Protest Law & Public Order Policing in Hybrid Regimes

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Abstract

Hybrid regimes are those in which only the formalities of representative electoral politics are observed. Consequently, political legitimacy is determined on the basis of whether the incumbent political leaders have the backing of non-representative political 'guardians' (such as the monarchy and the military) rather than through the popular vote exclusively. The incumbents need to win elections. They stay in power by manipulating the political sphere to gain unfair advantages over their political competitors. Individuals in hybrid regimes do not enjoy freedom of assembly in the same way as individuals in consolidated democracies. This thesis highlights how hybrid regimes in Southeast Asia (Cambodia, Malaysia, and Thailand) use legal mechanisms governing public assemblies to thwart the effective realisation of the freedom of assembly stipulated by international human rights law. Such legal factors are often overlooked by scholars in political science and social movement studies in seeking to explain both regime resilience and the repression of opposition protest movements. While hybrid regimes may appear to adopt international human rights standards on public assemblies, these are inconsistently implemented in practice. The resulting gap – between an apparent commitment to international standards and the reality 'on the ground' – can partly be explained by the fact that human rights standards are themselves primarily oriented to facilitating and protecting public assemblies as a part of the democratic process. In contrast, legal frameworks and public order policing in hybrid regimes serve a different purpose than to enable a democratic process. In particular, in the absence of mechanisms of accountability, hybrid regime incumbents manipulate legal rules – and the discretion conferred on law enforcement officials – so as to secure their continued dominance. The thesis thus illustrates how such rule *by* law is used to strengthen and 'street-proof' hybrid regimes.

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List of Abbreviations

AICHR	ASEAN Intergovernmental Commission on Human Rights
ASEAN	Association of Southeast Asian Nations
BBC	The British Broadcasting Corporation
CCC	The Civil and Commercial Code of Thailand
CPP	Cambodian People's Party
CCPR	The Human Rights Committee that monitors implementation of the ICCPR
CNRP	Cambodia National Rescue Party
CP	Contentious Politics
CRES	The Centre for the Resolution of the Emergency Situation
ECHR	The European Convention on Human Rights
ECtHR	The European Court of Human Rights
FSB	Federal Security Services
GONGOs	Government-Organised Non-Governmental Organisations
HINDRAF	The Hindu Rights Action Force
ICCPR	The International Covenant on Civil and Political Rights
ICESCR	The International Covenant on Economic, Social and Cultural Rights
IHRL	International Human Rights Law
ISA	Internal Security Act
ISOC	Internal Security Operation Command
KGB	Komitet Gosudarstvennoy Bezopasnosti
LANGO	Law on Associations and Non-Governmental Organisations
MoA	Margin of Appreciation

MVD	The Interior Ministry of Russia
NCOs	Non-Commercial Organisations
NCPO	National Council for Peace and Order
NDI	The National Democratic Institute
NDM	The New Democracy Movement
NGOs	Non-Governmental Organisations
ODIHR	The OSCE Office for Democratic Institutions and Human Rights
OSCE	The Organisation for Security and Co-operation in Europe
PAA	Public Assembly Act / Peaceful Assembly Act/ Law on Peaceful Assembly
PAD	People's Alliance for Democracy
PCAD	The People's Committee for Absolute Democracy with the King as Head of State
POS	Political Opportunity Structure
PRK	Parti Keadilan Rakyat (People's Justic Party)
RELA	The People's Volunteer Corps
SLAPP	Strategic Lawsuit Against Public Participation
SOSMA	The Security Offences (Special Measures) Act 2012
SUHAKAM	Suruhanjaya Hak Asasi Manusia Malaysia (The Human Rights Commission of Malaysia)
TRCT	Truth for Reconciliation Commission of Thailand
UDD	The United Front for Democracy Against Dictatorship
UDHR	The Universal Declaration of Human Rights
UK	The United Kingdom

UKM	Universiti Kebangsaan Malaysia
UMNO	The United Malays National Organisation
UNODC	The United Nations Office on Drugs and Crime
UNSRFAA	The United Nations Special Rapporteur on the Rights to Freedom of Assembly and of Association
UPR	The Universal Periodic Review
UUCA	The Universities and University Colleges Act 1971
VDC	The Volunteer Defence Corps
WUNC	Worthiness, Unity, Numbers and Commitment

List of Key Legislation:

The Charter of the United Nations 1945

The European Convention on Human Rights 1950

The International Covenant on Civil and Political Rights 1966

The International Covenant on Economic, Social and Cultural Rights 1966

Cambodia

Constitution of Cambodia 1993

Law on Peaceful Assembly 2009

Law on Associations and Non-Governmental Organisations 2015

Criminal Code of Cambodia 2009

Malaysia

Constitution of Malaysia 1957

Internal Security Act 1960

Legal Profession Act 1979

Peaceful Assembly Act 2012

Protected Areas and Protected Places Act 1959

Sedition Act 1948

Society Act 1966

Security Offences (Special Measures) Act 2012

Trade Unions Act 1959

Universities and University Colleges Act 1971

Volunteers Corps Act 2010

Thailand

Advertisement by Amplifier Act 1950

Civil and Commercial Code of Thailand 1925

Civil Procedure Code of Thailand 1934

Computer Crime Act 2007

Constitution of Thailand 2017

Constitution Referendum Act 2016

Interim Constitution of Thailand 2014

NCPO Order No.3/2558 2015

NCPO Order No.7/2558 2015

NCPO order No.88/2557 2014

Public Assembly Act 2015

Rule of the Ministry of Labour and Social Welfare on the Entry of Foreign Private Organisations to Operate in Thailand 1998

Volunteer Defence Corps Act 1954

Russia

The Federal Law No. 18-FZ on Introducing Changes to Several Legislative Acts of the Russian Federation 2006

The Federal Law No. 121-FZ 'On Amendments to Legislative Acts of the Russian Federation Regarding the Regulation of the Activities of Non-profit Organisations Performing the Functions of a Foreign Agent 2012

The Federal Law No.129-FN on Amendments to Certain Legislative Acts of the Russian Federation 2015

The Federal Law No.135-FZ (the Anti-LGBT Propaganda Law) 2013

The Federal Law No.54-FZ on Gatherings, Meetings, Demonstrations, Processions and Picket 2004

India

The Criminal Procedure Code of India 1973

United Kingdom

Civil Contingencies Act 2004

Emergency Powers Act 1964

List of Cases:

UN Human Rights Committee (CCPR)

Aleksandrov v Belarus (29 August 2014) Communication No. 1933/2010 CCPR/C/111/D/1933/2010

Alekseev v The Russian Federation (2 December 2013) Communication No. 1873/2009 CCPR/C/109D/1873/2009

Androsenko v Belarus (11 May 2016) Communication No. 2092/2011 CCPR/C/116/D2092/2011

Bakur v Belarus (7 September 2015) Communication No. 1902/2009 CCPR/C/114/D/192/2009

Bazarov v Belarus (29 August 2014) Communication No. 1934/2010 CCPR/C/111/D/1934/2010

Belyazeka v Belarus (23 March 2012) Communication No. 1772/2008 CCPR/C/104/D/1772/2008

Coleman v Australia (10 August 2006) Communication No. 1157/2003 CCPR/C/87/D/1157/2003

Evrezov, Nepomnyaschikh, Polyakov and Rybchenko v Belarus (25 November 2014) Communication No. 1999/2010 CCPR/C/112/D/1999/2010

Evrezov v Belarus (17 August 2015) Communication No. 1988/2010 CCPR/C/114/D/1988/2010

Katsora v Belarus (28 November 2012) Communication No. 1836/2008 CCPR/C/106/D/1836/2008

Kirsanov v Belarus (5 June 2014) Communication No. 1864/2009 CCPR/C/110/D/1864/2009

Koreshkov v Belarus (9 November 2017) Communication No. 2168/2012 CCPR/C/121/D/2168/2012

Kovalenko v Belarus (26 September 2013) Communication No.1808/2008 CCPR/C/108/D/1808/2008

Levinov v Belarus (12 July 2012) Communication Nos. 1867/2009, and 8 others CCPR/C/105D/1867/2009, 1936, 1975, 1977-1981, 2010/2010

Levinov v Belarus (14 July 2016) Communication No. 2082/2011 CCPR/C/117/D2082/2011

M.T. v Uzbekistan (21 October 2015) Communication No. 2234/2013 CCPR/C/114/D/2234/2013

Nepomnyashchiy v Russian Federation (23 August 2018) Communication No. 2318/2013 CCPR/C/123/D2318/2013

Olmedo v Paraguay (26 April 2012) Communication No. 1828/2008 CCPR/C104/D/1828/2008

Pivonos v Belarus (4 December 2012) Communication No. 1830/2008 CCPR/C/106/D/1830/2008

Poplavny v Belarus (30 December 2015) Communication No. 2019/2010 CCPR/C/115/D/2019/2010

Popova v The Russian Federation (17 April 2018) Communication No. 2217/2012 CCPR/C/122/D/2217/2012

Praded v Belarus (25 November 2014) Communication No. 2029/2011 CCPR/C/112/D/2029/2011

Protsko and Tolchin v Belarus (2 December 2013) Communication Nos. 1919-1920/2009 CCPR/C/109/D/1919-1920/2009

Reyes et al v Chile (27 November 2017) Communication No. 267/2015 CCPR/C/121/D267/2015

Statkevich and Matskevich v Belarus (16 December 2015) Communication No. 2133/2012 CCPR/C/115/D/2133/2012

Sudalenko v Belarus (28 December 2015) Communication No. 2016//2010 CCPR/C/115/D/2016/2010

Surgan v Belarus (15 July 2015) Communication No. 196/2010 CCPR/C/114/D/1969/2010

Svetik v Belarus (25 August 2004) Communication No. 927/2000 CCPR/C/81/D/927/2000

Sviridov v Kazakhstan (5 September 2017) Communication No. 2158/2012 CCPR/C/120/D/2158/2012

Turchenyak et al. v Belarus (10 September 2013) Communication No. 1948/2010 CCPR/C/108/D/1948/2010

Velichkin v Belarus (20 October 2005) Communication No. 1022/2001 CCPR/C/85/D/1022/2001

Youbko v Belarus (24 April 2014) Communication No. 1903/2009 CCPR/C/110/D/1903/2009

Zalesskaya v Belarus (28 April 2011) Communication No. 1604/2007 CCPR/C/101/D/1604/2007

Zhagiparov v Kazakhstan (8 November 2018) Communication No.2441/2014 CCPR/C/124/D/2441/2014

European Court of Human Rights (ECtHR)

Abdullah Yaşa and Others v Turkey App no 44827/08 (ECtHR, 16 July 2013)

Alekseyev v Russia App nos 4916/07, 25924/08 and 14599/09 (ECtHR, 21 October 2010)

Cambodia

Malaysia

Russia

Constitutional Court's judgment No. 24-П/2019 on 18 June 2019

Thailand

Administrative Court's injunction Black No.154/2561 on 26 January 2017

Administrative Court Red No. 2058/2561 on 28 September 2018

Administrative Court Red No.925/2561 on 21 May 2018

Appeal Court Red No.14177/2561 on 17 October 2018

Bangkok South Municipal Court Black No**.**1619/2559 on 19 May 2016

Bangkok South Municipal Court Black No**.**1620/2559 on 19 May 2016

Chiang Mai Municipal Court Black No. 6792/2561 on 25 December 2018

Constitutional Court No. 20/2551 on 2 December 2008

Criminal Court Black No. Aor.2542/2553 on 14 August 2019

Dusit Municipal Court Black No. 370/2562 on 21 August 2019

Dusit Municipal Court Red No. Aor.317/2560 on 10 February 2017

Dusit Municipal Court Red No.2772/2560 on 28 December 2017

Khonkaen Provincial Court Red No. Lor Mor.1/2560 on 2 November 2017

Songkhla Provincial Court Black No.115/2561 on 12 January 2018

Supreme Court Black No. Aor.1107/2559 on 27 August 2019

United Kingdom

Kay v Commissioner of the Police of the Metropolis [2007] EWCA Civ 477 and [2006] EWHC 1536 (Admin)

Kay v Commissioner of the Police of the Metropolis [2008] UKHL 69

United States of America

Whitney v California 274 US 35

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Chapter 1 Introduction

1.1 Background and motivation

Freedom of assembly is essential for every democratic society. It is a fundamental freedom under international human rights law (IHRL). Legal mechanisms governing public assembly in consolidated democracies are guided by IHRL and international standards, emphasizing that states have positive obligations to facilitate and to protect peaceful assemblies. Some states, however, that are bound to respect these IHRL obligations (having ratified relevant human rights treaties) do not comply. Their behaviour fits neither the description of a consolidated democracy nor of a closed-authoritarian regime. These states can be classified as "hybrid regimes" – an independent regime type standing between democratic and authoritarian regimes.[1]

A consolidated democracy or an authoritarian regime can be transformed into a hybrid regime.[2] Democratisation is not a one-way process. Hybrid regimes are characterised by their institutional features that are mixed between the features which are typical of a democracy and an autocracy.[3] The typical features of a hybrid regime are the presence of unfair political competition and the presence of a not-fully-functioning liberal constitution.[4] The authoritarian style of governance in hybrid regimes leads to the systematic alteration of the rules guaranteed by the constitution.[5] The uneven playing field allows the incumbent leaders to abuse state resources, manipulate the media, harass opposition politicians and government critics.[6] In these circumstances, the opposition parties can still win some seats in parliament but they have little (or no) chance of winning a general election and unseating the government.[7] Civil societies in

[1] András Bozóki and Dániel Hegedűs, 'An externally constrained hybrid regime: Hungary in the European Union' (2018) 25 Democratization 1173, 1175.

