and to maintain social order.”} The police in upholding the mandate in Article 1 is given the explicit authority to disapprove of any application to organize assembly: (1) if there are sufficient facts to indicate that there are direct risks of harm to state security, social order, and public interests (ROC Assembly Law Article 11(2)); and (2) if there are risks of harm to body, life, freedom, or great damage to property. (ROC Assembly Law Article 11(3). Then former limitation preserves the state as a viable political institution and the later secure the citizens from unwarranted harm and injuries, two of the primary functions of a state and government.\footnote{The general police power of the state has been defined as: “The power of a government to exercise reasonable control over persons and property within its jurisdiction in the interest of the general security, health, safety, morals, and welfare except where legally prohibited (as by constitutional provision).”}

See also Article 2(1) “Law of State Security during Mobilization to Suppress Disorder During Assembly and Procession.” \textit{(Dongyuan Kuanhuan Guojia Anquan Fa)} to the same effect, i.e., all public assembly must follow three broad political principles: abide by the Constitution; support anti-communism; and not support Taiwan independence.
The responsibility to maintain law and order during the assembly is equally shared by the assembly organizers, e.g., ROC Assembly Law Articles 18, 19, 20, 21, 22, and the police, e.g. Article 24.

To assure the orderly conduct of the assembly the ROC Assembly Law prohibits against inflammatory speech. Thus Article 30 provides that the assembly and procession should not use words, pictures, speech and other method to humiliate, defame public office.


91 ROC Assembly Law Article 18 provides: “The responsible person of the assembly … must be present during the assembly or procession, and responsible for maintaining order.”

92 ROC Assembly Law Article 19(1) provides: “When the responsible person of the assembly or procession is not present to be in charge or maintain order, some representative agent should act on his behalf.”

93 ROC Assembly Law Article 20(1) provides: “The responsible person of the assembly or procession should appoint prefects to maintain order.”

94 ROC Assembly Law Article 21(1) provides: “Participants of the assembly or procession should obey the instructions of the prefects in maintaining order.” Article 21(2) further provides for the removal of disorderly participants.

95 ROC Assembly Law Article 21(1) provides: “After the responsible person of the assembly or procession has declared the assembly or procession to be finished or terminated, participants should disperse.”

96 ROC Assembly Law Article 21(1) provides: “During an assembly and procession, the police must be present to maintain order. At the request of the agency in charge, they should direct traffic and maintain order.”

97 The doctrine that the Constitution is not a “suicide pact” is well accepted. The doctrine was first announced in the minority opinion of Justice Jackson who argued that the inflammatory speech of the petitioner charged with disorder conduct for delivery an inflammatory speech in the face of agitated and unruly crowd deserves no Constitutional first amendment protection: “The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.” Terminello v. City of Chicago, 337 U.S. 1 (1949). See George P. Fletcher, THE CLICHÉ THAT “THE CONSTITUTION IS NOT A SUICIDE PACT: Why It Is Actually Pro-, not Anti-, Civil Liberties, at http://writ.news.findlaw.com/commentary/20030107_fletcher.html.
and public officials, and others. To prevent violence, the ROC Assembly Law Article 23 prohibits the carrying of dangerous or offensive weapons.98

Finally, the police are given the authority to cancel, restrict, or otherwise terminate an assembly based on compelling and substantiated state security, social order, and public interests grounds.99 For example, the ROC Assembly Law Article 15 authorizes the police to terminate, alter or restrict the time, place, manner of the public assembly100 for the “protection of social order, public interests, and assembly and procession’s interests” and for any other reasons under Articles 11 to 12 which set for the basic principles for the approval of assembly and procession in all instances.

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98 ROC Assembly Law Article 21(1) provides: “The organizer, his representative agent, prefects, and participants are not allowed to carry materials harmful to person’s life, health, liberty, or property.”

99 Brandenburg v. Ohio, 395 U.S. 444 (1969) (KKK challenged Ohio’s Criminal Syndicalism Act prohibiting the advocating of use of violence to effectuate political reform or "to teach or advocate the doctrines of criminal syndicalism." The Court held: "The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.") For a discussion of the “clear and present danger” doctrine in restrain of free speech, see Whitney v. People of State of California, 274 US 357 (1927).

B. THE PRC CONSTITUTIONAL LIMITATIONS TO ASSEMBLY RIGHTS

The PRC constitutional rights are not absolute. They are relative and contingent. Theoretically speaking, the difference

101 “There is no freedom or right in this world that is absolute and without limitations.” PRC Assembly Law Treatise, 29, 59.

For PRC’s position on constitutional rights and limitations, see Li Buyun, On Basic Theory and Practice of Human Rights in Socialists Countries, in 4 STUDIES IN LAW (FAXUE YANJU) 1-9 (1992). (1.) Human rights naturally belong to a person but are also socially based. (2) Humans rights are supported by morality and are based on common expectations about the relative entitlements visa-via each other. (3) Human rights are universal (gongtongxing) as well as individualistic (gexing). (4) Human rights are multi-faceted (guanfanxing) and not limited. (5) Human rights emphasize on collective (jiti) utility and as realized in the individual’s (geren) interest.

PRC’s view towards human rights is in the main influenced by two factors, one historical the other ideological. Traditional China was regulated by custom and has no concept of right but duty. Zhang Hengshan, What is the Core of Law? – Comment on the Right Standard Theory, in POLITICAL SCIENCE AND LAW (ZHENGZHI YU FALU) 1, 13-18 (1989) (The appearance of law affirms the utility and necessity of legal rights as a regulatory device. The thesis is called “quanli benwei.”) Ideological, Marx and later Mao were of the opinion that all rights are class based. See Xu Xianming, Common Issues in the Research into Human Right Theory, reprinted in JOURNAL MATERIALS IN JURISPRUDENCE & LEGAL HISTORY (Fuyin Baokn Zhiliao - Lilun Faxu & Fashixue) (1996).

In spite of PRC’s denial of universality of human rights, PRC is a signatory to the U.N. Charter on June 1, 1945, which declared in Article 1(3) that counties should promote basic human rights and freedom. UN CHARTER ART. 1 PARA. 3.

102 Chinese Human Rights Conditions (1991). Lately, there is a marked shift in the PRC’s position on human rights. PRC recognized for the first time that human rights are common aspirations of mankind. However, the PRC leadership still insisted at the “Bangkok Declaration” in April of 1993 that human rights is an domestic issue to be resolved according to a country’s political and economic developmental needs. For a discussion of PRC’s human right position, see Human Rights and Chinese Values 125-151 (Michael Davis ed., 1997).

There is increasing evidence that the PRC is devoting more and more attention to protecting people’s constitutional rights. For example, the people are given more constitutional rights in the PRC Constitution (1982) than anytime before. PRC Constitution 1954 – 14 articles on rights, PRC Constitution 1975 - 2 articles on rights, PRC Constitution 1978 - 12 articles on rights.

103 Social Developments of China and Rights Protection, in 3 STUDIES IN LAW (FAXUE YANJU) 3-14 (1994). (Expectation of right is a social psychology (shehui xinli), id. at 3). Second, rights are contingent on the performance of duty to others. Lin Ji, The Debate between Rights and Duties, 4 LAW SCIENCE MONTHLY
between constitutional rights being absolute and belonging to the individual vs. constitutional rights being contingent and given by the state is a critical one. PRC’s concept of constitutional rights is contingent in two senses. First, rights are contingent to the extent they are economically structured, socially derived, and legally affirmed, i.e., the expectation and realization of rights are posited within a given set of economic foundation and social relations.

Contingency notwithstanding, PRC draws a clear distinction between fundamental rights (jiben quanli) and other legal rights. Fundamental rights are rights that: (1) cannot be deprived as a constitution of legal personality (buke quefa), i.e., one cannot function without it, such as human dignity; (2) cannot be replaced (buke quda), i.e. they are the foundational building blocks upon which the political state is constructed, e.g., voting rights; (3) cannot be transferred (buke huanyanz); i.e. they are the basis upon which a person is recognized as a functional social member; (4) very stable (wending xin); i.e. they do not change with the transition of state authority or amendment of the Constitution; (5) commonly shared amongst civilized society (wenming goujia juyou); i.e. they do not differ from one civilized state to another, e.g. democratic rights; (6) root to other rights (wuti xin),


There are two, not one, on going debates about (human) rights in PRC. One debate concerns the relative vs. absolute nature of human rights, i.e. whether human rights are natural and inalienable? Xu Xianming, Common Issues in the Research into Human Right Theory, reprinted in JOURNAL MATERIALS IN JURISPRUDENCE & LEGAL HISTORY (Fuyin Baokn Zhiliao - Lilun Faxu & Fashixue) (1996).

The other debate concerns the entitlement of human rights, i.e. whether human rights belong to the individual or given by the state with the right bearing party as passive beneficiary? Zheng Chengliang, On Standard of Right, in 4 POLITICAL SCIENCE AND LAW (ZHENGZHI YU FALU), 1-6 (1989). Quanli benwei (literally, rights in the subjective) makes the individual the bearer of right. According to Zheng, the characteristics of Quanli benwei as a concept are (1) Quanli benwei affirms equality (pingdeng). (2) Quanli benwei implies and facilitates the realization of freedom (zhiqu). (3) Quanli benwei gives expression to the diversity of social interests. (4) Quanli benwei actualize happiness (xiangfu). (5) Quanli benwei replaces duty. (6) Quanli benwei is not rights creating. (7) Quanli benwei is not selfishness. Id. at 5

i.e. they give rise to other lesser rights.\textsuperscript{106} There is however very few discussions by the political leaders or legal scholars on the legal consequences of calling a constitutional right “fundamental” or not, particular how the fundamental nature of a right might impact upon its enjoyment by the citizens or enforcement by the officials. However, one thing is certain, the PRC leadership is keen on achieving “fundamental rights” for all its citizens, e.g., right to jobs, food, shelter, and education. Thus it can be said that the PRC leadership is most interested in providing fundamental rights for all rather than protecting fundamental rights for a few.