[2] For example, Hungary after 2010 eroded from a consolidated Western-type liberal democracy to a hybrid regime. Thailand in 2008 (the Samak Sundaravej administration) and in 2019 (the Prayut Chan-o-cha administration) transformed from a military dictatorship to a hybrid regime.

[3] Andrea Cassani, 'Hybrid What? The Contemporary Debate on Hybrid regimes and the Identity Question' 13 September 2012) <https://www.sisp.it/files/papers/2012/andrea-cassani-1445.pdf> accessed 10 July 2019.

[4] ibid.

[5] ibid.

[6] Steven Levitsky and Lucan A Way, 'Elections Without Democracy: The Rise of Competitive Authoritarianism' (2002) 51, 53.

[7] Larry Diamond, Juan J Linz and Seymour Martin Lipset, *Democracy in developing countries* (Lynne Rienner Publishers 1989) 25.

these regimes enjoy greater space than in closed authoritarian regimes, but much less than that in consolidated democracies.

A consolidated democracy is often referred to as 'a democratic regime that relevant observers expect to last well into the future'.[8] When a democracy becomes consolidated, all political actors accept the legitimacy of democracy and regard democracy as the only game in town.[9] In contrast, closed authoritarian regimes do not select their leaders through general elections. They claim legitimacy from other sources such as foundational myths, ideology, personalism, procedures, performance, and international engagement.[10] Closed authoritarian rulers maintain their political power through the use of repression. Opposition political parties, civil society, and media are banned or diminished until they are powerless.[11] In contrast, political actors in hybrid regimes accept the principle of popular consent and citizens generally have more strength to check the government than those in closed authoritarian regimes (albeit at a much lower level than those in consolidated democracies).[12] Democratic principles in hybrid regimes are severely constrained as a result of the uneven playing field between government and opposition actors.[13] The competition between political parties is compromised because election outcomes do not represent popular preferences.[14] In the same way, I notice that this uneven playing field in hybrid regimes substantially affects how the authorities regulate public assemblies and how people exercise their freedom of assembly.

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[8] Andreas Schedler, 'What Is Democratic Consolidation?' (1998) 9.2 Journal of Democracy 91, 102

[9] Yana Gorokhovskaia, 'Democratic Consolidation' (*Oxford Bibliographies*, 26 July 2017) <https://www.oxfordbibliographies.com/view/document/obo-9780199756223/obo-9780199756223-0224.xml#firstMatch> accessed 4 July 2019.

[10] Christian von Soest and Julia Grauvogel, 'Identity, procedures and performance: how authoritarian regimes legitimize their rule' (2017) 23 Contemporary Politics 287, 289 – Von Soest and Grauvogel propose six claims to legitimacy in authoritarianism: (1) a foundation myth –the leader role in the state-building process such as war, revolutions, and liberation movements; (2) ideology—the righteousness of a given political order such as nationalism and communism; (3) personalism—the charismatic of the leaders or the ruler's centrality to achieve the nation's stability; (4) procedures—the rule-based mechanisms for handing power such as bureaucratic-military authoritarian regimes go through a lengthy legal framework to exercise their authority; (5) performance—the success in satisfying citizens' needs such as material welfare and security. The rulers present themselves as the guarantor of such success; and (6) international engagement—the leader's role in international arenas such as in international negotiations or regional organisations.

[11] ibid 292.

[12] ibid.

[13] S Levitsky and LA Way, 'The rise of competitive authoritarianism' (2002) 13(2) Journal of Democracy 51, 53.

[14] Leah Gilbert and Payam Mohseni, 'Beyond Authoritarianism: The Conceptualization of Hybrid Regimes' (2011) 46 Studies in Comparative International Development 270, 273 cited Dimond, Linz and Lipset (n7).

My curiosity was prompted by an observation that Cambodia, Malaysia, and Thailand have faced similar political protests in which the opposition parties and the pro-regime groups both mobilise their supporters on the street. Their politics are heavily polarised, and public assemblies have been a primary tool used to try and bring about regime change (though not always in the direction of transition to a more democratic society). I compared the laws governing public assemblies and found that these three countries share a number of further similarities. The constitution in these countries guarantees freedom of assembly, and the laws governing public assemblies have the declared purpose of allowing people to enjoy the freedom of assembly. However, these laws were all enacted as a response to an increase in street protests demanding regime change. I suspected that the true purpose these laws was less about protecting this fundamental democratic right than protecting the dominant political elites from popular challenge.

The political context in Thailand, Malaysia, and Cambodia

In Thailand, the contestation between the Red-shirt protests and the Yellow-shirt protests have been taking their turn to mobilise their supporters on the street to protest against the incumbent government. The Red-shirts are backed by pro-democracy groups and supporters of Thaksin Shinawatra and Yingrak Shinawatra, ousted-prime ministers, while the Yellow-shirts are backed by pro-military groups and royalists. Both camps organised street protests aiming to overthrow the existing government. The Red-shirts demanded that the government dissolve the parliament and call for a general election. On the other hand, the Yellow-shirts accused the head of the government of corruption and demanded political reform. These assemblies often led to violence on the street providing an opportunity for an aggressive security response, ostensibly to restore peace and order. For example, on 19 September 2006, following a series of Yellow-shirt protests against the government of Thaksin Shinawatra, the military intervened and took control of political institutions (regarded by many as a military ‘coup’). The military introduced a new constitution and then called for a general election.

Still, the Red-shirts managed to win the election and establish a popular government on 8 September 2008. However, from May to December 2008 the Yellow shirts launched series of street protests in Bangkok, including the seizure of the government house and two international airports in Bangkok. On 2 December 2008, while the Yellow-shirts still occupied these vanues, the Constitutional Court dissolved Palang Prachachon Party (the Red-shirt political party) on

the ground of electoral misconduct by a member.[15] Noticeably, the dissolution of the party coincided with one of the demands from the on-going Yellow-shirt protests.[16] Ultimately, the Yellow-shirt protests paved a way to the Abhisit administration, a military-backed government. Similarly, then the Red shirts mobilised supporters to protest against the Abhisit administration. However, they were faced with a brutal crackdown from the military. The Red-shirts demanded Abhisit to resign and called for a general election. They occupied several streets around Bangkok business centre. Then the government responded by using excessive use of force to disperse the protests in Rajprasong on 19 May 2010. The crackdown by the military led to a dissolution of Parliament and immediate elections. Later, the Red-shirt party won the general election. After the Red shirts took office, the Yellow shirts mobilised their supporters on the street and created an opportunity for the military to stage a further 'coup' on 22 May 2014.

Thai politics have been travelling through this circle twice in the past two decades. Although there are two different political competitors achieving in overturning the government, Thailand is a hybrid regime because the political competition has never been fair, and the constitutions were drafted to elevate the pro-military camp. Public order policing towards the Red and the Yellow was markedly different. The military explicitly sided with the Yellow movement, and so the Yellow shirt protesters could occupy many key government sites such as the government house and international airports, without being violently dispersed. In contrast, the Red shirt rallies (including the attempts to occupy streets around a business district) faced a brutal crackdown and were forcibly dispersed by the military.

The last two coup d'état, in 2006 and 2014 undeniably came after the Yellow-shirt demonstrations. A year after the 2014 coup, the military government enacted the Public Assembly Act 2015 to govern public assemblies. To me, it was obvious that the military government wanted a tool to manage political protests rather than the law's officially stated purpose – to fulfil Thailand's international obligations under the International Covenant on Civil and Political Rights (ICCPR). I suspected that the Act was another measure to reinforce the uneven playing field in terms of governing public assemblies.

Cambodia and Malaysia have similar laws governing public assemblies that shape the way people protest. Cambodia enacted the Law on Peaceful Assembly in 2009 and Malaysia enacted Peaceful Assembly Act in 2012. Both laws were enacted in response to the rise in anti-

[15] Thailand Constitutional Court Decision No.20/2551 on 2 December 2008.
[16] Björn Dressel and Khemthong Tonsakulrungruang, 'Coloured Judgements? The Work of the Thai Constitutional Court, 1998-2016' (2019) 49 Journal of Contemporary Asia 1, 6.

government protests. In 2013, the Cambodia National Rescue Party (CNRP), the major opposition party, ran large public assemblies against the government in the capital demanding more transparent politic. When the movements became popular, the military violently clashed with the protesters. The Freedom Park, a designated assembly area under the law, was closed outright and the Minister of Interior announced an indefinite ban on public demonstrations.[17] Numbers of trainings, meetings and public forums which fall outside of the notification requirements of the law were banned.[18] Organisers and participants were frequently targeted for criminal prosecution and harassment.[19] Later, the Cambodian People's Party (CPP) was accused of deliberately passing legislation to suppress political protests. The Penal Code, the Law on Peaceful Assembly and the Law on Associations and Non-Governmental Organisation provided a legal basis to contain the escalation of public assemblies. [20]

In Malaysia, the Peaceful Assembly Act was a response to contain massive opposition rallies. The opposition parties and several NGOs initiated the Bersih movement urging the government to reform the electoral process. The first Bersih rally was launched in 2007. The anti-government rally was stopped, and the organisers were arrested.[21] It was followed by the Bersih 2.0 in 2011 which attracted around 50,000 protesters. While Bersih 2.0 was a peaceful demonstration, the police deployed excessive force to disperse it and arrested 1,667 protesters.[22] After violent clashes, the Malaysian Government enacted the Peaceful Assembly Act 2012. This legislation bans any assembly in the form of street protest. Bersih 3.0 was held in 2012, it started out peacefully but turned to violence after police used tear gas and water cannons. Bersih continued mobilising supporters on the street and advocating regime change until the dominant party, UMNO and its alliance, lost the general election for the first time in Malaysian history

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[17] Amnesty International, 'Taking to the Street – Freedom of Peaceful Assembly in Cambodia' (4 June 2015) < https://www.amnesty.org/en/documents/asa23/1506/2015/en/> accessed 11 May 2016, 6.

[18] ibid 8.

[19] ibid.

[20] Siena Anstis, 'Using Law to Impair the Rights and Freedoms of Human Rights Defenders: A Case Study of Cambodia' (2012) 4 Journal of Human Rights Practice 312, 313.

[21] 'Police block Malaysia protest' (Aljazeera, 11 December 2007)<http://www.aljazeera.com/news/asia-pacific/2007/12/2008525131234195960.html> accessed 10 May 2016.

[22] Amnesty International, 'Malaysia frees activists detained under emergency law'(29 July 2011) <https://www.amnesty.org/en/latest/news/2011/07/malaysia-frees-activists-detained-under-emergency-law/> access 10 May 2016.

in 2018. Unsurprisingly, the Peaceful Assembly Act did not ease the people's right to enjoy freedom of assembly. In contrast, it was used as a tool to repress street protest. The new government was led by Mahathir Mohamad who was the Prime Minister from 1981-2003. Although he joined several Bersih rallies and had declared that he would abolish the Peaceful Assembly Act, the Mahathir administration only amended the law to decriminalise street protests and shorten the notification period requirement.[23] Although the amendment made the law less restrictive, there are still other restrictions that the government use in shaping the exercise of freedom of assembly in Malaysia.

The experiences in these three jurisdictions inspired me to explore the relationship between social movements, politics, and law. Having a legal framework that states its purpose to enable people to enjoy the constitutionally guaranteed freedoms does not guarantee that it will be implemented accordingly. By examining this relationship, we will learn more about how individuals enjoy freedom of assembly in hybrid regimes, and more specifically, about the role of law and its institutions in facilitating the mobilisation of social movements.

1.2 Justification for the research

The concept of hybrid regimes was proposed to distinguish a type of political regime that appears somewhere on the spectrum of transition towards democracy. It is a concept that challenges the standard authoritarian/democracy dichotomy. Social movement scholars have agreed that there is a strong relationship between patterns of contention and the nature of political regimes.[24] In particular, Graeme Robertson has argued that the social movement studies literature depicts a sharp contrast between protest in democracies and protest in authoritarian regimes while the characteristics of protest in hybrid regimes are relatively unexplored and tell a different story. He sought to fill this gap by introducing a study of the politics of protest in hybrid regimes (focusing on the Russian Federation). He suggests that classic social movement theoretical frameworks cannot be applied to hybrid regimes to understand the pattern of protests. This is because the protest pattern in hybrid regimes often looks like the protest pattern in democracies where there are well-organised and autonomous opposition movements (though here such opposition organisations are absent, protest in hybrid

[23] Syed Umar Ariff and Arfa Yunus, 'Parliament decriminalises street protests' (*New Straits Times*, 4 July 2019) <https://www.nst.com.my/news/nation/2019/07/501559/parliament-decriminalises-street-protests> accessed 10 July 2019.

[24] Graeme B Robertson, *The politics of protest in hybrid regimes. managing dissent in post-communist russia* (New York : Cambridge University Press 2011) 9-10.

regimes will look similar to those in authoritarian regimes).[25] Moreover, Robertson points out that not all protests in hybrid regimes advocate for democracy or liberal revolutions. Protests in hybrid regimes comprise both real pressure from below and ersatz social movements mobilised by the state itself.[26]

Overall, the disciplinary differences between social movement studies, political science, and law cause a silo effect in the literature on public assemblies.[27] On the one hand, social movement scholars use large-scale event catalogues. This method is hardly applied to understand contention in countries where there are no systematic newspaper records or well-organised databases. Social movement scholars rarely acknowledge the comparative frameworks developed by political scientists to understand contention in developing nations.[28] They prefer to rely on case studies of individual movements, often with a western bias, and focusing on the origins and outcomes of contentious episodes. Tarrow noted that Tilly and his collaborators overlooked the connections between contentious politics and different regime types.[29] On the other hand, scholars in political science rarely touch on the rich social movement and revolution studies literature in sociology because political scientists are not familiar with the tools and methods that sociologists use.

What makes this thesis particularly significant is that law, as a discipline, is broadly missing from the literature in both social movement studies and political science. Comparative legal scholarship has paid little attention to freedom of assembly – perhaps because it is assumed that any scholarly grand doctrine has already been developed through other similar freedoms such as freedom of expression and association.[30] This thesis argues that Robertson and other social movement scholars have overlooked the significance of legal mechanisms governing public assemblies. I believe that legislation and law enforcement practices are by-products of the exercise of state power. They provide vitally important insights, and tangible evidence for understanding, the repertoires of contention in every state. It is striking, therefore, that the social movement studies and political science literature have not yet attempted to explain why legal

[25] ibid 10.
[26] ibid 13.
[27] Donatella Della Porta and Mario Diani, *The Oxford Handbook of Social Movements* (Oxford University Press 2015) 90.
[28] ibid 89.
[29] ibid 91.
[30] Orsolya Salát, 'Comparative Freedom of Assembly and the Fragmentation of International Human Rights Law' (2014) 32 Nordic Journal of Human Rights 140, 141.

mechanisms governing public assemblies in hybrid regimes work differently from those in consolidated democracies.

1.3 Research problem and questions

The central question of this thesis is why laws governing public assemblies and public order policing in hybrid regimes do not support individuals to enjoy freedom of assembly according to international standards. The main thesis argument is that incumbents in hybrid regimes accommodate significant freedom of assembly while minimising the possibility of losing their power by curtailing the scope of freedom of assembly through legal frameworks governing public assemblies and public order policing. Although laws governing public assemblies in hybrid regimes have many components that are similar to those in consolidated democracies, these laws are enforced differently in hybrid regimes because they serve a different purpose than to enable the democratic process. This is why international standards on public assemblies and IHRL do not have much traction in hybrid regimes. The legal frameworks and public order policing in hybrid regimes provide the incumbents with opportunities to construct and to stabilise the regimes.

Unlike closed authoritarian regimes, in which opposition protests are generally prohibited, incumbents in hybrid regimes allow opposition movements to challenge the regime in the public. Therefore, the incumbents need to manage and reduce the threat from the street. On the one hand, a hybrid regime needs to effectively dominate the political sphere and ensure the continuity of the regime. On the other hand, it needs to be able to absorb pressure from the international community to uphold and protect human rights standards, and thus needs to provide (at least) the formal appearance of protecting and enshrining oppositional routes to power. Indeed, the constitutions in many hybrid regimes themselves guarantee freedom of assembly. States have committed themselves (through ratification of international treaties) to respect human rights. However, Robertson overlooks this legal aspect – the role of law and its institutions – in shaping protest patterns. Hence, this study aims to link aspects of the legal regulation of freedom of assembly in Southeast Asia (focusing on Cambodia, Malaysia, and Thailand) with Robertson's theoretical framework of protest in hybrid regimes. It seeks to illustrate the background factors that explain how laws governing public assemblies in hybrid regimes function (and are enforced) differently from those in consolidated democracies.

In short, there is a need to consider the role of law and its institutions in shaping the repertoires of political contention in hybrid regimes. The originality and significance of this thesis comes from the attempt to connect the relationships between three scholarly disciplines (social

movement studies, political science and law) in doing so – as well as from the region that this thesis focuses upon. The thesis highlights the effects of the disconnection between IHRL and public assembly law in practice. It suggests that there is a correlation between Robertson's understanding of the politics of protest in hybrid regimes and the specific characteristics of legal mechanisms governing public assemblies.

1.4 Methodology

This thesis follows a doctrinal approach to legal research. It focuses on the international standards distilled from the case law of the CCPR and ECtHR as well as court decisions and academic commentary involving the legislation on public assemblies and public order policing in hybrid regimes. The thesis also draws on inter-disciplinary works from the fields of social movement studies and political science. It aims to broaden these fields by inserting observations from a legal perspective. First, it identifies the international standards on governing public assembly from the CCPR and the ECtHR through their online databases.[31] The thesis then discusses Robertson's monograph, 'The Politics of Protest in Hybrid Regimes' and suggests that Robertson – like other social movement scholars – has overlooked the important role of law (and the way in which it shapes public order policing) in understanding protest practices in hybrid regimes.

This thesis seeks to identify the characteristics of legal mechanisms governing public assemblies in hybrid regimes by using Robertson's criteria in the politics of protest in hybrid regimes as a foundation. Then, it compares the international standards against the legislation in three jurisdictions in Southeast Asia (Thailand, Malaysia and Cambodia) governing public assemblies and public order policing to illustrate that hybrid regime incumbents essentially curtail freedom of assembly through legal mechanisms.

For legislation and cases from domestic jurisdictions, this thesis uses original documents if they are available in English or in Thai. There is no official English translated legal database in Cambodia and Thailand. The Malaysian legal database only partly includes English translations. To address this gap, and thus to help triangulate the data relied upon, the thesis further draws upon English translations of materials in other languages that are found in

[31] The CCPR cases can be found from the Office of the United Nations High Commissioner for Human Rights <http://juris.ohchr.org/Search/Documents>; The ECtHR cases can be found in HUDOC database <https://hudoc.echr.coe.int>.

credible sources such as from well-known newspapers and international human rights NGOs' reports.

1.5 Parameters of the research

This thesis draws exclusively from the European Court of Human Rights (ECtHR) and UN Human Rights Committee (CCPR) jurisprudence due to the rich case law developed by these bodies on the right to freedom of peaceful assembly. It omits consideration of other regional judicial bodies such as the Inter-American Court of Human Rights and African Commission on Human and Peoples' Rights due to the fact that the freedom of assembly jurisprudence of these bodies is both limited, and (in any case) is largely derivative of the ECtHR and CCPR standards.

Regarding the definition of "hybrid regimes". The two main approaches defining hybrid regimes are the diminished democracy approach and the diminished authoritarianism approach.[32] The diminished democracy approach conceives of hybrid regimes in terms such as illiberal democracy[33], semi-democracy,[34] partial democracy,[35] and defective democracy.[36] On the other hand, the authoritarianism approach refers to competitive authoritarianism[37] and electoral authoritarianism.[38] Instead of referring a non-democracy as a democracy or an authoritarianism with adjectives, it should be seen as a regime that is neither a democracy nor authoritarian.[39] Therefore, this thesis follows Robertson's generic term of "hybrid regimes" referring to *'a broad range of regimes in which at least some legitimate and public political competition coexists with an organisational and institutional playing field that renders this competition unfair'*.[40]

The thesis chooses Cambodia, Malaysia, and Thailand as the subject countries because they are hybrid regimes that have similar political movements. The yellow shirt – Red shirt movements in Thailand inspired protest organisers in Cambodia and Malaysia to adopt the same tactics to

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[32] Gilbert and Mohseni (n 14) 273.
[33] Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76 Foreign Affairs 22.
[34] Diamond, Linz and Lipset (n 7).
[35] David L Epstein and others, 'Democratic Transitions' (2006) 50 American Journal of Political Science 551, 555.
[36] Aurel Croissant, 'From transition to defective democracy: mapping Asian democratization' (2004) 11 Democratization 156.
[37] S Levitsky and L A Way, *Competitive Authoritarianism: Hybrid Regimes After the Cold War* (Cambridge University Press 2010).
[38] Andreas Schedler, *The politics of uncertainty. sustaining and subverting electoral authoritarianism* (Oxford studies in democratization, Oxford : Oxford University Press, 2013. 2013).
[39] Gilbert and Mohseni (n 14) 281.
[40] Robertson (n 24) 6.

advance similar demands. The incumbents in these three countries responded in the same manner by introducing legislation governing public assembly within the same decade. All three countries had many organised protests challenging long-dominant political factions. Eight other countries in Southeast Asia had the potential of being a subject country in this study but the selection here is based on an evaluation of those countries that most closely resemble the characteristics of a hybrid regime.[41]

In this regard, similar uneven playing fields in the political arenas can be found across the three countries at different levels. Thailand represents a regime that swings between the military-backed/junta government and the populist government. Although the populist political parties sometimes managed to win general elections, Thailand is still a hybrid regime because the uneven playing field continue to exist because the constitution was carefully designed to give pro-military parties an unfair advantage. Also, when the populist parties were in power, they tended to elevate their political advantage by abusing state resource and manipulated the media. Cambodia represents a strong hybrid regime. Prime Minister Hun Sen has been in power for more than thirty years. The Cambodian People's Party (CPP) and Hun Sen's sponsors turned Cambodian politics into personalised power networks through patron-client relationships.[42] They created '*a massive patronage-based vote- driving machine*' to ensure their election victory.[43] Also, there are several laws creating unfair political advantages to the incumbents.[44] Within the same spectrum, Malaysia represents a mild hybrid regime. The United Malays National Organisation (UMNO) ruled Malaysia from 1957 to 2018. It exercised semi-legal techniques to impose disadvantage on the opposition before any votes were cast.[45] The opposition parties were banned from organising large public rallies and were limited to small indoor gatherings. The election campaign period was short while the government utilised the media outlets, state equipment and development grants with a blind eye from the electoral commission.[46] Although the civil society exists, individuals and NGOs do not operate in the same capacity as those in consolidated democracies. UMNO has created ersatz social

[41] Eight other countries are Brunei, Indonesia, Laos, Myanmar (Burma), Philippines, Vietnam, Singapore, and Timor-Leste. These countries have specific laws on freedom of assembly and trend to arbitrarily enforce them to limit the scope of freedom of assembly. Laos and Vietnam follow communism. Brunei is an absolute monarchy.

[42] Mona Lilja, 'Discourses of Hybrid Democracy: The Case of Cambodia' (2010) 18 Asian Journal of Political Science 289, 302.

[43] Un Kheang, 'The Cambodian People Have Spoken' (2015) Southeast Asian Affairs 102, 103.

[44] Anstis (n 20) 313.

[45] Jason Brownlee, *Authoritarianism in an age of democratization* (Cambridge : Cambridge University Press, 2007), 129.

[46] ibid.

movements to drive the party's agendas and dominate the civil society. The uneven playing field in Malaysian politics continued at a lesser degree after UMNO lost the general election in 2018.

This thesis is a study on the nature of protest law and its enforcement in hybrid regimes. The term 'protest' and 'public assemblies' are used interchangeably (though it is of course recognised that not all protests take the form of an assembly, and not all public assemblies are protests). In this study, the focus is on assemblies in public places that demand change in public policies or that advocate particular political opinions. This focus encompasses a wide range of protest activity (including, for example, labour marches on the international labour day, protests by standing silently in a small group, protests by gathering names to submit a petition to the authorities, and protests by performing arts). However, it deliberately excludes from the scope of the thesis online protest in digital space – primarily because such activism raises a range of very different issues that have not yet been the focus of legal (i.e. legislative) initiatives in hybrid regimes. Moreover, I suggest that online mobilisation does not demonstrate the participants' worthiness, unity, numbers and commitment (WUNC) in the same tangible way as offline, real-world, physical assemblies.[47] Of-course, that does not exclude the possibility that online protests may, in future years, take over some or many of the political functions currently realised primarily through physical assemblies. Nor is to deny that online mobilisation may already play a significant role in political will formation, and thus represent a challenge to regime stability, in hybrid regimes. The focus, here, is however on the particular legal frameworks enacted to govern real-world demonstrations in the street.