In the present context, the alienation of an absolute and individualized assembly right must be justified by the state with a heavy burden of proof that its free exercise would harm other people or disrupt order is required. A person’s fundamental right is not to be easily taken away even in the face of demonstrated mass utility.\textsuperscript{107} Practically, the balancing of individual right vs. public interest is always in the individual’s favor. This is the case with ROC.

In the case of the PRC, a person cannot claim a contingent right unless the person can demonstrate to the political authority that the necessary contingency as conditions precedent or subsequent are being fulfilled, e.g. he is entitled to exercise such a right as a law abiding citizen and the exercise of such a right is compatible with state, qua all the people’s, interests. Most significantly, the individual cannot enjoy more right than the collective is willing to concede and able to afford. This is the case with PRC.

Deng has made clear that under the socialist system the interests of the individual give way to the collective, the interests of the separate parts give way to the comprehensive whole, and the interests in the short term give way to the long term.\textsuperscript{108}


\textsuperscript{106} Comprehensive Interpretation at 83.

\textsuperscript{107} Jeremy Bentham observed: “By principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question…” Jeremy Bentham, THE UTILITARIANS 17 (1973).

\textsuperscript{108} 1 Deng Xiaoping Wenxuan 127. For a more theoretical based discussion, see Yang Haikun, On the interest Group in the Primary State of Socialism, in 2 POLITICAL SCIENCE AND LAW (ZHENGZHI YU FA LU) 1-4 (1989).
provides that “Citizens enjoy rights guaranteed by the Constitution and law but they must also fulfill their constitutional and legal responsibility.” The CCP has interpreted this to mean that the concept of right (quanli) and duty (yiwu) is unitary in nature (tongyixin): “People can enjoy right but also have to fulfill their duty, just enjoying rights and not fulfilling duties is not allowed; nor should the assumption of duty without the enjoyment of right be tolerated.” This is to say that right and duty are supplementary to and complementary of each other (xiangfu-xiangcheng). More significantly, the CCP observed that: “the pre-requisite to the enjoyment of right is duty (yi yiwu wei qianti), only through the maximum effort (of everyone) in pursuing ones duty will there be a sufficient material base for the rights to be built upon, then and only can we improve upon the enjoyment of rights.”

Second, and more specifically, a person can only exercise his rights (of assembly) to the extent he does not harm the interests of others. Thus article 51 provides: “When PRC citizens exercise their freedom, they should not harm the interests of the country, society, collective, and other citizens legitimate freedom and rights” The “harm to others test” is not narrowly construed. It has been interpreted as: “each citizen’s individual interests can only be protected when all the other people’s fundament interests are being protected or developed.” Contrarily, this means that an individual’s freedom will not be allowed when other people’s basic needs are not being met.

The PRC’s position on constitutional rights gives rise to two legal consequences: (1) it shifts the burden of showing entitlement to

109 Comprehensive Interpretation at 89.

110 See Qu Ye, On the Utility of Right and Duty in Law, in 3 Studies in Law (Faxue Yanjiu) 16 (1990). Duty and right are different concepts. They cannot be separated and one is not above the other.

111 Id.

112 Id. at 90. In practical terms and in context, this means that there must be a stable political and social environment for the economic reconstruction and the four modernization of China to take hold – this is considered the “fundamental interest of all the people”(genben renmin liyi). Any person who contributes to political instability or social disorder will not be allowed. PRC Assembly Law Treatise at 61.
right of assembly to the claimant of rights, i.e. the citizen,\(^{113}\) (2) it allows the PRC law makers, and by delegation the police, to deny rights of assembly based on collective and utilitarian considerations.\(^{114}\)

The above-discussed PRC constitutional limitations were more specifically provided for in PRC Assembly Law. In this regard PRC Assembly Law Article 12 clearly states that under the following circumstances, the application for assembly, procession, and demonstration will not be approved: (1) against fundamental constitutional principles, e.g. “the four basic principles,”\(^{115}\) (2) harming national unity, sovereignty, and territorial integrity;\(^{116}\) (3)

\(^{113}\) Under PRC Assembly Law Article 12(4) the police has to justify their disapproval. Under Article 12(1)(1) all the police need to do is to establish that the assembly’s “purpose, billboard, slogan” is against constitutional principle or harmful to national unity, sovereignty, or territorial integrity – no actual or direct harm needs to be shown. *PRC Assembly Law Treatise* at 59-64.

\(^{114}\) The position taken up by the PRC law makers and police (in terms of the latitude they enjoy) with respect to the regulation of citizens’ assembly right recalls the position adopted by the Supreme Court in conducting substantive due process review of state economic legislation. Mr. Justice Holmes dissented in the case of *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 95 L. Ed. 937 (1905) by observing: “It is settled …that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical . . . . The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same . . . is interfered with by school laws, by Post Office, by every state or municipal institution which takes money for purposes though desirable, whether he likes it or not.” Under this rationale, which was later to become the dominant constitutional principle, the State interference with individual rights protected by the Fourteenth Amendment of the Federal Constitution is beyond review if “state measures bears a rational relation to a constitutionally permissible objective.” *Ferguson v. Skrupa*, 372 U.S. 726.


\(^{115}\) The provision is there to safeguard the political ideology (Marx-Lenin-Mao and people’s dictatorship) and the party leadership of Communist China.

\(^{116}\) This provision is there to protect against past national humiliation and facilitate future unification effort with Macau, Hong Kong, and Taiwan.
inciting ethnic division; 117 (4) sufficient facts to indicate that the assembly, procession, and demonstration will cause direct harm to public safety or serious damage to social order.

The question of what constitutes an assembly against “basic constitutional principle” (Article 12(1) or “endangering national unity, sovereignty, and territorial integrity” (Article 12(2) or “inciting ethnic division” (Article 12(3) or “causing direct harm to public safety” or “serious damage to public order” (Article 12(4) was not specifically defined nor clearly explained. This is in fact a major problem with implementing the PRC Assembly Law. This makes the evaluation of harm to national security and danger to public order a “subjective” and “conjectural” exercise. This is particularly the case with Article 12(1) and (2) when the legality of an assembly ultimately depends on the “intent” and “purpose” of the organizers and participants. In such cases the police are invited to interpret the purpose or impact of an assembly in accordance with their own conception of what constitutes a sufficient “threat” to “security” or “order” to warrant disapproval. This results in arbitrarily determinations. Thus an application may be approved one day and not the other, with one official and not another, and in one place and not another.118

117 This provision is there to forestall against internal civil war, such as the Tibet issue.

118 Han Nanshan, Discussion in Criminal Ambiguities, in 5 STUDIES IN LAW (Faxue Yanjiu) 51-59 (1993). (Ambiguities in law led to over and under enforcement.) The ambiguities in Chinese law causes “perennial” implementation problems, making the realization of the “rule of law” and “rule by law” all but impossible. This view is shared by the former editor of Faxue Yanjiu and former Deputy Director of China Social Science Academy, Chang Hsin. Personal interview at Chinese University of Hong Kong on Dec. 17, 1997. Indeterminacy in applying the law also creeps in another way. Chinese legislature and police officers do not think in legal terms. The Chinese “legal” language is loaded with culturally imprecise meanings and laden with moral imperative. Hoa Tiechuan, Influence of Traditional Way of Thinking on China’s Legislative Techniques at Present Age, in 4 CHINESE LEGAL SCIENCE (Zhongguo Faxue) 32-41 (1993).
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VII. ASSEMBLY LAWS IN ACTION

A. IMPLEMENTING ASSEMBLY LAW IN ROC

ROC police are given wide discretion to interpret and apply the Assembly Law in ROC. ROC Assembly Law Article 26 provides: “The approval, limitations, and order to disperse should be fairly and reasonable considered in order to balance the need to protect the people’s right to assembly and demonstration with other legal interests....”

According to ROC statistics, the ROC police were increasingly tipping the balance in favor of the people’s freedom to assembly. For example, from Jan. 20, 1988 to Feb. 1989 there were a total of 1696 incidences of public and private assemblies and processions (1444 public and 252 private). Of these 75.62% (1092) applied for police permission, and 1074 were approved. The approval rate was 98.38%. Though it is entirely possible that those who did not apply for permission (352 cases or 24.38%) would not have otherwise been approved, the approval rate was still very high. It is also clear the ROC police were getting more permissive in granting approval to assembly: approval rates ran from 98.07% in 1987 to 99.68% in 1988 and to 99.84% in 1989. The increase in approval rate was likely to be policy driven; since 1986, then President Chiang Ching-kuo has pledged to democratize the political system and transformed Taiwan from a one party (KMT) state to a multi-party union, as a model of political reform for mainland China.

The political liberalization effort depended on the conscientious support of the KMT police. There was legitimate concern about their commitment at the time from some quarters. For example, ROC Executive Yuan (Xingzhengyuan) found that the KMT police was not exercising their discretion in a fair, objective and legal manner. Specifically: (1) The police held hostile mentality to radical protesters and was resentful towards disorderly assemblies.

119 ROC Police Research II at 62.

120 Bruce J. Dickson, China's Democratization and the Taiwan Experience, in 38 Asian Survey No. 4, 349-364 (April 1998).

121 ROC Police Research II at 5.
(2) The KMT police was not even handed in applying Assembly Law, i.e. favoring KMT over DPP. This led to calls for the establishment of an independent office to oversee assembly approval process. 123 (3) The KMT police was using the Assembly Law to harass political opponents, e.g. treating anti-KMT public rallies as ipso facto illegal. 124 This led to a call for more police education and training on citizens’ constitutional rights. 125

There were many reasons why the KMT police could not be trusted to enforce the Assembly law:

First, in Taiwan and elsewhere police officers are a conservative lot. 126 Their primary functions are to secure state power,

123 See statement of researcher Lin Meiling, id. at 246.
124 See “Wuguo Jihui Yousingfa Zhixing zhi Yanjiu” (Second Conference on Research on the Implementation of Our Country’s Assembly and Procession Law), July 15, 1991, id. at 253 for statement of Professor Qu Haiyuan, item 8, (It is hard to convince the people that the police can be impartial, since the police chief and ministers are all from the same party.) and statement of legislator Xie Zhangting, item 4 (Police are all KMT members. They are inclined to look upon dissenters and protesters as radicals and troublemakers.).
126 Jihong Zhao, Ni He, Nicholas P. Lovrich, Individual Value Preferences Among American Police Officers The Rokeach Theory of Human Values Revisited, in 21 Policing No. 1 at 22 (1998).