1.6 Thesis outline

This thesis is organised into six chapters. Following from this first introductory chapter, the second chapter explores international standards on freedom of assembly arising from CCPR and ECtHR case law. It examines the particular image of a democratic society that human rights law pursues (or perhaps, assumes) – namely, a society that upholds the values of pluralism, tolerance and broadmindedness. Ultimately, the right to freedom of assembly will be afforded protection only if its exercise is deemed to conform with this pluralist conception of democracy. The chapter further explores the scope of the right to peacefully assemble; the corresponding obligations imposed on states by IHRL; permissible and impermissible restrictions on freedom

[47] Cf. Human Rights Council, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association (13 June 2018) A/HRC/38/34 para 80 –freedom of assembly covers the rights to assemble peacefully and associate freely online.

of assembly; prior notification requirements; and international standards on public order policing (specifically in relation to surveillance, arrest and the use of force). These international human rights standards – because of the principle of subsidiarity – can only provide a minimum baseline of protection (rather than a maximal standard). However, while these minimal standards ought to inform the legal framework governing public assemblies, and despite formal ratification of the ICCPR in two of the subject countries –Cambodia and Thailand – they ultimately fail to gain sufficient traction in hybrid regimes (as later chapters demonstrate).[48] It is suggested that while IHRL may be capable of constraining the worst excesses of protest regulation within established democracies, the gap between the conception of democracy underpinning human rights standards and the political and legal realities in hybrid regimes thwarts the realisation of an effective right of assembly in the latter.

The second chapter explores cases law involving time, place, and manner restrictions, content-based restrictions, and prior notification requirements to illustrate the international standards protecting freedom of assembly. Then, it discusses the international standards on public order policing such as the general duties of the police, surveillance, arresting, use of force, derogation and judicial review on public order policing. This chapter attempts to show that the CCPR and the ECtHR have established a minimum level of protection for the freedom of assembly. However, this body of case law also demonstrates that IHRL aims primarily to support and underpin democratic processes – and this (instrumental) democratic rationale is repeatedly emphasized by these regional and international bodies. In other words, the legal framework governing public assemblies and public order policing must conform with IHRL standards to ensure that democratic processes function properly.

The third chapter serves as a literature review exploring the role of public assemblies through social movement studies and political science perspectives. Then, it argues that scholars in these two disciplines have overlooked the role of law and its institutions, especially the legal mechanisms governing public assemblies. Consolidated democracies have incorporated international human rights standards on public assemblies (as identified in chapter 2) to ensure that freedom of assembly is properly exercised as a part of the democratic process. In contrast, hybrid regimes claim that they commit to international standards but it is suggested that the real

[48] Although Malaysia is not a party to the ICCPR, some provision of the ICCPR, particularly the freedom of assembly, are internationally recognised as binding under customary international law. In addition, Malaysia is a party to the ASEAN Human Rights Declaration which reaffirms that ‘every person has the right to freedom of assembly’.

goal is to minimise the political effect of street protests. This chapter then discusses Robertson's theory of the politics of protest and argues that it reveals the incentives of regime incumbents in hybrid regimes to restrict freedom of assembly: to impose the restrictions to limit the ability of political dissenters to mount public protests and, at the same time, allowing ersatz social movements to mobilise and dominate civil society.[49] In turn, this thesis seeks to identify the characteristics of laws governing public assemblies and of public order policing. This assumption is then tested by demonstrating that Russia under the Putin administration has curtailed opposition street protests through legal mechanisms while the regime itself has the ability to mobilise supporters to create an appearance of invincibility.[50] This chapter illustrates that the Putin administration controls what Robertson describes as "organisational ecology" through a legal framework governing NGOs and also controls "state mobilisation strategies" through legal frameworks governing public assemblies and public order policing. The result leads us to the question of whether the three Southeast Asian hybrid regimes use the same techniques to curtail the scope of freedom of assembly. This question is explored in chapter 4 and chapter 5.

The fourth chapter examines the characteristics of the legal frameworks governing public assemblies in Cambodia, Malaysia, and Thailand. With the incentives operating on hybrid regime incumbents that we have discussed in chapter 3, this chapter explores how the three hybrid regimes curtail the scope of freedom of assembly through legal frameworks governing public assembly. It demonstrates that hybrid regimes do not simply ban public assemblies but rather unfairly limit anti-regime protesters' ability to organise public assemblies. The legal frameworks in these regimes act as the 'street-proofing' mechanisms. This chapter argues that the legal frameworks in Cambodia, Malaysia and Thailand share two characteristics: (1) overly broad legal grounds for restricting freedom of assembly without the strict tests of necessity and proportionality, and (2) a lack of adequate judicial oversight. The authorities are thus able to enforce the law arbitrarily (even though the laws appear to be neutral). Content-based restrictions, blanket bans, and onerous notification requirements are imposed to curtail the exercise of the right to freedom of assembly. Therefore, the legal frameworks governing public assemblies have a clear role in providing the authorities with opportunities to act in favour of the regime incumbents.

[49] Robertson (n 24) 27.
[50] ibid 32.

The fifth chapter examines public order policing in hybrid regimes. It argues that public order policing in Cambodia, Malaysia, and Thailand were curtailed to provide the police opportunities to swing between democratic approach and authoritarian approach. It argues that the police in hybrid regimes share two characteristics: the lack of insulation from political influence and the divergence between the cultural norms of the police and international human rights norms. These two characteristics allow public order policing in the three states to 'swing' between a rights compliant approach and a rights abusive approach. This chapter examines public order policing in the three regimes through Pino and Wiatrowski's description of the principle of democratic policing: the rule of law, legitimacy, transparency and accountability, and subordination to civil authority. It demonstrates that the incumbents abuse and twist the understanding of the principle of democratic policing in order to manipulate the police. Police in the three regimes do not always abide by the positive obligations under international standards because their legal frameworks and institutional settings grant them unchecked power. Therefore, public order policing has a role in shielding the incumbents' political power from anti-regime protests on the street and in facilitating ersatz social movement to show their dominance.

The last chapter concludes how Robertson's politics of protest reveals the incentives of hybrid regimes incumbents in curtailing freedom of assemblies through legal frameworks and public order policing. They are street-proofing mechanisms allowing them to accommodate freedom of assembly to a minimal degree (so as to appear as democratic) while filtering out protests regarded as presenting a potential threat to the regime.[51] These mechanisms help the incumbents maintain elite unity and allow regime-supporters to display an appearance of invincibility. This chapter concludes that laws governing public assemblies and public order policing in hybrid regimes are designed precisely to give advantage to the incumbent leaders. This is the reason why the scope of freedom of assembly in hybrid regimes is significantly reduced when compared to that enjoyed in consolidated democracies. In conclusion, it is argued that social movement theorists and political scientists should pay more attention to the legal mechanisms governing public assemblies.

[51] Robertson (n 24) 168.

Chapter 2 International Human Rights Standards on Freedom of Assembly

Political stability and democratic legitimacy have long been closely connected with international human rights norms. Many world leaders after the Second World War believed that a strong international organisation with a mandate to address human rights issues could have prevented the rise of Hitler and the Holocaust.[1] Following from the non-binding 1948 Universal Declaration of Human Rights, UN member states in 1966 established binding treaty-based norms and institutions for the protection of the rights of individuals by adopting the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[2]

Notwithstanding this historical backdrop, the aspirational twinning of democratic pluralism and human rights has only really become an express hallmark of the international community since the 1990s.[3] After the ideological confrontation during the Cold War ended, democracy has been proven to be the best option allowing individual rights to thrive.[4] Moreover, there was a recognition that human rights became significant only when international norms are translated into real safeguards both domestically and internationally.[5]

Notably, the ICCPR and the ECHR provide us with good examples showing that international instruments can enhance the protection of human rights. Of particular relevance to this thesis, the UN Human Rights Committee (CCPR) and the European Court of Human Rights (ECtHR) have produced sizeable bodies of case law and legal principles in relation to freedom of assembly. Their voluminous jurisprudence allows this study to identify international standards on freedom of assembly. As such, this chapter aims to identify the international standards emerging from the CCPR and the ECtHR. Both have identified issues where domestic courts have failed either to recognise violations or to provide an effective remedy to victims of such violations.

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[1] Thomas Buergenthal, 'International Human Rights in an Historical Perspective' in Janusz Symonides (ed), *Human rights : concept and standards* (Unesco 2000) 11.

[2] The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted in the same year to make a composite package.

[3] Symonides (n 1) 17-8, 24.

[4] 'The Opening Statement of the United Nations Secretary-General', World Conference on Human Rights, United Nations, DPI/1394-39399, August 1993, 17.

[5] Symonides (n 1) 25.

The chapter first argues that IHRL depicts a certain image of a democratic society – namely, a polity that upholds the values of pluralism, tolerance, and open-mindedness. Moreover, IHRL has recognised that states must be able to defend themselves from anti-democratic behaviour. Second, this chapter explores the scope of the right to freedom of peaceful assembly, as elaborated by the CCPR and the ECtHR. The third part explores international standards on the power of a state to impose legitimate restrictions on freedom of assembly (focusing, in particular, on content-based restrictions, blanket-bans, and notification requirements). The last part identifies international standards on public order policing. Overall, this chapter highlights the centrality to a democratic rule of a legal framework and to public order policing of compliance with IHRL (and its image of a democratic society). As later chapters then show, this stands in stark contrast to (and provides a benchmark against which to assess) the significantly weaker protections for the right to assemble in hybrid regimes.

2.1 Is international human rights law relevant?

Democratic processes, public assemblies and IHRL are inter-connected. They complement each other's existence. A democratic society values individualism and respects that everyone can participate in politics. Hence, people are allowed to exercise freedom of assembly peacefully to put pressure upon or influence their government. As we shall see in the next chapter, Tilly suggests that the repertoires of contention in a democracy contain three elements: an organised campaign targeting authorities, peaceful collective actions, and displays of worthiness, unity, numbers, and commitment (WUNC).[6] There must be a strong civil society, which operates freely to put political pressure on the politicians. Democracy depends on collective actions from social movements rather than from particular individuals.[7] This process needs rules and guidelines to keep it continuing democratically. A democratic society needs to lay down some restrictions to prevent public assemblies from corrupting democratic processes and to prevent the authorities from the unjustifiable breaching of democratic values. This is where IHRL and international standards on public assemblies play a role.

Although many human rights do not require democracy before they can be implemented – that is to say, that democracy or democratic credentials is no a prerequisite of a governmental framework that protects human rights – IHRL aims to promote democracy.[8] It is at least

[6] Charles Tilly, *Regimes and Repertoires* (University of Chicago Press 2006) 53, 183.
[7] Jean Grugel, *Democratization : A Critical Introduction* (Palgrave 2002).
[8] Anthony J Langlois, 'Human Rights without Democracy? A Critique of the Separationist Thesis' (2003) 25 Human Rights Quarterly 990, 1002.

conceivable that other forms of government could respect human rights without adopting democratic values. However, there is a strong alignment between democratic principles – such as self-determination, freedom, autonomy, individualism, egalitarianism, tolerance, and pluralism – and the values embodied by IHRL.[9]

Many human rights (such as freedom of expression, freedom of assembly, the right to privacy and to information) are integral to a properly functioning democracy.[10] Moreover, human rights require the majority to respect the principle that everyone is due a basic level of respect – a democratic majority may not therefore simply overrule the rights of a minority. The majority in power is tempted to manipulate political rights to proliferate their supporters, especially to win elections.[11] The Holocaust reminds us that the majority could pursue evil goals and became self-righteous and insensitive toward dissents. In this sense, human rights serve to constrain the worst excesses of bare majoritarianism.[12] Most importantly, a functioning democracy needs to ensure that individuals have access to the means to protect their rights, especially from the state's interference. IHRL offers both the grounds and mechanisms to challenge the legitimacy of state interferences (including specific policies and practices, or even particular rulers). On this point, Langlois has summarised that human rights and democracy share the same goal – namely, to force the authorities 'to rule in the name of and for the interests of the people—rather than merely serving their own interests.'[13]

The following section argues that IHRL has produced a particular image of a democratic society whereby a state needs to uphold at least three values: pluralism, tolerance, and broadmindedness. IHRL is relevant to every democratic society because it promotes the democratic process. At the same time, some restrictions are needed to prevent democracy from destroying itself or being destroyed by non-democratic means – but even still, these restrictions must comply with IHRL to protect the fundamental fabric of a democratic society. Last, it will discuss the limitation of international judicial organs in adjudicating IHRL.

2.1.1 Image of a democratic society under IHRL

[9] ibid 1004-1005.
[10] James Griffin, *On human rights* (Oxford University Press 2008) 243, 253.
[11] Wiktor Osiatyński, *Human Rights and their Limits* (Cambridge University Press 2009) 73.
[12] Langlois (n 8) 1012-1013.
[13] ibid 1017.

IHRL presents a particular image of a democratic society. This image becomes especially significant in explaining the lack of traction of human rights norms in 'hybrid regimes' (as later chapters demonstrate). Democracy values freedom of assembly on the basis that they provide a means to exercise civil rights outside the election period and enable individuals to directly participate in the politics. Citizens can signal their demands to the government through public assemblies and protests. In order to make this function work, a society must process a certain quality of tolerance towards peaceful assemblies. Hence, IHRL offers a universal minimum baseline to protect freedom of assembly.[14]

2.1.1.1 A democratic society must uphold pluralism, tolerance, and broadmindedness

A democratic society cannot exist without pluralism, tolerance and broadmindedness.[15] These qualities enable peoples with different backgrounds and beliefs to live together in peace. Both democracy and pluralism rely on citizens' willingness to tolerate values, ideas, and actions with which they disagree.[16] To promote pluralism, states must persuade their citizens to believe that they will gain something more significant by tolerating others' views or behaviours.[17] Bollinger has argued that the greatest strength of the First Amendment guarantee of free speech is that, in forcing us to confront the extremist views of others, it elicits and promotes the sort of tolerance necessary for healthily functioning democracy and collective, interactive social life.[18] Hence, IHRL demands that states must protect freedom of expression because it is one of the foundation stones in every democratic society.[19] The UN Human Rights Council has reaffirmed that every free democratic society is constituted by freedom of opinion and freedom of

[14] Michael Hamilton, 'Freedom of Assembly, Consequenctial Harms and the Rule of Law: Liberty Limiting Principles in the Context of Transition' (2007) 27 OJLS 81.

[15] Aernout Nieuwenhuis, 'The Concept of Pluralism in the case law of the ECtHR' (2007) 3 European Constitutional Law Review 367, 369.

[16] David Feldman, 'Protest and Tolerance: Legal Values and the Control of Public-Order Policing' in Raphael Cohen-Almagor and Yitzhak Rabin (eds), *Liberal Democracy and the Limits of Tolerance: Essay in Honor and Memory of Yitzhak Rabin* (Liberal Democracy and the Limits of Tolerance: Essay in Honor and Memory of Yitzhak Rabin, University of Michigan Press 2000) 44.

[17] ibid; Jean-François Akandji-Kombe, *Positive obligations under the European Convention on Human Rights*, vol No.7 (Human Rights Handbooks, Council of Europe 2007) 51.

[18] Lee C Bollinger, *The Tolerant Society : Freedom of Speech and Extremist Speech in America* (Oxford University Press 1988) 4.

[19] *Reyes et al v Chile* (27 November 2017) Communication no 267/2015 CCPR/C/121/D267/2015, para 7.3.

expression.[20] This includes the expression and receipt of communications through freedom of assembly and association.[21]

Democratic states must protect political speech because this type of speech enable individuals to express their ideas concerning public interests.[22] Hence, states must persuade their members to believe that unorthodox views should not be suppressed but rather be challenged through counter-argument and tested against other possibilities. By doing so, peoples have the information they need when they participate in their political activities and when they hold their representative accountable.[23] For example, the CCPR, in *Svetik v Belarus*, has ruled that the call to boycott a particular election was protected political speech.[24] Similarly, the ECtHR regards political speech as the most protected kind of expression under the ECHR. The ECtHR emphasised that freedom of speech under ECHR Article 10 included speech that offends, shocks or disturbs. A pluralistic society must be able to tolerate severe criticism.[25] In *Wingrove v The United Kingdom* , the ECtHR established that 'there is little scope under Article 10 para 2 of the Convention (art.10-2) for restrictions on political speech or on debate of questions of public interest…'[26] The Court saw that the public has the rights to discuss public interests in order to engage in political activities effectively. Again, in *Arslan v Turkey*, the Court explained: '[i]n a democratic system the action or omission of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion.'[27] In short, the CCPR and the ECtHR have agreed that a democratic society must uphold pluralism tolerance and broadmindedness because they are necessary qualities enabling individuals to participate effectively in their politics. A plurality of views in the public sphere provides richer debate and a more informed polity.

2.1.1.2 A democratic society is not required to tolerate violent or anti-democratic behaviour

Tolerance in a democratic society comes with a limit. The harm principle directs that a person deserves to enjoy his liberty as long as he does not harm the interests of others. Indeed, on this

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[20] UN Human Rights Committee, *General comment No. 34 Article 19: Freedoms of opinion and expression* (12 September 2011), para 2.
[21] ibid para 13.
[22] Barendt, *Freedom of speech* (n 6) 18-21.
[23] Katharine Gelber, 'Freedom of political speech, hate speech and the argument from democracy: The transformative contribution of capabilities theory' (2010) 9 Contemporary Political Theory 305.
[24] *Svetik v Belarus* (25 August 2004) Communication no 927/2000 CCPR/C/81/D/927/2000, para 7.3.
[25] Nieuwenhuis (n 15), 370.
[26] *Wingrove v The United Kingdom* App no 17419/90 (ECtHR, 25 November 1996), para 58.
[27] *Arslan v Turkey* App no 23462/94 (ECtHR GC, 8 July 1999), para 46.

basis, the only legitimate purpose of legal coercion is to prevent harm to others.[28] This principle justifies an interference with someone's action only when the action meets the threshold of harming others.[29] To the freedom of assembly, this principle is reflected in Article 17 ECHR and Article 5 ICCPR – the prohibition on the abuse of rights. It is also reinforced by ICCPR Article 20(2)—prohibiting the dissemination of ideas based on racial superiority or hatred, incitement to discrimination, hostility or violence.[30] Therefore, a democratic society is not required to tolerate violent or anti-democratic behaviour.

In *Refah Partisi (the Welfare Party) and Others v Turkey*, a political party was dissolved by the Constitutional Court of Turkey on the ground that it became 'a centre of activities contrary to the principle of secularism'.[31] The party also engaged in a holy war (*jihad*) and aimed to introduce Islamic law (*sharia*). The ECtHR held that a political party which incites violence or fails to respect democracy cannot demand protection from the Convention.[32] The Court emphasised that, in a healthy democracy, a political party's means to promote an idea and the idea itself must be compatible with fundamental democratic principles.[33] As appeared in European history, totalitarian movements in the form of political parties can bring about the destruction of a democratic society.[34] Hence, limiting some freedoms in order to protect pluralism and democracy is acceptable.[35] The dissolution of *Refah Patisi* was regarded as 'necessary in a democratic society'.[36] This case affirms the idea that a democracy must be able to prevent itself from self-destruction (though the judgment is also somewhat ironic since the purported threat presented by the Welfare Party was itself measured in terms of the party's electoral success).

The concept that democracy can defend itself is known as "militant democracy" or "defensive democracy.[37] The principle suggests that states should be able to repress enemies of the

[28] The harm principle was first articulated in J S Mill, *On liberty* (1972) [1859] 123-124.
[29] Piers Norris Turner, '"Harm"and Mill's Harm Principle' (2014) 124 Ethics 299, 302.
[30] Hamilton (n 13) 81.
[31] *Refah Patisi (the Welfare Party) and Others v Turkey* App no 41340/98 and three others (ECtHR, 13 February 2003), para 23.
[32] ibid para 98.
[33] ibid.
[34] Such as Nazi Germany and Fascist Italy.
[35] *Refah Patisi (the Welfare Party) and Others* (n 29), para 99.
[36] ibid para 135.
[37] ECtHR merely acknowledged this principle. However, it is clear that ECHR Article 17 prohibit any interpretation that is aimed at the destruction of any rights and freedoms guaranteed in the Convention.

constitutional order before they have any chance to enter public office.[38] The aim of militant democracy is to solve "the democratic dilemma" that a functioning democracy carries the possibility of destroying itself in the process.[39] However, by adopting militant democracy, a state creates another paradox. On the one hand, it needs a politically insulated institution to guard democracy. On the other hand, giving the monopoly over banning and enforcing militant measures to an institution may turn the institution to become a threat to democracy.[40] Hybrid regime incumbents may co-opt judges and use them to dissolve their rival political parties.[41] Therefore, peaceful assemblies should be recognised as a peaceful means to defend democratic values from anti-democratic behaviour.

2.1.2 The constraints upon international judicial organs: the margin of appreciation and doctrine of subsidiarity

It is important to note that international judicial organs adjudicating IHRL, such as the ECtHR and CCPR, are limited and themselves operate within certain constraints. The principle of subsidiarity constrains both the ECtHR and the CCPR from reviewing national laws in the abstract. This principle aims to guarantee a degree on independence to a state by preventing the supra-national organ from intervening in affairs that may be better dealt with domestically.[42] The principle is applied to IHRL on the basis that (1) the primary responsibility to secure human rights belongs to States, and (2) international human rights organs have only a supervisory function.[43] IHRL was not designed to fill the gaps of domestic law but was rather formed upon existing domestic bills of rights or constitutions.[44] Hence, the enforcement of IHRL relies primarily on domestic institutions. However, international human rights institutions complement domestic mechanisms by providing a monitoring system of external review. With

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[38] Jan-Werner Müller, 'Militant Democracy' in Michel Rosenfeld and András Sajó (eds), *The Oxford handbook of comparative constitutional law* (The Oxford handbook of comparative constitutional law Oxford University Press 2012) 1254.

[39] ibid.

[40] ibid 1267.

[41] For instance, (as mentioned in Chapter 1), on 2 December 2008, Thailand Constitutional Court dissolved Palang Prachachon Party and its political allies parties on the ground of electoral misconduct. It was clear that the dissolution provided a political opportunity to establish a military-backed government. Similarly, in Cambodia, on 16 November 2017, the Supreme Court dissolved the Cambodian National Rescue Party (the main opposition party) on the ground that its members, aided by the United States, attempted to overthrow the government by calling for 'Colour Revolution'.

[42] Roberta Panizza, 'The principle of subsidiarity' (*European Parliament*, October 2018) <http://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity> accessed 30 January 2019.

[43] Samantha Besson, 'Subsidiarity in International Human Rights Law--What is Subsidiary about Human Rights?' (2016) 61 American Journal of Jurisprudence 69, 72.

[44] ibid 76.

this power, they can point out where the minimal human rights standards are violated. This is the main reason why the right of individual petition under the First Protocol to the ICCPR is optional. Another requirement reflecting this principle of subsidiarity is the obligation to exhaust domestic remedies before bringing a case to the CCPR or the ECtHR.[45]

The different approach between the CCPR and the ECtHR is that the ECtHR explicitly relied on the 'margin of appreciation' (MoA) doctrine while the CCPR explicitly rejects it.[46] The CCPR perceives the MoA as a threat to the universality of human rights.[47] While States may undermine universal values by seeking to justify human rights interferences on the basis of cultural and historical differences, the ECtHR developed the MoA as a form of judicial self-restraint – first in the context of derogations and later expanded to other substantive obligations under the ECHR.[48] This means that the State parties have some discretion to implement the Convention's standards in accordance with their unique circumstances and conditions.[49] The size of the margin of appreciation depends on the interactions between domestic courts, national parliaments, and the ECtHR (as well as on the nature of the particular right(s) engaged).[50] The MoA offers states some flexibility in two ways: in assessing the nature of the threat that is said to justify a restriction or interference, and in assessing the solution or response.

The ECtHR applies the MoA in the context of freedom of assembly. For example, in *Kudrevičius and Others v Lithuania*[51], the Grand Chamber of the Court allowed a relatively wide MoA in relation to the particular interference aimed at maintaining public order (prosecution for taking part in a 'riot'). However, the authorities must exercise their power based on a fair balance between the legitimate aims to prevent disorder and the requirements of

[45] Optional Protocol to the ICCPR art 5.2(b); ECHR art 35 (1).

[46] Dominic McGoldrick, 'A defence of the margin of appreciation and an argument for its application by the Human Rights Committee' (2015) 65 International and Comparative Law Quarterly 21, 58 –McGoldrick argued that the explanations as to why the CCPR rejected the margin of appreciation appear more political than legal.

[47] ibid 53.

[48] ibid 23.

[49] M Saul, 'The European Court of Human Rights' margin of appreciation and the processes of national parliaments' (2015) 15 Human Rights Law Review 745, 749.

[50] ibid.

[51] *Kudrevičius and Others v Lithuania*, app no 37553/05 (ECtHR, 15 October 2015), para 129. –A group of farmers set up roadblocks on national highways to protest and to draw attention to their problems. Despite the protests were carried out peacefully, the organisers were convicted for rioting. The government argued that the interference pursued the legitimate aims of the prevention of disorder and the protection of the rights and freedoms of other. The domestic courts found that applicants' roadblocks constituted a serious breach of public order and provoked general chaos in the country.

freedom of assembly on the other.[52] In *Zakharov v Russia* (as in many earlier cases), the Court acknowledged that the national authorities enjoy the MoA in choosing the means for achieving the legitimate aim of protecting national security.[53] However, this margin is subject to European supervision embracing both legislation and the decisions applying it. [54]

It is worth noting that the constraints on adjudication by international judicial organs in relation to the hybrid regimes in Cambodia, Malaysia, and Thailand is even greater. The invocation of IHRL in these hybrid regimes depends solely on domestic mechanisms because there is no international judicial institution which has jurisdiction to adjudicate IHRL. None of the three Southeast Asian hybrid regimes is a party to the Optional Protocol to the ICCPR which allows individuals to lodge a complaint with the CCPR. This is a significant defect since it means individuals are reliant on measures taken by, and within, states. Nevertheless, IHRL aspires to articulate universal values, and thus acts as a universal benchmark against which to assess the compatibility of domestic political processes with democratic values (at least, with the particular image of a democratic society that values pluralism, tolerance, and broadmindedness).