The literature has consistently pointed to the conservative political orientation of police officers . . . Wilson (1967) has observed that Chicago police officers are unreceptive to social change. Skolnick (1966) concluded about the California police of his study that ‘a Goldwater type of conservatism was the dominant political and emotional persuasion of police (p. 61) . . . . Bayley and Mendelsohn (1969) have reported that Denver police are more conservative and more Republican than the community as a whole. They also found that the age of policemen is not related to political orientation, concluding from this finding that it is initial selection rather than socialization after recruitment that explains police conservatism (pp. 157-8).
maintain public order, promote social stability and protect personal safety.\textsuperscript{127} In Taiwan and in historical context this meant securing the political base of the ruling KMT Party. The police perceived themselves as the ultimate defender of society’s values and interests (\textit{tianxia wei zhiren}).\textsuperscript{128} With this mentality, the police act zealously against any challenge to state authority – from political dissenters to disorderly people.\textsuperscript{129} For example, a scientific survey in Taiwan showed that whereas 89.5% of police favored the immediately arrest of violent perpetrators at assembly only 59.4% of former assembly participants approved of immediate arrest.\textsuperscript{130}

Thus in spite of the police’s effort to accommodate the assembly organizers and participants, the people still felt that the police could not be trusted to be fair and objective in implementing the law. For example only 42.9% of the assembly participants, and 50.9% of the citizens thought the police could be objective and neutral in implementing the ROC Assembly Law, a full 83.8% of the police thought that they could.\textsuperscript{131}


\textsuperscript{127} ROC Police Law Article 2: “Maintain public order according to law, protect society’s safety, prevent all harms, promote people’s welfare.”

\textsuperscript{128} There is a tendency for the police to take the violation of law as personal affronts. No where is this more evident than in police vs. student encounters. See Donald Goodman and Arthur Niederhoffer, \textit{Universities and the Police}, Yale Review of Law and Social Action 1 (1970). This resulted as much from the police’s occupational status (as law enforcer) as from their class SES background (from middle-class). See Jacob Chwast, \textit{Value Conflicts in Law Enforcement}, in 11 Crime and Delinquency 151-61 (April 1965). Seeing legal violations and disorderly conducts as personal affront led to confrontation. See The Official Report of the National Commission on the Causes and Prevention of Violence: Rights in Conflict, (1968).

\textsuperscript{129} However, official statistics showed that the ROC police were very well constrained. It is evident that the ROC police did not seek to use force against the assembly in the first year the ROC Assembly Law was put into effect. Of the 1,444 incidences that were held outdoor with or without permission, the military police was called in only one percent of the times (fifteen incidences). There were a total of thirteen incidences of violence, leading to 482 police injuries and only six civilian casualties. ROC Police Research I at 233-242.

\textsuperscript{130} See Table 7-1, ROC Police Research II at 223.

\textsuperscript{131} See Table 5-1, ROC Police Research II at 212.
Second, the lack of public confidence in the police resulted in part from a lack of agreement over the role and functions of the police. For example, a random survey of 1352 officers, 144 assembly participants, and 1028 citizens showed that there was substantial divergence on their perception of the roles, functions, and powers of the police in the management of public assembly. Thus while a majority of the people surveyed - 89.5% of the police and 73.8% of the public - thought that all assemblies, including emergency ones, should be subject to application process, only 49.7% of the assembly participants thought so.\[^{132}\] Similarly, whereas 85.4% of the police and 75.9% of the people thought that unapproved procession should be terminated, only 46.8% of the assembly participants agreed that the police should.\[^{133}\] Such wide disagree over fundamental issues of police role and functions was responsible for much of the confidence crisis in the police.

Third, the police was asked to act as the lawgiver (approving of assembly) and law enforcer (enforcing assembly order) at the same time. These are incompatible roles. It is difficult if not impossible to draw a fine distinction between such inherently conflicting roles. Police would approve applications with an eye towards enforcement, or simply with a law enforcer’s eye. The former mentality would assure that those who were respectful and orderly would be preferred over those who were radical and disorderly. The later attitude would predisposed the police towards pro-establishment (KMT) groups than “dang wai” (outside party) organizations.\[^{134}\]

Fourth, the police were not legal professionals but street level bureaucrats.\[^{135}\] As such, their model of professionalism was not legality but efficiency.\[^{136}\]

\[^{132}\] See Table 4-2, ROC Police Research II at 212, 208. For research methods, see id. at 9-22.

\[^{133}\] See Table 5-2, id. at 213.

\[^{134}\] See Jerome Skolnick, The Police View of Protest and Protestors, in POLICING AMERICA 154-163 (Anthony Platt and Lynn Cooper, ed., 1974). (“The Police are led to view protest as illegitimate misbehavior, rather than as legitimate dissent against policies and practices that might be wrong.”) Id. at157.

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constitutional role, and professional standards make them defender of political and social order at the expense of citizens’ rights to public assembly.

Coming to enforcement, the police usually have a limited presence during assembly, e.g. 10 or less police for assembly of 200 civilians or less. Trend data showed that the number of police v. civilian ratio at the assemblies from 1988 of 1990 has been on the decline, i.e. from 1 (officer) vs. 8.06 (civilians) in 1988 to 1 vs.16.19 in 1989 to 1 vs. 63.88 in 1990 (Table 1). More tellingly officers on scene per incident dropped from 63.99 to 2.12 between 1998 and 1990, a drop of 30 times, while civilians at assembly dropped from 515.5 in 1988 to 135.5 in the same period, a drop of only 3.8 times.

The dropped in police presence at demonstrations coincided with the increase in civilian injuries during assembly in the same period (Table 2). More revealingly, from assembly injury statistics, it appeared that the police were getting more inclined to use force. Thus while the violent incidence rate per public assembly declined from13/1429 in 1988 to 15/5446 in 1989 to 6/7770 in 1990, and the injury rate per violent incident dropped from 483/13 (37.38/incident), to 144/15 (10.25/incident), to 103/6 (17.16/incident). The civilians’ casualties went up (6 in 1988, 14 in 1989, and 26 in 1990) as drastically as the police casualties went down (489 in 1988, 131 in 1989, and 77 in 1990)!!

Thus in 1988 the police vs. citizens injuries ratio was 480 vs. 13 (or 36.9 officer per civilian injured), in 1990, the ratio was 77 vs. 16 (or 4 officers per civilians injured). As a function of violence incidence, in 1998 the police vs. citizens injuries ration was 36.6

136 The larger theoretical compass is provided by Herbert Packer, THE LIMITS OF THE CRIMINAL SANCTION (1968).

137 Due to the small number of injuries (six to twenty-six) and limited trend data (three years), any interpretation is tentative.

138 This set of data may not be accurate for three reasons. (1) The data was compiled by the ROC police. There is no methodology section informing upon how the data were reported or classified. There was a vested interest to err on the side of the police, if only because the police injuries were systematically recorded and maintained. (2) The police injury statistics could be inflated. Police injury at work was rewarded for heroism with commendations and other incentives, e.g. promotion. There was thus a tendency to over-reporting. (3) The civilian injury statistics could be deflated. Injured civilians were less likely to report for fear of legal prosecution and administrative investigation.
(police) vs. 1 (police) and in 1990 12.8 (police) vs. 4.3 (civilian) (3 officer per civilian).

The implications are clear. The police have a reduced presence at the demonstrations due to resources constrains, since overall police were growing not as fast as demonstrations or incidences. But the control tactics used were much more aggressive and lethal. Thus while trend data showed that the number of violent assemblies were declining, from 13/949 assemblies in 1988 to 6/7770 assemblies in 1990, the civilians were getting injured as on a faster rate per incident than the police.

### Table 1: Police v. Civilian Ratio at Assembly – 1988 to 1990

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<tr>
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<tr>
<td>Incidences</td>
<td>1429</td>
<td>5446</td>
<td>7770</td>
</tr>
<tr>
<td>Total Police</td>
<td>271914</td>
<td>446048</td>
<td>413082</td>
</tr>
<tr>
<td>Police at scene</td>
<td>91441</td>
<td>137664</td>
<td>16480</td>
</tr>
<tr>
<td>Civilians</td>
<td>736988</td>
<td>2228418</td>
<td>1052707</td>
</tr>
<tr>
<td>Police (total) vs. Civilian (population)</td>
<td>1:2.7</td>
<td>1:05</td>
<td>1:2.55</td>
</tr>
<tr>
<td>Police (scene) vs. Civilian (demonstrators)</td>
<td>1:8.06</td>
<td>1:16.19</td>
<td>1:63.88</td>
</tr>
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### Table 2: Incidences of Public Assemblies and Reported Injuries: 1988 – 1990

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<thead>
<tr>
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<tbody>
<tr>
<td>Total outdoor incidences</td>
<td>949 (Assembly)</td>
<td>4480 (Assembly)</td>
<td>7770 (Assembly)</td>
</tr>
<tr>
<td></td>
<td>292 (Procession)</td>
<td>462 (Procession)</td>
<td>6730 (Procession)</td>
</tr>
<tr>
<td>Applications</td>
<td>936 (Applications)</td>
<td>4428 (Applications)</td>
<td>6918 (Applications)</td>
</tr>
<tr>
<td></td>
<td>18 (Denied)</td>
<td>14 (Denied)</td>
<td>11 (Denied)</td>
</tr>
<tr>
<td>Violent incidences</td>
<td>13</td>
<td>15</td>
<td>6</td>
</tr>
<tr>
<td>Injuries</td>
<td>480 (Police)</td>
<td>131 (Police)</td>
<td>77 (Police)</td>
</tr>
<tr>
<td></td>
<td>13 (Civilians)</td>
<td>1 dead 13 injuries (Civilians)</td>
<td>26 (Civilians)</td>
</tr>
</tbody>
</table>
B. INTERPRETING PRC ASSEMBLY LAW

In applying the Assembly law, the first and foremost concern of the PRC police is security, order and stability. Thus in order to determine whether an assembly is to be allowed under Article 12 of PRC Assembly Law, the police looked at four places for answers. The ultimately legal question is how real and substantial the danger would the public gathering be posing to the party, state and/or the public?

First, a fair reading of the legislative history to the PRC Assembly Law indicates that the law was promulgated not as an effort to promote people’s assembly right but to protect the state against future violent confrontations between the state and the students (as with the case of June 4, 1989), radicals (as with the case of “cultural revolution” of 1966-76), and only later used displaced worker, disgruntled peasants and “fanatic” cult (Falun Gong). In this regard, the Assembly Law functioned as much as a knife to punish welcomed dissenters, e.g. Falung Gong, as it was a shield to those to protect legitimate petitioners, e.g. oppressed peasants.

Wang Fang, the Minister of Public Security explained to the NPC Standing Committee the reasons for drafting the PRC Assembly Law in solemn and foreboding terms:

Recently, a social upheaval (dongluan) happened Beijing which led to a counter-revolutionary revolt (baoluan), and affected a number of big cities all over the nation. This has led to tremendous loss for the nation and the people… a problem we should be concerned with is that of a few bad people using the student movement to plan, organize, and conspire to incite the crowd and create social upheaval…In order to prevent the re-enactment of the “great cultural revolution” and revolt associated with this upheaval the law was made.140

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139 Clarifications at 1487-1491.

The message was clear. Dissenters - radicals and troublemakers alike - must not be allowed to exercise their constitutional rights of free speech and assembly, unrestrained and without control. Their protest activities must be sterilized by the PRC Assembly Law application process. Thus the guiding principle (zhidao shixiang) of the PRC Assembly law makes clear that police officers should be concerned with state security and social stability over and above the citizens right of assembly:

China has 11 billion people. There are bound to be basic differences in individual interests. If today a person is not happy and demonstrate in the street, tomorrow another person is not happy and take to the street to demonstrate, the country will be in chaos, the people will be distracted, where will there be energy

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141 *PRC Assembly Law Treatise* at 29. Any public assembly that is not used to achieve the above “approved” purposes are considered as inappropriate and if continued is a “reckless” abuse of the freedom of assembly.

142 Legislative intent in the U.S. and “guiding principle” (zhidao shixiang) in the PRC differs in material ways. Whereas legislative intent of a piece of legislation is often difficult to ascertain from the record, the “guiding principle” of law is often clearly articulated. Whereas the legislative intent offers helpful suggestions for interpreting the law (and never binding), the “guiding principle” imposes binding instructions on how law should be applied. See Zhou Wangsheng, *LIFA XUE* (Science of Legislation) 221-238 (1988).

143 The “official” guiding principle (zhidao shixiang) presented by the public security chief to the NPC was toned down someone in the educational/lecture materials made available to the general public. The *PRC Assembly Law Treatise* affirmed the utility and functionality of the assembly right at length and before it discussed the problems of its “reckless use” (lanyong). The *PRC Assembly Law Treatise* at 28-29.

However, another interpretation is possible. Whereas the remarks of the Minister of Public Security were uttered for internal consumption, the PRC Assembly Law was promulgated for external reference. This interpretation conforms to PRC constitutional prescribed legislative process – the Ministry of Public Security proposes and the NPC disposes. See *Science of Legislation* at 350-368.

We can draw two conclusions from this brief investigation into the legislative process of the PRC Assembly Law. Symbolically, PRC people’s rights enjoy a marked elevation in legal status. In practice, the enjoyment of rights is still very much subject to the Minister of Public Security exacting scrutiny under the PRC Assembly Law.
left for construction. If there is no stable political environment or social order, we will not be able to conduct economic construction, much less to achieve political reform.\textsuperscript{144}

In this regard, it is interesting to observe that the Minister of Public Security did not once mention about the functional utility of the freedom of assembly to PRC political economic, e.g. holding government accountable.\textsuperscript{145} His antagonistic view towards the freedom of assembly was not shared by the other NPC Standing Committee members. The NPC Standing Committee saw the need to revise the original language of the PRC Assembly Law (Draft) in Article 1 from “\textit{In order to maintain public order and social security, facilitate the smooth progress of socialist modernization, protect he people’s right of assembly legally ... this law is promulgated}” to PRC Assembly Law Article 1 “\textit{In order to protect people’s right of assembly, procession, demonstration legally, and maintain social security and public order, this law is promulgated.}” (emphasis added) The reversal of the key language to the purpose of the law from “maintain public order” in the first PRC Assembly Law (Draft) to “protect people’s right” in the final PRC Assembly Law manifested a difference of views between the Ministry of Public Security which drafted the Assembly Law and the NPC Standing Committee which approved it.

Although the differences between the NPC which defined legislative philosophy and the Ministry of Public Security which set enforcement policy, it is apparent that both readily conceded that collective interests prevails over individual rights in a socialist state. This controversy in drafting of PRC Assembly Law raised important and interesting questions for Chinese legal researchers: (1) Whether the perceived difference over the language of the Article 1 reflected a real internal debate over the priority and utility of the PRC Assembly Law? (2) Whether such an internal debate was driven by issue or whether it registered a deeper and more enduring conflict between the two policy setting bodies? (3) How might such differences find manifestation and resolution in the daily application of the PRC Assembly Law?

\textsuperscript{144} \textit{Clarifications} at 1489.

\textsuperscript{145} \textit{Clarifications} at 1488.
Second, PRC lawmakers, police officers, and scholars all agreed that the freedom of assembly, as with other socialist rights and entitlements, are not to be “recklessly” used. “Reckless” or abusive use of assembly freedom is not a constitutional or legislative provision, but it is nevertheless adopted as a measure of an assembly’s legality. “Reckless” use of assembly rights means the “unnecessary” use of such constitutional freedom, e.g. making excessive, unreasonable and/or inappropriately demands e.g. using it not for the purpose intended, such as assembly to attack Communist ideology.

For the purpose of judging “recklessness” the PRC law makers have affirmed that the purpose of assembly, procession, and demonstration as contemplated by the Constitution is to provide a vehicle for the people to communicate their desires or air their grievances. Public assembly is effective in dislodging entrenched bureaucracy or exposing official corruption. Public assembly is helpful in correcting policy mistakes and uncovering implementation errors. Public assembly is useful in airing grievances and alleviating discontent. Any public assembly that is not used to achieve the above “approved” purposes is considered as inappropriate and if continued is a “reckless” abuse of the freedom of assembly. More pointedly, the exercise of assembly freedom must not meet the requirements set forth by the letter of the law but also come within the spirit of the law, i.e. socialist morality; an extra legal yardstick.

Clarifications at 1489.

Clarifications at 1489.

PRC Assembly Law Treatise at 29.

For a discussion on the meaning of “reckless exercise” of rights, see Wang Yuanzhi, A Discussion on the Principle of Reckless exercise of rights, in 3 STUDIES IN LAW 15-23 (1995). Reckless exercise of rights mean: (1) the exercise of a right not for the purpose it was intended; (2) the exercise of a right is beyond the limits provided; (3) a mixture of the above two.

PRC Assembly Law Treatise at 29.

This amounted to an interjection of an extra-legal requirement of “reasonableness” in the approval process. “Recklessness” or “reasonableness” is a Trojan horse of law. It allows social morality and in the case of the PRC political ideology to come into play in determining whether an act is legal. This conforms with traditional Chinese practice where the law adopted and incorporated social morality through a process called the Confucianization of the law. Kam C. Wong,
Third, PRC Assembly Law 12(4) makes clear that the denial of approval on “public safety” and “social order” ground must be based on two conditions. There must be ample basis (chongfen genju) that the assembly will likely cause direct harm or damage. “Ample basis” has been interpreted as factual judgment that a direct harm will result. The “amply basis” language however only applies to Article 12(4) and not with respect to the other Article 12 provisions in Article 12(1), 12 (2), and 12(3). Cannons of legal construction suggest that the explicit enumeration of legal requirements to one subsection of a legal provision in the face of the absence of such legal requirements to other sub-sections of the same legal provision points

“Confucianization of the Law: A Study if Speech Crime Prosecution in Imperial China” (unpublished manuscript on file with the author.) The legal implications are as interesting as it is profound: law is only for the lawful, broadly define! (This recalls the admonition of Mao in classifying contradictions in society and polity into two kinds – antagonistic contradictions (between the people and the enemy) and non-antagonistic contradictions (between the people themselves.).) The adoption of societal moral values and incorporation of ethical principles by the law was neither unique to China nor uncommon with the law enterprise. In western jurisprudence, the issue is most often raised under the rubric of a law vs. morality debate. See Martin P. Golding, PHILOSOPHY OF LAW (1975). The more pressing issue in the current context is whether social-moral principles could be used to interpret legal rules? In American tort law, the “standard of reasonable conduct” is a community standard and an ethico-legal judgment. See William Proser, LAW OF TORT 167 (1971). The American jury system has originated with the firm belief that community justice shall prevail over the black letter law. Jeffrey Abramson, WE, THE JURY 22-33 (1994). This has led inevitably to the nullification of the law based on “conscience of the community” in modern time. Michael Granberry, Abortion Protest Juries Told to IgnoreNullification Ad, L.A. TIMES (San Diego County edition), Jan. 27, 1990, at B1. See Jon M. Van Dyke, Merciful Juries: The Resilience of Jury Nullification, 48 WASH. & LEE L. REV. 165-83 (1991). In the case of “Camden 28” the judge allowed the draft card burning defendants to argue for nullification based on the fact that the FBI informants have supplied the antivar protesters with the tools to carry out their draft raids. Donald Jackson, Judge Instructs “Camden 28” Jury, N. Y. TIMES, May 18, 1973, at 13. The defense lawyer in the case argued to the jury that the term “nullification” means: “power of a jury to acquit if they believe that a particular law is oppressive, or if they believe that a law is fair, but to apply it in certain circumstances would be oppressive…” Id. WE, THE JURY, at 59. The jury “nullification” doctrine clearly allows the jury to rise above the confine of the law in search of higher justice. In so doing, they imbue the legal process with moral and ethical considerations.