2.2 The scope of the right to freedom of assembly under IHRL

The scope of freedom of assembly under IHRL is determined by many international human rights treaties. The United Nations human rights system is the main umbrella while there are several regional human rights systems to complement the protection of the freedom. Under the United Nations human rights system, the UDHR and the ICCPR are the main instruments. The Human Rights Committee (CCPR), a treaty-based body which is able to receive and consider complaints from individuals is the main driver to expand the Article 21 jurisprudence. It comprises of independent experts who are tasked with duties to monitor implementation of ICCPR. It can request a State party to submit a report on human rights and address its concerns and recommendations in the form of "Concluding Observations" to the State party. Complaints can be raised through the First Optional Protocol to the CCPR (where this has been ratified) which help in establishing an international standard on freedom of assembly, creating a corpus of adjudications.[55] As noted above, none of the three Southeast Asian states is a signatory.

[52] ibid, para 182.
[53] *Zakharov v Russia* App no 47143/06 (ECtHR GC, 4 December 2015), para 232.
[54] *Navalnyy v Russia* App no 29580/12 and 4 others (ECtHR GC, 15 November 2018), para 139.
[55] Optional Protocol to the International Covenant on Civil and Political Rights, ratification and accession by General Assembly res 2200A (XXI).

Moreover, the UN Human Rights Council also has independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective known as 'the Special Procedures of the Human Rights Council'.[56] The UN Human Rights Council established the mandate of the Special Rapporteur on the freedom of assembly in October 2010.[57] The UN Special Rapporteur on the rights to Freedom of Assembly and of Association (UNSRFAA) has duties to undertake fact-finding country visits and make annual reports to the Human Rights Council and the General Assembly. In doing so, the UNSRFAA also helps define the scope of freedom of assembly under the United Nations human rights system. In addition, the UN Human Rights Council has the Universal Periodic Review (UPR) as a universal mechanism to monitor human rights situation in all UN Member States. It requires members to declare human rights situations in their jurisdictions and explain how they fulfil their obligations towards human rights commitments.[58]

At the regional level, there are several regional human rights systems defining the scope of freedom of assembly. The African Court has the jurisdiction to adjudicate freedom of assembly based on the African Charter on Human and Peoples Rights. In America, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights define the scope of freedom of assembly in the American Convention on Human rights. In Southeast Asia, there is the ASEAN Intergovernmental Commission on Human Rights (AICHR) to advocate the freedom of assembly under the ASEAN Human Rights Declaration. Nonetheless, none of these regional human rights systems have so far generated a body of assembly jurisprudence on the same scale as the ECtHR in Europe.

Hence, this study will focus mainly on scope of freedom of assembly defined by the United Nations human rights system and the European human rights system namely the CCPR, the UNSRFAA, and the ECtHR. By examining interpretation of the scope of freedom of assembly from these institutions, we can see that the scope of freedom of assembly is defined by negative obligations (to avoid interfering with the right to peaceful assembly) and positive obligations

[56] OHCHR, 'Special Procedures of the Human Rights Council' (*Special Procedures Division*, 2019) <https://www.ohchr.org/en/hrbodies/sp/pages/welcomepage.aspx> accessed 17 July 2019.

[57] Human Rights Council, *Resolution adopted by the Human Rights Council 15/21 The rights to freedom of peaceful assembly and of association* (6 October 2010).

[58] Human Rights Council, 'Universal Periodic Review' (*United Nations Human Rights Council*, 2019) <https://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx> accessed 29 August 2019.

(to protect and facilitate peaceful assembly). Hence, the following paragraphs discuss these negative and positive obligations in detail.

2.2.1 Positive obligations to facilitate and protect peaceful assemblies

The negative obligation to respect and ensure the rights of all individuals under international law means that States must refrain from restricting the exercise of the rights where it is not expressly allowed under international law.[59] States are also under a positive duty to protect and promote human rights.[60] In terms of freedom of assembly, the duty to facilitate and protect rights means that states are required to create, facilitate or provide the necessary conditions for the enjoyment of rights.[61] This includes the responsibility to provide basic services such as traffic management, medical assistance, and clean-up services.[62] States have the positive obligations to facilitate and protect peaceful assemblies to both participants in an assembly and to those who are affected from the exercise to the freedom of assembly.[63] Thus, States may need to restrict freedom of assembly to facilitate an enabling environment. Still, any restriction imposed on peaceful assemblies must comply with international human rights standards. Restrictions should be used as an exception rather than a norm, and they must not impair the essence of the right.[64]

The CCPR and the ECtHR have ruled that states have the positive obligations to facilitate and protect peaceful assemblies. In *Kirsanov v Belarus* and *Turchenyak et al v Belarus,* the CCPR held that 'states should be guided by the objective of facilitating rather than seeking to limit the right to peaceful assembly disproportionately'. [65] Similarly, the ECtHR has applied the concept of positive obligations to public order policing.[66] In *Plattform "Ärzte für das Leben" v Austria,* an association of pro-life doctors held two demonstrations to influence the Austrian legislation reform on the issue of abortion. Their demonstrations were confronted by counter-

[59] UN Human Rights Council, Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, UN Doc. A/HRC/31/66, para 14.
[60] ibid.
[61] ibid.
[62] ibid para 40.
[63] ibid para 13.
[64] ibid paras 29-36.
[65] *Kirsanov v Belarus* (5 June 2014) Communication No. 1864/2009 CCPR/C/110/D/1864/2009, para 9.7; *Turchenyak et al. v Belarus* (10 September 2013) Communication No.1948/2010 CCPR/C/108/D/1948/2010, para 7.4.
[66] Jim Murdoch and Ralph Roche, *The European Convention on Human Rights and Policing* (The Council of Europe 2013) 9.

demonstrations. To prevent disorder, the police formed a cordon between the opposing groups. However, the organiser claimed that the cordon was insufficient because the counter-demonstrators were able to interrupt them by using loudspeakers and throwing eggs/clumps of grass at them. The ECtHR found that the Austrian authorities did not fail to take reasonable and appropriate measures. The Austrian Government argued that ECHR Article 11 did not create any positive obligation to protect demonstrations because the Article was designed to protect the individual from direct interference by the state and that Article 11 did not apply to relations between individuals.[67] The ECtHR, however, ruled that Article 11 required positive measures from the state because 'in a democracy, the right to counter-demonstrate cannot extend to inhibit the exercise of the right to demonstrate.'[68] On this point, the ECtHR established an important key principle – one that illustrates the Court's vision of the public sphere in a 'democratic' society:

> A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community.[69]

The ECtHR saw that the objective of Article 11 could not be achieved through only a negative obligation of non-interference. State parties to the Convention have 'obligations to take a positive step to protect the rights of individuals'.[70] Therefore, peaceful demonstrators must be protected from violent counter-demonstrations or any other violent party including those from their own side.[71] In addition, in *Plattform Ärzte für das Leben,* the ECtHR sees positive obligations as measures to be taken rather than results to be achieved. [72] States do have wide discretion on the choice of tactics. This principle was restated in *the United Macedonian*

[67] *Plattform Ärzte für das Leben v Austria* App no 10126/82 (ECtHR, 21 June 1988), para 29.
[68] ibid para 32.
[69] ibid.
[70] Murdoch and Roche (n 66).
[71] Maina Kiai, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association* (United Nation General Assembly 21 May 2012) para 33.
[72] *Plattform Ärzte für das Leben* (n 67), para 34.

Organisation Ilinden and Ivanov v Bulgaria.[73] The Court held that the authorities were bound by positive obligations under the Article 11 to take adequate measures to prevent violent acts directed against the participants in a peaceful assembly, or at least the authorities must limit their extent.[74] The Court reaffirmed: 'genuine, effective freedom of peaceful assembly cannot be reduced to a mere duty on the part of the State not to interfere; it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully'.[75]

In short, the CCPR and the ECtHR have the same opinion that limiting state interference alone is not enough to enable people to enjoy the freedom of peaceful assembly. Rather, the state must also take action to protect and facilitate peaceful assemblies. The next question is what public assemblies can be considered as peaceful assemblies. To more clearly ascertain what kind of assemblies give rise to these state obligations under IHRL, the following section discusses the international standards in relation to determining the peacefulness of an assembly.

Since only peaceful assemblies are protected under international standards, peacefulness is a key ingredient in determining the extent of the state's positive obligations.[76] In determining whether an assembly qualifies as peaceful, a broad interpretation of the term 'peaceful' should be afforded,[77] and the manner in which an assembly is held and the intention of its participants must be taken into consideration.[78] Assemblies which cannot be defined as peaceful lose their protected status within the scope of the right to assembly. Non-peaceful assemblies can thus be limited *without* the state needing to demonstrate that the requirements in ICCPR article 21(2) and ECHR article 11(2), allowing proportionate restrictions, have been met.[79]

IHRL has established a number of important standards in relation to this key criterion of 'peacefulness' and these will be dealt with here in turn. They concern, respectively: an emphasis

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[73] *The United Macedonian Organisation Ilinden and Ivanov v Bulgaria* App no 44079/98 (ECtHR, 20 October 2005).
[74] ibid.
[75] ibid para 115.
[76] Organisation for Security and Co-operation in Europe, *Guidelines on Freedom of Peaceful Assembly* (Second edn, ODIHR 2010), guideline 1.3, 15; Human Rights Council, *First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai,* (21 May 2012) UN Doc A/HRC/20/27, para 25; Human Rights Council, *Resolution 25/38 The promotion and protection of human rights in the context of peaceful protests* (11 April 2014) 2.
[77] Manfred Nowak, *U.N. Covenant on Civil and Political Rights : CCPR commentary* (2nd edn, N.P. Engel, 2005) 487.
[78] ibid.
[79] Orsolya Salát, 'Comparative Freedom of Assembly and the Fragmentation of International Human Rights Law' (2014) 32 *Nordic Journal of Human Rights* 140, 147.

on the *intentions* of assembly organisers and participants; 'peacefulness' in the context of a threat of violence arising from *counter-demonstrators*; 'peaceful' as distinct from 'lawful'; and the ambiguous threshold of 'reprehensible behaviour'.

Both the CCPR and the ECtHR determine whether it is a peaceful assembly by assessing whether the organisers and participants have violent intentions. States have an obligation to presume that an assembly is peaceful until the contrary intention can be proven.[80] Furthermore, the burden of proving violent intention belongs to the state rather than to the organisers or to the participants.[81] In *Christians against Racism and Fascism v United Kingdom*, the European Commission on Human Rights established that 'the right to freedom of peaceful assembly is secured to everyone who has the intention of organising a peaceful demonstration'.[82] The Commission affirmed that 'the notion of "peaceful assembly" does not include any demonstration where the organiser and participants have violent intentions that result in public disorder'.[83]

In *Stankov and the United Macedonian Organisation Ilinden v Bulgaria*, the ECtHR further noted that, when assessing the proclaimed intentions of an assembly organiser, one important factor to consider is whether there has been an express call for the use of violence, an uprising or any other form of rejection of democratic principles.[84] In this case, the court noted that the authorities might have had reason to interfere with the applicant's Article 11 right if there had been such a 'real foreseeable risk of violent action or of incitement to violence' – but on the facts of the case, the court held that 'there was no real foreseeable risk of violent action or of incitement to violence or any other form of rejection of democratic principles'.[85] Similarly, in *Mushegh Saghatelyan v Armenia*, the ECtHR noted that the organisers' purported intention to start an armed riot could have been proven by the authorities had they produced evidence

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[80] UN Human Rights Council, UN Doc A/HRC20/27 (n 76) para 25; Organisation for Security and Co-operation in Europe (n 76) guideline 2.1.

[81] *Christian Democratic People's Party v Moldova* (No2) para 23; *Frumkin v Russia*, App no 74568/12 (ECtHR, 6 October 2016), para 98; See also *Taranenko v Russia*, App no 19554/05 (ECtHR, 15 May 2014), para 65.

[82] *Christians against Racism and Fascism v The United Kingdom* App no 8440/78 (ECHR, 16 July 1980), DR 21, 138, 148.

[83] ibid. Similarly, *Cisse v France* App no 51346/99 (ECtHR, 9 April 2002) para 37: 'the only type of events that do not qualify as "peaceful assemblies" are those in which the organisers and participants intended to use violence.'

[84] *Stankov and The United Macedonian Organisation Ilinden v Bulgaria*, App nos. 29221/95 and 29225/95 (ECtHR, 2 October 2001), para 90.

[85] ibid para 111.

suggesting that firearms, explosives or bladed weapons were used by the participants.[86] The applicant was found carrying a clasp knife but had never shown his intention to use the knife.[87] The assembly, in this case, went peacefully until the police dispersed it with force without prior warning.[88] The Court saw that there was not sufficiently convincing evidence to conclude that the applicant had violent intentions.[89]

In addition to the emphasis placed by the court on peaceful intentions, the right to organise or to join a demonstration under Article 11(1) cannot be taken away simply because there is a possibility of violent counter-demonstrations or a risk of disorder coming from outside the control of those organising it. In *Christians against Racism and Fascism,* the Commission ruled that the violent threat from counter-demonstrations alone did not justify interference with the peaceful assembly.[90] The police continue to have an obligation to facilitate an assembly and protect it from counter-demonstrators, so long as it itself remains peaceful.[91]

In *Ziliberberg*, a protest began peacefully but later turned violent. The ECtHR explained: 'an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration if the individual remains peaceful in his or her own intentions or behaviour'.[92] The word "sporadic violence" here is open to interpretation. At the very least, the authorities may not quickly conclude that a demonstration should be dispersed because *some* violence has occurred.