152 PRC ASSEMBLY LAW TREATISE at 91.
to a clear legislative intent to draw a legal distinction.\textsuperscript{153} From this we can argue that in the case of Article 12(1) to (3) there is no need to provide evidence to establish “ample basis” of harm as a pre-condition of denial of permission to assembly. In fact one authoritative police reference source interprets the language of Article 12 as any assembly having the mere tendency of being against the basic constitutional principles (Article 12(1), endangering national unity (Article 12(2), and inciting ethnic division (Article (3)).\textsuperscript{154} Indeed this interpretation is most likely, given the fact that it is relatively difficult, if not impossible, to demonstrate with clarity, certainty, and specificity, what harm if any may result from an adverse idea.\textsuperscript{155} 

\textsuperscript{153} Karl N. Llewellyn, \textit{Remarks on the Theory of Appellate Decision and the Rules of Cannons About How statutes are to be Construed}, 3 VAND.L.REV. 395, 401-406 (1950). According to Prof. Llewellyn’s “Cannon of Construction” item 16, “Every word and clause must be given effect” and item 20 “Expression of one thing excludes another.”

\textsuperscript{154} ZHONGGUO JINGCHA FALU FAGUI GUIZHANG SHIYI DAQUAN at 91.

\textsuperscript{155} It is interesting to observe the U.S. protects free speech and assembly for the very reasons the PRC prohibits it. The US allows free speech because there is no direct and substantive harm. In \textit{Whitney v. California}, 274 U.S. 357 (1927), Miss Whitney was a socialist and was found guilty of assisting in the organizing and being a member of a “criminal syndicalism” under the California Criminal Syndicalism Act which prohibited the organization of and membership in any “criminal syndicalism” which advocates, teaches, or abets sabotage or other unlawful acts of violence as a means of accomplishing industrial or political change. Justice Brandeis wrote a dissenting opinion stating: “Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from bondage of irrational fear. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free practiced. There must be reasonable ground to believe that the danger is imminent.”

The PRC is against free speech and assembly because it creates non-substantive (i.e. ideological) and indirect harm.

On a more historical and cultural note, the Chinese, from Confucians to the Communists, have pursued after the “purity of the mind” as a legitimate mean of social control, considering it as the root of all good and evil. Confucius said: “Wishing to govern well in their states, they would first regulate their families. Wishing to regulate their families, they would first cultivate their persons. Wishing to cultivate their persons, they would first rectify their minds. Wishing to rectify their minds, they would first seek sincerity in their knowledge. Wishing for sincerity in their thoughts, they would first extend their knowledge.” WM. Theodore De Bary, Wing-tsit Chan, and Burton Watson, I SOURCES OF CHINESE TRADITION 115 (1963).
Lastly, the broad and unequivocal restrictions on free speech and assembly invites the police\textsuperscript{156} to consider any assembly and speech having any tendency to challenge state authority and Party ideology as “counter-revolutionaries.” This is evident from past police practices in dealing with “subversive” assembly.\textsuperscript{157}

The PRC Criminal Law (1979) provides in Article 90 that “Conduct which is harmful to the People’s Republic of China and done with the purpose of over-throwing the proletarian dictatorship and socialist system are all counter-revolutionary crimes.” Counter-revolutionary crimes include crime involving: (1) inciting people to resist and harm the implementation of state law and order and (2) use counter-revolutionary slogans, pamphlets and other means to incite others to over-throw the proletarian dictatorship and socialist system.\textsuperscript{(The PRC Criminal Law (1979) Article 102.)}\textsuperscript{158}

\textsuperscript{156} Some PRC Chinese scholars have openly questioned the lack of control over the police exercise of discretion in an unstructured way. Wang Xingye, \textit{The Control of Police Discretion, in 7 LAW SCIENCE MONTHLY (FAXUE) 33-35 (1991).} (The police are asked to make critical decisions in complicated cases with very little guideline or structure.) It has been demonstrated in the U.S. that police can be politicized, i.e., police policy and practices are very much determined by local politics and political culture. Stuart A. Scheingold, \textit{THE POLITICS OF LAW AND ORDER} (1984).

\textsuperscript{157} Zuigao Renmin Jianchayuan, \textit{XINGSHIFANZUI ANLI CONSHU (FANGEMINZUI)} (Book on Criminal Cases) (Counter-revolutionary Crimes) (1990).

\textsuperscript{158} A exhaustive review of prior and existing counter-revolutionary laws, regulations, and directives is not informative on what constitute counter-revolutionary conduct beyond the fact it refers to speech or conduct which is intended to or in effect was harmful to the state’s political order or challenge the established government. See “Zhongguo Renmin Zhengzhi Xieshang Huiyi Gongtong Ganglin (The Chinese People’s Political Consultative Conference Common Program) (promulgated on September 29, 1949) Article 7; PRC Constitution (promulgated on September 20, 1954) Article 19; Zhengwuyuan, Zuigao Renmin Fayuan, “Guanyu Zhenya Fangemin Huodong de Zhishi” (Government Administrative Council and Supreme People’s Court “Directive on the Suppression of Counter-revolutionaries”) (promulgated on July 23, 1950); Zhonghua Renmin Gonheguo Zhenzhi Fangemin Tiao Li (PRC Punishment of Counter-revolutionary Regulations) (promulgated on Feb. 20, 1951), Article 2.; Zhongyang Sifabu “Guanyu Eba, Guanfei, Bufa Dizhu Ruhe Shiyong Zhenzhi Fangemin Tiaoli Piifu” (Party Central Judicial Department “Reply Regarding How to Apply Punishment of Counter-revolutionary Regulations to Local Tyrant, Habitual Criminals, and Illegal Landlord”) (promulgated in 1951); Zhongyang Xiren Xiaozu “Guanyu Fangemin-fenzi he Qita Huaiwenzi de Jieshi ji Chuli de Zengce Jixian de Zanxing Guiding” (Party Central Party of Ten Committee Temporary Regulations Regarding Policy and Limits on Explaining and Handling
According to the PRC political-legal authority, what makes for a counter-revolutionary crime turns ultimately on the purpose, intent, and motive of speech maker and assembly organizer. Purpose, intent, and motive being internal to the offender cannot be definitely ascertained and must be re-construed from the speech act and attending circumstances. For example, defendant Fu X-qi was of Counter-revolutionary Elements and Other Bad Elements (promulgated March 3, 1956); Zhongyang Xiren Xiaozu “Guanyu Fangemin-fenzi he Qita Huaifenzi de Jieshi ji Chuli de Zhengce Jiexian de Zanxing Guiding” (Party Central Party of Ten Committee “Temporary Regulations Regarding Policy and Limits on Explaining and Handling of Counter-revolutionary Elements and Other Bad Elements”) (promulgated March 3, 1956); Zhonggong Zhongyang Xiren Xiaozu “Guanyu Fangemin-fenzi he Qita Huaifenzi de Jieshi ji Chuli de Zhengce Jiexian de Zanxing Guiding” de Buchong (Communist Party Central Party of Ten Committee “Supplement to Temporary Regulations Regarding Policy and Limits on Explaining and Handling of Counter-revolutionary Elements and Other Bad Elements” (promulgated June 24, 1957) (Counter-revolutionary damages mean causing damage with counter-revolutionary intent and purpose); Renmin Gongan Pianweihui Guanyu Zhongyang Xiren Xiaozu “Guanyu Fangemin-fenzi he Qita Huaifenzi de Jieshi ji Chuli de Zhengce Jiexian de Zanxing Guiding” de Buchong Jieshi Zhong Yixie Wenti de Jieda (PRC Organizing Committee “Answers to Certain Questions on Supplementary Explanation Regarding Temporary Regulations Regarding Policy and Limits on Explaining and Handling of Counter-revolutionary Elements and Other Bad Elements”) (promulgated 1957) (Contemporary counter-revolutionary elements means people who spread reactionary pamphlets with counter-revolutionary intent); Zhongyang Xiren Xiaozu “Guanyu Putong Fangemin Fenzi ji Qita Fandong Fenzi de Jieshi” (Committee of Ten from Party Central “Explanation Regarding Common Counter-revolutionary Elements and Other Reactionary Elements”) (November 1957) (Counter-revolutionary elements are people who insist upon their reactionary class viewpoint); Zhongyang Zhengfa Xiaozu “Guanyu Xinde Fangemin Fanzui Xingwei de Jiexian” (Party Central Political-legal Committee “Regarding the classification of Counter-revolutionary Elements” (1962). (People who are merely critical of the party or government policy or implementation are not counter-revolutionary.) Zuigao Renmin Jianchayuan, Xingshifanzui Anli Conshu (Fangeminzui) (Book on Criminal Cases) (Counter-revolutionary Crimes) 269-311 (1990).

Counter-revolutionary purpose can be analyzed with respect to the following: (1) from psychological characteristics (xinli tezheng); (2) from conduct characteristics (xingwei tezheng); (3) from motive (dongji). XINGSHIFANZUI ANLI CONSHU (FANGEMINZUI) at 30-34.

Gao Fa, Gao Jian “Guanyu Chuli Fan Geming Baoluan he Zhengzhidongluan zhong Fanzui Anjian Juti Yingyong Falu Rugan Wenti de Yijian” (Opinion regarding how to deal with certain legal issues in particular counter-revolutionary, riot, and political disturbance crimes) (adopted August 1,
arrested and prosecuted for counter-revolutionary propaganda as a result of publishing in his *Voice of Democracy* (*Minzhu zhì shēng*) an “Open Letter to the Chinese Government” in September, 1980 calling for the people to resist the Fifth NPC’s resolution;\(^{161}\) defendant Zhang X-sheng was arrested and prosecuted for counter-revolutionary crimes as a result of publishing the *Wanderer* (*Liulang zhe*) and *Republican News* (*Gonghebao*) and openly defamed and attacked the people’s democratic dictatorship, including openly defending the counter-revolutionaries Wei XX and Liu XX in April of 1979;\(^{162}\) defendant Pan X was arrested and prosecuted for counter-revolutionary crimes as a result of publishing two books - *Safe the Country With Democracy* (*Minzhu Jiuguo*) and *Pioneers of the Tide* (*Langcha Xiānfēng*) – in between September 1985 and March 1986 which were critical of the CCP and defamed the socialist system, calling it a “reactionary dictator regime” at a university.\(^{163}\) Lastly, defendant Zhong X-hua was arrested and prosecuted for counter-revolutionary crimes for writing news, poetry, cartoons, advertisements, and drawings and sending them to various communist newspapers from November of 1980 to October of 1986.\(^{164}\) It is clear from a close examination of these cases that the defendants were guilty of nothing more than publishing of materials critical of the PRC regime. However, no counter-revolutionary action was taken. Yet, they were all prosecuted and convicted of being counter-revolutionaries.

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\(^{161}\) *Id.* at 240.

\(^{162}\) *Id.* at 242.

\(^{163}\) *Id.* at 243.

\(^{164}\) *Id.* at 243.
If “pure” speech\(^\text{165}\) critical of the administration, state, or party were taken so seriously as being against the national security, assembly and demonstration, assembly, procession will not be taken lightly since they will be considered as an active mobilization of the people for political actions. They will certainly be prosecuted and sanctioned much more severely under the counter-revolutionary law.\(^\text{166}\)

The other practical problem in using “intent” and “motive” as a screening tool to determine the offensiveness and legality of assembly is that “intent” and “motive” are never pure and people may have good motive in do illegal things, as the following example shows:

Ji X-liang was arrested, prosecuted, and convicted of counter-revolutionary crimes as a result of his vocal political speech. The facts were upon which Ji was found guilty included the following: (1) Between March 1983 and November 1983, Ji send three letters to the *Guan Ming Ribao*, *Shenxi Ribao*, and *Renmin Ribao*. The letters made the follow comments: “Rehabilitation

\(^{165}\) The PRC concept of “pure” speech differs from the west in material ways. In the west pure speech refers to speech which only express ideas but stop short of advocating for action. Depending on how likely the speech will be creating danger to social order the speechmaker may be restrained. See Laurence H. Tribe, *Purity and Obscurity: The Speech-Conduct Distinction*, in *CONSTITUTIONAL CHOICES* 198-203 (1985).

However in the PRC, a person will be judged solely by his purpose of his speech act, irrespective of the likely consequence of his speech act (sian yi). Xiang Ming & Guo Zhi, *A Reflection on the Law of Free Speech*, in *8 LAW SCIENCE MONTHLY* 4-10 (1991). (A speech which is not “not well intended” (bushi shangyi) by the speaker is ipso facto deemed to be a malicious (eryi) speech conduct and considered as a reckless (lan yon) exercise of speech right.).

\(^{166}\) The PRC Assembly Law in placing such broad and burdensome restrictions on speech content is contrary to the CCP’s “liberal view” on free speech. The CCP has clearly and unequivocally stated that the freedom of speech must be respected and protected by the Constitution and law against government officials, state leaders, popular morality, and party politics. Specifically: (1) Freedom of speech is beyond government control. Citizens have a right to hold the government accountable, including being critical of its administration. (2) Freedom of speech is beyond the interference of political leaders or state officials. (3) Freedom of speech is not bound by the standard of true or false. Truth is relative and to be debated openly. (4) Freedom of speech is not bound by morality of any kind. (The critical language of reservation here is unless “morality is enforced by law.”) Lastly and most importantly for our purpose (5) Freedom of speech is not subject to control by Party policy. (The critical language that is missing is that there is no mention of Party or state ideology.)
(pingfan) blows like wind, it destroyed all political movements.” “The basic nature (benzhi) of the society is changing.” “Beginning to practice capitalism.” (2) Between July 1984 to June 1985, Ji send eight letters to the People’s Liberation Army HQ, Staff Command HQ, Naval Command HQ, State Council, Ministry of Labor, Ministry of Finance, Economics Commission, and Central Banks stating: “The party in power which Deng XX head is perpetrating conspiracy.” “[Let us] Converge in Tiananmen Square to have a question and answer sessions with the people from every provinces, municipalities, and autonomous region government, to reason with words.” “If our representatives are arrested, we have to repay an eye for an eye, a tooth for a tooth.” (3) In September of 1985, Ji distributed 35 copies of pamphlets in Beijing public thoroughfare. The pamphlet read: “We have to be organized, we must overthrow (‘dadao’) the revisionist capitalist and cannot stop halfway.” An investigation into Ji’s background revealed that he was an old Communist party member who participated in the revolution in 1947. His conduct has always been exemplary in the past. The police was quick to seize on his outward manifestation of discontent and expression of anti-Deng message to prosecute him. Some PRC legal scholars argued that Ji did not engage in counter-revolutionary activities. His was only dissatisfied with the changing “capitalistic” nature of the Chinese society. His activities were not counter-revolutionary in nature because he did not intent to change the socialist system. Quite to the contrary he wanted to embrace and perfect the socialist system along the class-struggle line suggested by Mao. The PRC legal scholars’ views in this case reflected clearly articulated Party policy and police enforcement practice of only punishing people with the wrong “motive”, “intent” or “purpose”:

| However in dealing with the people … when (they are) only unhappy with certain policy and practices, unhappy with their work style and bad quality of the |

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167 XINGSHIFANZUI ANLI CONSHU (FANGEMINZUI) at 261-262. See Zhongyang Zhengfa Xiaozu “Guanyu Xinde Fangeming Fanzui Xingwei de Jiejian” (Party Central Political-legal Committee “Regarding the Classification of Counter-Revolutionary Elements”) (1962). (People who are merely critical of the party or government policy or implementation are not counter-revolutionary.) Zuigao Renmin Jianchayuan, XINGSHIFANZUI ANLI CONSHU (FANGEMINZUI) (“Book on Criminal Cases”) (Counter-revolutionary Crimes) 310-311 (1990).
cadre, even though they have mis-spoke, and have taken some drastic action, we do not treat them as counter-revolutionaries and make them new targets of new counter-revolutionaries...they should be dealt with as contradiction amongst the people.\textsuperscript{168}

Another case making the same point was the case of Ni X-cai. In the case Ni was charged with counter-revolutionary crimes for sending anonymous letters to a number of public, political, and educational institutions, including the \textit{People’s Daily} to express his view that the country was engaging “typical, one hundred percent ("buzhe-bukou") revisionism ("xiuzheng-zhuyi") and capitalism”. He observed that since the “Sanzhong Quanhui” (Third Plenary Session) the country has been pursuing a policy of catering to foreigners and in the process is destroying the basic principles of socialism. He further observed that this was a critical time in PRC history where truth and falsehood was at loggerhed and must be resolved. Some scholars considered Ni’s letters to be just expressing his displeasure over the direction the country is heading. In so doing, he was trying to improve the state and not seeking to over-throw it. His attack on the leadership was personal in nature and not directed at the legitimacy of the party leadership.

VIII. CONCLUSION

Now we come to answering the research question posed: In comparing PRC vs. ROC Assembly Law, in what way can it be said that they are the same and how much that can be observed that they are different? To this question we now turn.

A. TEXTUAL SIMILARITIES

First to observe is that while the PRC and ROC Assembly Laws were independently made by two different political entities, they share marked similarities in content, language, organization and style that cannot be explained by sheer coincidence.\textsuperscript{169} For example, 

\textsuperscript{168} \textit{Id.}

\textsuperscript{169} In this regard the PRC Assembly Law shows more similarity with the ROC Assembly Law than with Beijing Assembly Law. \textit{See} Beijingshi Guanyu
organizationally the PRC and ROC Assembly Laws have corresponding provisions in purpose of law (ROC Assembly Law Article 1, PRC Assembly Law Article 1), definition (ROC Assembly Law Article 2, PRC Assembly Law Article 2), police agency in charge (ROC Assembly Law Article 3, PRC Assembly Law Article 3); prohibited activities (ROC Assembly Law Article 4, PRC Assembly Law Article 12); protection for lawful activities (ROC Assembly Law Article 5, PRC Assembly Law Article 18); restricted areas (ROC Assembly Law Article 6, PRC Assembly Law Articles 22, 23); responsible person in charge (ROC Assembly Law Article 7, PRC Assembly Law Article 8); exempted activities (ROC Assembly Law Article 8, PRC Assembly Law Article 7); application particulars (ROC Assembly Law Article 9, PRC Assembly Law Article 8); eligibility of responsible person (ROC Assembly Law Article 10, PRC Assembly Law Article 8); approval criteria (ROC Assembly Law Article 12, PRC Assembly Law Article 9). (See Appendix for textual comparison of key provisions and other areas). See Table 3 below.