Peaceful assemblies, even in consolidated democracies, are often repressed because states too often regard the lawfulness of an assembly as being more important than its peacefulness.[93] Moreover, since the legal frameworks in non-democratic contexts (including in 'hybrid regimes') are often drafted and applied with the aim of protecting the incumbent rulers, what is 'lawful' is itself often narrowly circumscribed. Crucially, however, under IHRL, peacefulness and lawfulness are different, and the protection of the right to freedom of assembly ought to depend primarily on its 'peacefulness' (rather than mere 'lawfulness'). In *Nurettin Aldemir and Others v Turkey,* the ECtHR found that Turkish security forces violated Article 11 as they

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[86] *Mushegh Saghatelyan v Armenia,* App no 23086/08 (ECtHR, 20 September 2018), para 230.
[87] ibid para 232.
[88] ibid.
[89] ibid para 233.
[90] *Christians against Racism and Fascism* (n 82) 151.
[91] ibid.
[92] *Ziliberberg v Moldova* App no 61821/00 (ECtHR, Admissibility decision of 4 May 2004).
[93] Tabatha Abu El-Haj, 'The Neglected Right of Assembly' (2009) 56 UCLA Law Review 543, 562.

dispersed peaceful demonstrations on the ground that the protest location was not permitted by law.[94] The demonstrators did not engage in any violent action, and the Court ruled that the forceful intervention by the police was disproportionate and was not necessary for the prevention of disorder.[95] Similarly, in *Kovalenko v Belarus*, a group of thirty people conducted a commemoration to those who were killed during the Stalinist repression. They were stopped and charged with an administrative offence by the authority because their commemoration was seen as an unauthorised mass event (a picket). The CCPR saw that 'the peacefulness of the assembly was demonstrated by its aim of paying tribute to the victims of the Stalinist repression'.[96] Breaking the requirement for prior authorisation alone (even if unlawful) does not determine whether an assembly is not a peaceful assembly.

In *Ezelin v France*, the ECtHR established that a person had the freedom to take part in a peaceful assembly as long as he/she does not commit any 'reprehensible act'.[97] This principle has been reaffirmed in *Galstyan v Armenia*[98] and *Ziliberberg v Moldova*.[99] It is worth noting, however, that 'reprehensible' is a much more ambiguous term than either 'non-peaceful' or even 'unlawful'/'illegal'. In *Kudrevicius v Lithuania*, the ECtHR held that the almost complete obstruction of major highways against police instructions was a 'reprehensible act'.[100] In this case, the court considered that the protesting farmers had intended to cause serious disruption to ordinary life, more than the normal exercise of the right to peaceful assembly would permit.[101] Such a finding was arguably foreshadowed by the Commission's decision regarding the sit-in (blocking a road leading to US military barracks) in *G. v Germany*. Even though this protest was carried out peacefully, the Commission found that the blocking of a public road, which caused more obstruction than would normally arise from the exercise of the freedom of

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[94] *Nurettin Aldemir and Others v Turkey* App no 32124/02, and 6 others (ECtHR, 18 December 2007), para 46.

[95] ibid. In contrast, in *Cisse*, a group of several hundred illegal immigrants occupied a church for two months. They were forced to evacuate on the ground of unsatisfactory sanitary conditions by the police. Although the occupation of the church had been peaceful and did not disturb public order, the Court saw that the intervention by the authorities was justified as the sanitary conditions had become inadequate. See *Cisse* (n 83), para 51.

[96] *Kovalenko v Belarus* (26 September 2013) Communication No.1808/2008 CCPR/C/108/D/1808/2008, para 5.3.

[97] *Ezelin v France* App no 11800/85 (ECtHR, 26 April 1991), para 53.

[98] *Galstyan v Armenia* App no 26986/03 (ECtHR, 15 November 2007), para 115.

[99] *Ziliberberg* (n 92).

[100] *Kudrevičius and Others* (n 51), para 174.

[101] ibid 173.

assembly, was an unlawful action that constituted a legal ground for its dispersal.[102] The German Government argued that this assembly was not peaceful because the German law prohibited sit-in protests. [103] As such, one might speculate that the origins of 'reprehensible' behaviour are closer to the notion of 'illegality' than 'non-peacefulness'.

In this light, the notion of 'reprehensible behaviour' is problematic – offering an ill-defined and elastic concept which domestic authorities might interpret widely (or as akin to 'unlawful'/'illegal') to justify their interference with the freedom. Reliance on the threshold of 'reprehensible behaviour' potentially makes the scope of the right to freedom of assembly contingent on the minimum level of tolerance afforded by domestic authorities rather than the ECtHR's emphasis on peaceful intentions (which offers stronger protection for assemblies).

As a fundamental right, States should have the presumption in favour of holding assemblies.[104] The notion of peaceful assembly is a key pillar in a democracy because freedom of assembly allows individuals to use peaceful means to exert some measure of control on political decision makers instead of using violent means to solve public affairs.[105] Therefore, violent assemblies intended to create disorder or to disrupt the rule of law cannot be justified as being in the interest of a democratic society.[106]

2.2.2 The meaning of 'assembly': organisers, participants and manner

It is worth exploring the basic guarantees established by IHRL in relation to the composition of an assembly – its organisers/leaders, participants, and further obligations arising from human rights law relating to the location and manner of assemblies.

2.2.2.1 Organisers and participants

International standards establish that the right to enjoy freedom of peaceful assembly should be enjoyed by everyone without discrimination. Everyone can be an organiser of or a participant in a public assembly,[107] – though states should not assume that someone has been an organiser

[102] ibid.
[103] *G. v Germany* [1989] ECHR 28.
[104] UN Human Rights Council, UN Doc A/HRC20/27 (n 76) para 27; Organisation for Security and Co-operation in Europe (n 76) guideline 2.1, 15.
[105] Vojin Divitrijevic, 'Human Rights and Peace', in Symonides (n 1) 53-54.
[106] Research and Library division and Council of Europe/ European Court of Human Rights, 'Article 11 The conduct of public assemblies in the Court's case-law' 22 May 2013) <https://www.echr.coe.int/Documents/Public_assemblies_ENG.pdf> accessed 19 October 2018, para 9.
[107] Organisation for Security and Co-operation in Europe (n 76) guideline 2.5.

unless they can prove his or her intention.[108] This includes non-nationals, children, people with disabilities, as well as law enforcement personnel. Although Article 21 ICCPR does not use the same wording as found in Article 19(2) – 'everyone shall have the right …' – or indeed, as Article 11 of the ECHR – 'everyone has the right to freedom of peaceful assembly ...'[109] – but is instead phrased in more abstract terms – 'the right of peaceful assembly shall be recognised' – this provision has nonetheless been interpreted to ensure that its application extends beyond mere citizenship.[110]

The UNSRFAA pointed out that, under the ICCPR, all individuals, without distinction of any kind, have the right.[111] This includes minors, indigenous peoples, persons with disabilities, minorities, non-nationals, refugees, and unregistered groups. "Everyone" has the rights to freedom of peaceful assembly and of association.[112] This includes stateless persons, refugees or migrants, and unregistered associations.[113] The CCPR itself commented that the right to freedom of assembly is not limited only to citizens.[114] For example, Kuwait Law No.65 (1979) on public gathering prohibiting non-Kuwaitis from participating in public gatherings was found to be an overly broad prohibition.[115] The Committee further emphasized that the peaceful exercise of the rights to peaceful assembly cannot be used as a ground for revoking citizenship.[116]

To answer the question of the minimum number of participants needed to constitute an assembly, the relationship between freedom of expression and freedom of assembly must be explored. Both the ECtHR and CCPR agree that freedom of assembly and freedom of expression complement each other.[117] The difference is that, in the Strasbourg court's

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[108] UN Human Rights Council, UN Doc A/HRC20/27 (n 76), para 29.
[109] However, the right under Article 11 is subject to limitation under Article 16, which allows Contracting Parties to restrict political activity of aliens.
[110] Michael Hamilton, *Towards General Comment 37 on Article 21 ICCPR The Right of Peacecful Assembly* (The European Center for Not-for-Profit-Law 2019) 16.
[111] UN Human Rights Council, UN Doc A/HRC20/27 (n 76), para 13.
[112] Human Rights Council, *Resolution adopted by the Human Rights Council 15/21 The rights to freedom of peaceful assembly and of association*.
[113] UN Human Rights Council, UN Doc A/HRC20/27 (n 76), para 15.
[114] LOI Kuwait 2015, LOI Monaco 2008.
[115] HRC 'Concluding observations on the third periodic report of Kuwait' (11 August 2016) CCPR/C/KWT/CO/3, paras 42-43.
[116] ibid para 49.
[117] UN Human Rights committee, *General comment No.34* (n 20) paras 50-52; *Ezelin* (n 97), para 35; *Navalnyy v Russia* (n 54), para 101.

jurisprudence, freedom of assembly is considered as *lex specialis* in relation to freedom of expression (as *lex generalis*) while the CCPR does not follow this approach.

The ECtHR has held that an assembly must have more than one participant.[118] A single-individual protest does not constitute an assembly but is instead protected under the scope of freedom of expression. In contrast, the CCPR have produced inconsistent case law, leading in three directions. First, the CCPR found that a single-person-protest was not an assembly in *Coleman v Australia, Levinov v Belarus (2012), Surgan v Belarus, and Levinov v Belarus (2016).*[119] Second, the Committee found that a single-person-protest was admissible under Article 21 but examined it under Article 19 (in *Katsora v Belarus, Pivonos v Belarus*, and *Protsko and Tolchin v Belarus*).[120] Last, the CCPR has considered cases affirming that single-person-protests were protected under both freedom of expression and freedom of assembly.[121]

Being an organiser of an assembly usually incurs legal obligations and responsibilities under domestic law. This is especially so in authorisation regimes, where penalties are imposed on the organisers if they fail to obtain official authorisation before commencing their events. In *Zalesskaya v Belarus*,[122] the complainant argued that three persons walking on a sidewalk distributing leaflets could not be considered as an organised mass event. The authorities saw that it was a mass event because the Belarusian Law on Mass Events did not specify any quantitative threshold. The CCPR noticed that the Law on Mass Events was ambiguous and lacked clarity. The law left the question of qualification of a mass event to the competent state organs. The CCPR considered that the fine imposed on the complainant was unjustified because the authorities did not explain why the restriction was necessary within the meaning of article

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[118] *Kudrevičius and Others* (n 51), para 91; *Novikova and Others v Russia* App nos. 25501/07 and 4 others (ECtHR, 26 April 2016), para 108.

[119] The CCPR ruled that a single-person protest was not an assembly in *Coleman v Australia* (10 August 2006) Communication No 1157/2003 CCPR/C/87/D/1157/2003, *Levinov v Belarus* (12 July 2012) Communication Nos 1867/2009, and 8 others CCPR/C/105D/1867/2009, 1936, 1975, 1977-1981, 2010/2010, *Surgan v Belarus* (15 July 2015) Communication No 196/2010, and *Levinov v Belarus* (14 July 2016) Communication No 2082/2011.

[120] *Katsora v Belarus* (28 November 2012) Communication No 1836/2008 CCPR/C/106/D/1836/2008 paras 6.4 and 7.6; *Pivonos v Belarus* (4 December 2012) Communication No. 1830/2008 CCPR/C/106/D/1830/2008, paras 8.4 and 9.4; *Protsko and Tolchin v Belarus* (2 December 2013) Communication Nos. 1919-1920/2009 CCPR/C/109/D/1919-1920/2009, paras 7.9-8.

[121] *Poplavny v Belarus* (30 December 2015) Communication No. 2019/2010 CCPR/C/115/D/2019/2010, para 8.6; *Sudalenko v Belarus* (28 December 2015) Communication No 2016//2010 CCPR/C/115/D/2016/2010, para 8.6; and *M.T. v Uzbekistan* (21 October 2015) Communication 2234/2013CCPR/C/114/D/2234/2013, para 8.

[122] *Zalesskaya v Belarus* (28 April 2011) Communication No. 1604/2007 CCPR/C/101/D/1604/2007.

21 of the ICCPR.[123] It is worth noting that the CCPR did not decide the legal issue whether the complainant's action could properly be held to constitute an unauthorised mass event under domestic law because the CCPR's ability to undertake more intensive scrutiny is limited by the doctrine of subsidiarity.[124] By failing to decide this matter, the CCPR accepted the State party's claim that the question of qualification of a "mass" event shall be decided each time by the competent state organs. In other words, the national authority could continue to apply "the Law On Mass Events" on case by case basis.