Table 3: A Table of Textual Comparison of Key Provisions between ROC Assembly Law and PRC Assembly Law

<table>
<thead>
<tr>
<th>Content</th>
<th>ROC Article</th>
<th>PRC Article</th>
</tr>
</thead>
<tbody>
<tr>
<td>Purpose of the law</td>
<td>Art. 1: protect assembly and procession rights; maintain social order</td>
<td>Art. 1: protect assembly, procession, demonstration rights; maintain social order</td>
</tr>
<tr>
<td>Definitions</td>
<td>Art 2: public meeting, speech, any other gathering</td>
<td>Art 2: public gathering to express ideas or wishes</td>
</tr>
<tr>
<td>Police agency in charge</td>
<td>Art. 3: assembly site police unit; two jurisdictions – supervising authority.</td>
<td>Art. 3: assembly site police unit; two jurisdictions – supervising authority.</td>
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</tbody>
</table>

Youxing Shiwei de Rugan Zhanxing Huidin, supra note 7; see Law. Y.B. of China 1989, supra note 7, at 420.
<table>
<thead>
<tr>
<th>Content</th>
<th>ROC Article</th>
<th>PRC Article</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prohibited activities</td>
<td>Art. 4: against Constitution, promote communism; split the country.</td>
<td>Art. 12: against constitutional principles; endanger national unity; incite ethnic division; endanger public safety; serious harm to social order</td>
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<td></td>
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<tr>
<td>Protection for</td>
<td>Art 5: from violence, coercion, or other illegal interference</td>
<td>Art 18: from violence, coercion, or other illegal interference, attack, and damage</td>
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<td>lawful assembly</td>
<td></td>
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<tr>
<td>Restricted areas</td>
<td>Art. 6: government buildings; airports &amp; harbors; military installations.</td>
<td>Art. 23: government buildings; foreign VIPs; military installations; airports, railway stations, harbors</td>
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<tr>
<td></td>
<td>Art. 22: temporary no-cross zones: government institutions; military</td>
<td>Art. 22: temporary no-cross zones: government institutions; military</td>
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<td></td>
<td>installations; broadcast/TV stations; embassies.</td>
<td>installations; broadcast/TV stations; embassies.</td>
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<tr>
<td>Responsible person in</td>
<td>Art. 7: should have designed responsible person or representative</td>
<td>Art. 8: should have responsible person.</td>
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<tr>
<td>charge</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Exempted assembly</td>
<td>Art. 8: by law; academic, social, &amp; cultural activities; traditional &amp;</td>
<td>Art. 7: state sponsored activities, by law or charter.</td>
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<td></td>
<td>festive activities.</td>
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<tr>
<td>Application particulars</td>
<td>Art. 9: seven days in advance &amp; two days in exceptional cases in writing;</td>
<td>Art. 8: five days in advance in writing; responsible person, purpose,</td>
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<tr>
<td></td>
<td>responsible person, date, purpose, time, route, people, cars, equipment;</td>
<td>manner, signs, slogans, people, cars, equipment, equipment, date, route, time.</td>
</tr>
<tr>
<td></td>
<td>consent &amp; detail plan.</td>
<td></td>
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<tr>
<td>Eligibility of</td>
<td>Art. 10: (including representative or prefects) over 20; ROC national; not</td>
<td>Art. 8: person with capacity; not convicted &amp; awaiting sentence or labor-education; not under legal coercive measures.</td>
</tr>
<tr>
<td>responsible person</td>
<td>convicted &amp; awaiting sentence or discipline; bankrupt.</td>
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</tbody>
</table>

A Comparative Study of Laws of Assembly in the China

<table>
<thead>
<tr>
<th>Content</th>
<th>ROC Article</th>
<th>PRC Article</th>
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</thead>
<tbody>
<tr>
<td>Approval criteria</td>
<td><strong>Art 11</strong>: Art. 4 (constitutional, no communism; not against national unity), Art 6 (not in restricted areas), Art. 10 (eligible person); no harm to national security, social order, &amp; public welfare; factually demonstrated danger to life, body, freedom, property; not disapproved before; illegal, cancelled, or dispersed assembly; no proper application (Art. 11).</td>
<td><strong>Art. 12</strong>: not against Constitution; not against national unity or sovereign integrity; not ethnically divisive; factually demonstrated to be directly harmful to public safety and social order.</td>
</tr>
<tr>
<td>Approval procedure</td>
<td><strong>Art 12</strong>: approval in three days; disapproval with reasons.</td>
<td><strong>Art 9</strong>: approval in two days; disapproval with reasons.</td>
</tr>
</tbody>
</table>

More significantly, some of the articles use similar concepts, identical language, and mirror sentence structure, e.g., the purpose of the ROC and PRC Assembly laws are fairly similar, the prohibited kinds of public assemblies are very much alike, and the approval criteria are near identical. It appears likely that the ROC Assembly Law (being the first to be adopted) has been consulted, if not even used as a model, before the PRC Assembly Law was drafted.\(^{171}\) If this observation is a correct one, this is an encouraging sign for future ROC v. PRC cooperation. It demonstrated a willingness of the PRC to put aside political differences to consult, if not indeed learn from ROC, which is more advanced legally, in making its own law.\(^{172}\)

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\(^{171}\) A detailed examination of *PRC Assembly Law Treatise* shows that the PRC drafters have consulted a number of countries’ assembly laws included U.S., U.K., Japan, and Russia, but Taiwan was not one of them. *See PRC Assembly Law Treatise, supra* note 4, at ch.1. This could be explained by the fact that ROC was considered a province of PRC and a political enemy of the CCP. It is “politically incorrect” to model law after your political inferior and ideological enemy.

\(^{172}\) Political differences should not stop us from researching into and learning from Taiwan’s legal system, especially in the area of commercial law.
Beyond such conceptual and textual similarities, the Assembly Laws reflected discernible historical continuity and registered clear radical political disjuncture.

B. HISTORICAL CONTINUITY

Historically and ideally, in imperial China, since antiquity until recent times, the emperor ruled with mandate from heaven and according to a pre-ordained cosmic order of things. Rulers have absolute authority to govern and in virtuous ways. Citizens have unmitigated duty to be obedient to the ruler and show deference and respect. Order is to be promoted unrelentingly. Disorder is to be avoided at all costs. There is no right to dissent, still less to engage in organized opposition and public challenge to government policy and practices. The virtuous ruler has a duty to listen to the people and be responsive to their needs and concerns.173

This philosophy of governance, ingrained as national ethos and expressed as cultural imperatives, was alive and well in China when the Assembly Laws were enacted.174 Both PRC and ROC were

173 ROBERT P. WELLER, ALTERNATIVE CIVILITIES: DEMOCRACY AND CULTURE IN CHINA AND TAIWAN (1999) (Democratization in China and Taiwan cannot be adequately explained by western civil society model or market economic process. The best way to explain and understand is still traditional Chinese culture of Confucianism and Buddhism).

174 The continuity thesis here observed is subject to “reference society” (Reinhard Bendix) criticism. “Reference society” observed that less developed countries developed by learning from advance countries, such as Britain or United States. In the case of China, a colony of Qin then Japan, the role model has been Japan and United States. Ramon H. Myers, A New Chinese Civilization: The Evolution of the Republic of China on Taiwan, 148 CHINA Q. 1072-1090 (1996). Even without referencing, Taiwan was subjected to four diverse streams of influences: traditional Chinese stream giving Taiwan language, culture and custom, Japanese stream for 50 years after 1895 cutting it off from outside (mainland Chinese) influence, ROC stream since arriving in 1945 from mainland China bringing with it mainland culture, education system, constitutional structure, political and social institutions and governing elites, and the cosmopolitan stream, the educational and intellectual elites with education from Japan and U.S. Ralph N. Clough, The Enduring Influence of the Republic of China on Taiwan Today, 148 CHINA Q. 1054, 1054 (1996). Finally, cultural identity of Taiwan is afflicted by tension between traditionalism and modernism, foreignism and localism, and cosmopolitanism and localism. David Shambaugh, Exploring the Complexities of Contemporary Taiwan, 148 CHINA Q. 1045, 1048 (1996)(citing Tu Weiming).
run by political parties – CCP and KMT - that sought political legitimacy through virtuous governance, i.e. treating the citizens as sons and daughters; paternalistically if autocratically, benevolently, if dictatorially, absolutely, if meritoriously. Both ruling parties considered their governance as legitimate because it represented the absolute best in political ideology and governing philosophy, i.e. virtuous (ren) rule and benevolent (yi) governance. Both resented challenges to government as illegitimate and treacherous. Both rejected organized opposition and open dissent as inimical to good order and detrimental to public welfare; being disruptive to social order, interfering with economic development and undermining of political stability; or, just ought not be done (bu gai).

The PRC Assembly Law, in content and as applied, reflected and reinforced these governing ideas and ideals, dating back to the Xia (2100 – 1600 BC), Shang (1600 – 1100 BC) and Zhou (1100 – 771 BC) dynasties some 4000 years ago. Viewed in this light, the Assembly Laws, as drafted, were not just another set of proscriptions and prescriptions imported from the liberal west in celebrating the inalienability of protest rights and promoting the sanctity of speech freedom, but a sincere effort by contemporary political leadership to apply venerable Chinese governing philosophy, principles and practices to a new set of emerging and evolving social – political circumstances, in giving vent to Chinese cultural heritage and re-inventing China in her historical image. This observed need to accommodate the new (democratic instincts in people) within the old (cultural tradition in China) is no better demonstrated by the CCP attempt to practice democratic centralism in order balance free speech rights and hierarchy control tradition:

As the term democratic centralism implied, it was to be a mixture of democracy and centralization. In its democratic aspect, the masses had opportunities to express their opinions, but the process was centralized in that the leaders solicited public opinion, analyzed and interpreted it, and then – ideally – used it as the basis of government policy. Given the very personal nature of Chinese social relations, the lack of a voting tradition, reservations in the expression of personal opinion, and willingness to obey authority, this personal and informal style of soliciting public opinion, if properly implemented, was perhaps a more
feasible and effective way to establish a government responsive to the public than the Western form of
democracy achieved through electing candidates.\textsuperscript{175}

C. POLITICAL DISJUNCTURE

Before the promulgation of Assembly Laws, citizens’ rights to
assembly in both nations were protected by entrenched, if illusory,
Constitutional provisions. For example: ROC Constitution (1949),
Article 14 provides: “People have the right of assembly and
association” and PRC Constitution (1982) Article 35 provides:
“Citizens of the People's Republic of China enjoy freedom of speech,
of the press, of assembly, of association, of procession and of
demonstration.”

In the ROC, there was no need for an assembly law before
1987. The country then (1945 – 1987) was laboring under single
party (KMT) dictatorial rule made possible by a suspended
Constitution\textsuperscript{176} and effectuated with imposed martial law.\textsuperscript{177} During
this period, Taiwan citizens’ freedom of speech was abridged, right to
assembly was denied, dissents were silenced, strikes were outlawed,
and opposition parties were forbidden. For all intent and purpose
ROC was a Leninist state where the security police used white terror

\textsuperscript{175} Kwong, supra note 7, at 975.

\textsuperscript{176} The Constitution of the Republic of China was adopted on December
25, 1946, by the National Constituent Assembly convened in Nanking. It was
promulgated by the National Government on January 1, 1947 to be effective
December 25, 1947. It comprised 175 articles in 14 chapters. For text of the
Constitution, see ROC CONST., supra note 58. On May 10, 1948, the National
Government passed the “Temporary Provisions Effective During the Period of
Communist Rebellion” Promulgated by the National Government on May 10, 1948
which suspended as it superceded the Constitution during Communist insurgency in
mainland China. Governor Chen explained the situation thusly: “mainland Chinese
were advanced enough to enjoy the privileges of constitutional government, but
because of long years of despotoc Japanese rule, the Formosans were politically
retarded and were not capable of carrying on self-government in an intelligent
manner.” John Tkacik, History’s Implications for Taiwan’s Constitution, 4:21
CHINA BRIEF 4, 6 (2004).

\textsuperscript{177} Trong R. Chai, The Future of Taiwan, 26:12 ASIAN SURVEY 1309-1323
(1986).
to silence dissidents and eradicate opposition.\footnote{178} For example, on December 10, 1979 an “illegal assembly” organized by the pro-democracy “Formosa” group led to the arrest of over 100 intellectuals. Subsequent military trials convicted and sentenced twelve defendants to between 12 years to life imprisonment. This has come to be known as “The Kaohsiung Incident.”\footnote{179}

In PRC there was no need for assembly law because political dissents were frowned upon and mass public protests were disallowed. They were deemed as challenges to Party rule and inimical to public welfare. Public dissents and organized challenge to CCP or government, depending on ascribed motive and intent, might be considered as counter-revolutionary offenses.\footnote{180} In the ultimate analysis, people protest at their own risks. Otherwise, citizens’ grievances and officials’ abuses could be taken care of through Party disciplinary process\footnote{181} and government administrative channels, e.g. “xinfang”.\footnote{182}

The political culture and process of the two regimes undertook a drastic change both in the end of 1970s and beginning of 1980s. In 1979, the PRC under the stewardship of Deng Xiaoping sought economic reform. In 1986, the ROC under the leadership of Chiang Ching-guo aspired towards democratization. The forces of reform

\footnote{178} Peng, supra note 12.

\footnote{179} Chai, supra note 177, at 1310 – 1311.

\footnote{180} The PRC Criminal Law (1979), Article 90 states that: “All acts endangering the People’s Republic of China committed with the purpose of overthrowing the political power of the dictatorship of the proletariat and the socialist system are crimes of counter-revolution.” H.L. Fu, Sedition and Political Dissidence: Towards Legitimate Dissent in China? 26 HONG KONG L.J. 210, 215 (1996).


\footnote{182} See “Xingfang gongzuo bian” [“Chapter on letter petition work”], in ZHEN YUEGANG & GUAN, SHUGUAN GONGAN NEIQIN GONGZUO SHouce [HANBOOK OF PUBLIC SECURITY INTERNAL ADMINISTRATION WORK] 449-470 (2001). Xinfang is the mass or organization way to communicate with the political leadership to share ideas and express wishes, including reports, complaints, petition, criticism, and suggestions. Id. at 449.
dislodged the administration from the past, forced it to the confront the future and was represented by thousands of interests competing for resources and millions of voices that were struggling to be heard.

D. POLITICAL RECKONING IN PRC

June 4, 1989 was a moment of reckoning for the PRC political leadership. The PRC leadership saw their political legitimacy sinking and the nation’s social stability problems multiplying. The PRC authority took a number of remedial measures to consolidate control and shore up support, including institutionalization of orderly succession processes, introduction of meritocratic promotion system, establishment of bureaucratic differentiation, and channeling of mass participation. The last measures included: First, introduction of The Administrative Litigation Act of 1989 in allowing citizens to sue government agencies for alleged violations of government policy. Second, strengthening of letters-and-visits departments (xinfangju) at Party and government agencies. Third, making the People’s Congresses more responsive to the people, i.e. listening to their complaints and addressing their concerns. Fourth, PRC Administrative Supervision Law, adopted on May 9, 1997 at the 25th session of the eighth National People’s Congress Standing. Committee allowed the people to air their grievances and supervise the Party and government officials.

The ROC Assembly Law allowed the citizens to talk back to the establishment – directly, openly and forcefully – as co-equal, rather than subordinate parties or subservient charges.

E. POLITICAL RECKONING IN ROC

The ROC retreated to Taiwan from mainland China in 1945. Ever since then, the KMT has been fighting two political battles to secure their place in history in building the first democratic China in the vision of Dr. Sun: communist insurgency in the mainland and local rebellion in Taiwan. The KMT’s military and security


184 Clough, *supra* note 174, at 1058.
apparatus was 200,000 strong. They were monitoring everyone and controlling everything in Taiwan with the help of seditious and marital law. Before 1980, there was no dissent in Taiwan or organization opposition. Dissents were limited to visionary intellectuals, blind sighted students and die hard opposing Party. Except for time of election, such dissenting voices never reach the mass much less strike up a common cord.185 Between 1949 and 1955, it was estimated that 90,000 political dissidents were arrested with half of them executed.186

The ROC Assembly Law has its origin in a demonstration gone violent in December of 1980. The Formosa group demonstrated on International Human Rights day without permission with 100,000 to 300,000 people. 150 officers were hurt. The 12 leader of the group was sentenced to long imprisonment. The government took steps to liberalize its policy to avoid a repeat of the incidence.187

The road from dictatorship to democracy started in 1980 and was substantially completed in 1990s. The turning point was in 1987 when martial law was lifted, opposition parties was legalized, control of the press relaxed, sedition law was abolished and Garrison command was disbanded.188

F. DISSIMILARITIES BETWEEN PRC VS. ROC

Similarities in legal content, historical antecedent and political fortunes aside, the ROC Assembly Law and PRC Assembly Law differ in one major respect. The ROC Assembly Law is more solicitous of individual rights to assembly and free speech while the PRC Assembly Law is more protective of the state interests and

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185 Hung-mao Tien, Taiwan in Transition: Prospects for Socio-Political Change, 64 CHINA Q. 615, 628 (1975) (“Political Dissent”).

186 Id. at 629 (citing Douglas Mendel).


188 Seymour, supra note 22, at 74-76 (“Politics: The Great Turning Point?”).
concerned with social order. This reflects a marked difference in political philosophy and police practices between the two countries.

In the PRC, there were two reasons why assembly rights were deemed as less important. First, Deng sought economic and not political reform to strengthen China. Consistent with mainstream Marxist doctrine, changing the material base of the nation will lead to corresponding political consciousness of the people, one way to achieving the socialist revolution. Second, Deng recalled the chaos of the Cultural Revolution and witnessed the disintegration of the Soviet Union. He did not want this to happen to China. Thus, he was committed to maintain political stability and with it, social order for the country at all costs and above all things else. The reform slogan was “no security no reform.”

In ROC, Chiang saw the need to democratize in order to bring about political changes in Taiwan and China. In Taiwan, democratization was needed to rejuvenate the KMT and empower local political groups. With mainland China, democratization in Taiwan would set an example and speed up political transformation of CCP leading to eventual unification of the nation.

Thus while the ROC police was specifically instructed to balance the interest of the state security vs. freedom of citizens in favor of the later, the PRC police has demonstrated its reluctance to entertain political dissents of the kinds which challenge the legitimacy and control of the Party and State. A comparison of the statistics from PRC and ROC on the nature of the assembly makes this point apparent. In the case of ROC, from Jan. 20, 1988 to Feb. 1989, there were a total of 1,696 assemblies of which 1,044 or 61.6% were political in nature (e.g. democratic talk, town hall meeting, congress re-election, Taiwan independence march, provincial election etc); 484 or 28.5% were social in nature (e.g. labor, environment, strike, union); and 113 or 6.7% were economical in nature (e.g. appreciation of the Taiwan currency, tax on stocks) and 55 or 3.2% of all others.

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189 PRC scholars have conceded that the PRC Assembly Law on the book and as applied is very restrictive, but maintained that it is constitutional, legal, and reasonable, having compared it to other countries’ law and the PRC’s national circumstances (guoqing). You Junyi & Feng Yuexian, Some Problems Concerning Turmoil and Rebellion, 6 ZHENGZHI YU FALU [POLITICAL SCIENCE AND LAW] 2, 5 (1989). In this regard, all PRC legislations are supposed to reflect historical, cultural, economical, social, and political guoqing. See Zhou Wangsheng, supra note 142, at 191-220.

190 ROC Police Research 1, supra note 8, at 233-234.
In the case of PRC, from 1987 to 1988 there were a total of 500 procession and demonstration applications from 23 provinces, autonomous regions, municipalities directly under Central Government, of which 85% was concerned with grievances by individual or group (e.g. household, housing, schooling, employment, continuing education, wages, assignment after graduation, incentive pay, correct assignment, border area allowances, retirement benefits, implementation of private housing policy, forest land, and return to city); 15% was concerned with social issues (environmental pollution; coerced contribution, inflation; poor merchandize; destruction of farm land by mining; inaccurate news reporting; unfair court adjudication; party leadership revenge, harm by illegal activity; poor food at school, and school premises invasion). There were less than 1% concerned with political assembly. Most of the grievance applications (530 from 1988 to 1989) involved a few to less than hundred participants with just a few over a hundred to a thousand.\footnote{PRC Implementation Regulations, supra note 8, at 57-58.}

The implication is clear. Whereas in ROC the Assembly Law is an effective tool to channel political dissents, in the PRC the Assembly Law is a convenient mean to facilitate personal grievances. The ROC saw political reform, liberalization and democratization, as the way of the future – consolidating Taiwan and uniting China. The PRC insisted on seeking economic reform without fundamental political change. If there is to be a successful unification of the two political regimes, a creative way must be found to reconcile this basic difference in political philosophy and police practices.