In *Belyazeka v Belarus*, the author claimed that he was only a participant to a commemoration, therefore he should not be held responsible for administrative liability under the Law on Mass Events which required a prior authorisation.[125] Similar arguments were also found in *Kovalenko* and *Velichkin v Belarus.*[126] This two cases involved the breaking up of the commemoration of the victims of the Stalinist repression on 30 October 2007 in Vitebsk. The Vitebsk Regional Court ruled that the Law on Mass Events required participants at the commemoration to seek an authorisation to hold a mass event. The Supreme Court agreed. The CCPR later found that Belarus violated the ICCPR Article 19 and Article 21. Although the restrictions were in accordance with the law, the CCPR found that such restriction did not conform to the strict tests of necessity and proportionality. The Belarus authorities has not explained why the commemoration would violate the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.[127] These cases show that domestic law can impose restrictions on organisers and participants in a public assembly through the law governing public assembly but these restrictions must conform to the strict tests of necessity and proportionality. On this issue, this study will contrast below (chapter 4.2.3.1) how Southeast Asian hybrid regimes use the definition of organisers (including assumed organisers) and participants to shape the scope of freedom of assembly.

2.2.2.2 Manner of an assembly

[123] ibid para 10.6.
[124] ibid para 10.4.
[125] *Belyazeka v Belarus* (23 March 2012) Communication No. 1772/2008 CCPR/C/104/D/1772/2008, para 2.7.
[126] *Kovalenko* (n 96), para 5.3; *Velichkin v Belarus* (20 October 2005) Communication No 1022/2001 CCPR/C/85/D/1022/2001, para 5.2;
[127] *Kovalenko* (n 96), para 8.8,

As we have seen, international standards establish that all types of assemblies are protected as long as their organisers and participants do not intend to use violence.[128] The UNSRFAA has explained that freedom of assembly 'includes the right to plan, organise, promote and advertise an assembly in any lawful manner'.[129] Forms of assembly such as long-term demonstrations, sit-ins, occupy-protests, and online-protests should be protected.[130] All simultaneous assemblies and counter-protests should be facilitated by States[131] (unless these prevent other individuals and groups from exercising *their* freedom of peaceful assembly).[132] According to the ECHR, the right to peaceful assembly includes many forms of meetings trying to convert others or to communicate or to show strength.[133] Indeed, the Court has held the notion of 'assembly' to be an autonomous concept within the Convention, and has explicitly 'refrained from formulating the notion of an assembly … or exhaustively listing the criteria which would define it …' precisely in order to 'avert the risk of a restrictive interpretation.'[134] Similarly, the CCPR has not provided any definitive list of the types of assembly that fall to be protected under Article 21. In addition, the OSCE/ODIHR Guidelines recommend that the definition of a peaceful assembly in domestic legislation should be inclusive and be defined as broadly as possible.[135]

On this issue, in Chapter 4, this thesis will further discuss the definition of 'a peaceful assembly' in the three Southeast Asian hybrid regimes. It argues that the definition of a peaceful assembly in the law governing public assembly (PAA) in these regimes meets the international standards but the law gives the authorities vast discretion to ban or to restrict an assembly. For example, the PAA gives the authorities discretion to restrict some public assemblies which they considered as political gatherings or street protests. As a result, hybrid regime incumbents can discriminately filter out or restrict anti-regime protests.

2.2.3 Right to choose time, place, and manner

[128] *Cisse* (n 83), para 37.
[129] UN Human Rights Council, A/HRC/31/66 (n 59) para 19.
[130] ibid para 10.
[131] UN Human Rights Council, UN Doc A/HRC20/27 (n 76) para 24.
[132] *Christians against Racism and Fascism* (n 83) 148; OSCE/ODIHR – Venice Commission, *Guidelines on Freedom of Peaceful Assembly*, draft 3rd edition (forthcoming, 2019) cited in Hamilton, 'Towards a General Comment 37…' (n 110) fn 41.
[133] David Mead, *The New Law of Peaceful Protest. Rights and Regulation in the Human Rights Act Era* (Hart 2010), 65.
[134] *Navalny v Russia*, App Nos 29580/12 and four others (ECtHR, 15 November 2018), para 98.
[135] Organisation for Security and Co-operation in Europe (n 76), para 17.

International standards establish that organisers have rights to choose a location for their assembly. This principle is premised on an understanding of urban space as not only an area for traffic but also an area for participation.[136] The free flow of traffic should not automatically prevail over the freedom of assembly.[137] While domestic traffic law and street regulations often prioritize the maximisation of traffic flow, Nicholas Blomley has pointed out that the 'traffic logic' of traffic law may lead us too readily to accept that public space is merely a 'transport corridor' rather than a site for citizenship.[138] An effective right to freedom of peaceful assembly implies that it is the state's duty to facilitate a space for exercising the freedom.

As a general principle, organisers have the right to demonstrate within 'sight and sound' of their target audience or target object.[139] Freedom of assembly would be rendered meaningless if people could only gather and communicate amongst themselves without being able to deliver their message to a wider public. The ability to choose a location, time and manner for spreading their messages is at the core of this freedom.[140] In this regard, both the CCPR and the ECtHR have affirmed the 'sight and sound' principle. In *Sáska v Hungary*, the ECtHR held that 'the right to freedom of assembly includes the right to choose the time, place and modalities of the assembly, within the limits established in paragraph 2 of Article 11.'[141] In CCPR jurisprudence, the Committee held that organisers have the right to choose a location within hearing and seeing distance of their target audience.[142] The Committee emphasised that this right is crucial in a democratic society.[143]

The 'sight and sound principle' also applies in relation to counter-demonstrations which should be facilitated within 'sight and sound' of one another: there would be no counter-demonstrations if the opposition were unable to see and hear the dissenting message. To rebut this argument, the authorities might argue that if the core purpose of an assembly is to send a message, organisers and participants could seek another way to express their opinion through

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[136] UN Human Rights Council, UN Doc A/HRC20/27 (n 76), para 41.
[137] *Öllinger v Austria* App no 76900/01 (ECtHR, 29 June 2006), para 29.
[138] Nicholas Blomley, 'Civil Rights Meet Civil Engineering: Urban Public Space and Traffic Logic' (2007) 22 Canadian journal of law and society 55, 64.
[139] Maina Kiai, 'FOAA Online!:The Right to Freedom of Peaceful Assembly ' 2017) <http://freeassembly.net/foaa-online> accessed 22 October 2018, 32.
[140] *Sáska v Hungary* App no 58050/8 (ECtHR, 27 November 2012), para 21.
[141] ibid.
[142] *Koreshkov v Belarus* (9 November 2017) Communication No 2168/2012 CCPR/C/121/D/2168/2012 para 8.5.
[143] ibid para 7.4.

alternative channels (such as press releases or leafleting). However, one could argue that posting a comment or contribute a token display of support on a social network, especially when it is done in private, does not show as much commitment as going to a public gathering.[144] Sending a message is not the sole function of the right to peaceful assembly. It enables like-minded people to generate a social movement which drives their society. The effectiveness of the right of freedom of assembly would be diminished if the authority were simply able to redirect participants to shout to themselves at some distance removed from their target audience.

Another common method of undermining the 'sight and sound' principle is the designation by city or State authorities of a single approved location for holding assemblies. In *Turchenyak et al v Belarus* and *Kozolve et al v Belarus*, the Human Rights Committee noted that designating a sole location for public assembly to a stadium under the domestic legal framework cannot justify a ban on the use of other public locations.[145] Similarly, in *Sudalenko v Belarus*, the Committee found that a restriction limiting public assemblies to a remote designated location was equal to a de facto prohibition.[146] In *Statkevich and Matskevich*, the complainants requested to hold a ten-person-picketing in the city centre, in front of a shopping mall. The local authority refused on the ground that the complainants failed to ensure public safety and order, medical assistance and clean-up.[147] The domestic court ruled that the complainants could picket only at the designated location according to the local by-law.[148] The CCPR found the restriction was unjustified because the authorities failed to explain why the complainants' picket in the proposed location would 'jeopardize national security, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others'.[149]

Under CCPR jurisprudence, the right under Article 21 covers both outdoor and indoor assemblies.[150] In *Bakur v Belarus*, the Committee held that an indoor public event was protected by ICCPR.[151] Similarly, the ECtHR has affirmed that 'the right to freedom of assembly covers

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[144] Kirk Kristofferson, Katherine White and John Peloza, 'The Nature of Slacktivism: How the Social Observability of an Initial Act of Token Support Affects Subsequent Prosocial Action' (2014) 40 Journal of Consumer Research 1149, 1152.
[145] *Turchenyak* (n 65), para 7.5.
[146] *Sudalenko* (n121), para 8.6.
[147] *Statkevich and Matskevich v Belarus* (16 December 2015) Communication No 2133/2012 CCPR/C/115/D/2133/2012, para 2.2.
[148] ibid para 2.4.
[149] ibid para 9.5.
[150] Hamilton, 'Towards a General Comment 37…' (n 110) 16.
[151] *Bakur v Belarus* (7 September 2015) Communication No. 1902/2009 CCPR/C/114/D/192/2009 para 7.3.

both private meetings and meetings in public thoroughfares as well as static meetings and public processions …'[152] The OSCE/ODIHR Guidelines also recommends that the right to freedom of assembly cover assemblies on private property.[153] Nevertheless, the owners of properties may lawfully restrict access to their land – a position that has been reinforced by IHRL: In *Zündel v Canada,* the CCPR established that neither Article 19 nor Article 21 of the ICCPR confers an absolute freedom of forum.[154] In *Taranenko v Russia,* the ECtHR explained that freedom of expression does not automatically grant the rights of entry to private property or to government offices.[155] In *Appleby v The United Kingdom* , the ECtHR has ruled that a private landowner can deny entry to anyone without having to consider the important of freedom of expression against the right of property.[156] The Court has noted that under the circumstance that individuals have no space to exercise freedom of assembly, i.e. because the entire municipality is controlled by a private body, the state has a positive obligation to regulate property rights to protect the enjoyment of freedom of assembly under the ECHR.

To sum up, states have both negative and positive obligations towards freedom of assembly. In general, all forms of assemblies are protected in a democratic society, unless there is a violent intention on the part of the organiser. The right to peaceful assembly should be extended to everyone without discrimination but the role of an organiser (and related liabilities) should not be assumed or imposed. International standards also provide that organisers and participants have the right to assemble within sight and sound of their target audience. In later chapters, this thesis will demonstrate that the three Southeast Asian hybrid regimes do not follow the principle of sight and sound that we have discussed in this section. The authorities in these regimes use blanket bans to restrict freedom of assembly and shield the incumbents from challenges on the street. Although, they could argue that international standards allow states to interfere freedom of assembly upon certain conditions, it is important to remark that the international standards also require that such interference is permissible only if it conforms with the law and the strict test of necessity and proportionality.[157] Therefore, the following section explores the international standards involving states' ability to interfere with and limit freedom of assembly.

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[152] *Barankevich v Russia* App no 10519/03 (ECtHR, 26 July 2007), para 25.
[153] Organisation for Security and Co-operation in Europe (n 76), para 1.2.
[154] Hamilton, 'Towards a General Comment 37…' (n 110) 16.
[155] *Taranenko* (n 81), para 78.
[156] *Appleby and Others v The United Kingdom* App no 44306/98 (ECtHR, 6 May 2003), para 47.
[157] *Christian Democratic People's Party v Moldova* App no 28793/02 (ECtHR, 14 February 2006), paras 63-64; *Barankevich* (n 152), para 30; *Animal Defenders International v The United Kingdom* App no 48876/08 (ECtHR, 22 April 2013), para 78.

2.3 Grounds for any interference with the freedom of peaceful assembly

Generally, it is a negative obligation for the states not to unduly interfere with the freedom of assembly. States can only interfere on the grounds provided by the treaties. The legitimate grounds for imposing restrictions of freedom assembly appear in Article 21 ICCPR and Article 11(2) The CCPR and the ECtHR use the three-prong test to justify any restriction on the freedom of assembly: They assess whether a restriction: (1) is prescribed in conformity with the law, (2) pursues a legitimate aim, and (3) is necessary in a democratic society (comply with a strict test of necessity and proportionality).[158] The principle of proportionality requires that 'any restriction must be appropriate to achieve its protective function'.[159] At the same time, it must be the least intrusive instrument that can deliver the desired outcome.[160]

In my view, the central purpose of these limitations is to enable a democratic society to function properly. If we were to remove the democratic quality from this provision, any restriction in any regime type would perfectly fit the three-prong test because a state could exercise its sovereignty to make any law, especially to define what is in the interest of national security and what is the desired quality of its public order.[161] Hence, "necessary in a democratic society" becomes a fundamental determinant of whether restrictions on the right of peaceful assembly are legitimate. The test provides a measure of independent objectivity by which to evaluate the quality and effect of whatever restrictions have been imposed.

The CCPR has held that the law regulating the freedom of assembly must be in strict compliance with the grounds for restriction indicated in Article 21 of the Covenant.'[162] In *Belyazeka v Belarus*, the complainant was convicted on the ground of organising an unauthorised mass event.[163] The domestic court found that the commemoration service met the definition of a "picket" under the Law on Mass Events. The Committee points that by imposing a procedure for holding mass events, it is the state's obligation to explain how its restrictions

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[158] Kiai (n 139).
[159] UN Human Rights Council, *Joint report of the Special Rapporteur* (n 59), para 30.
[160] ibid.
[161] For example, the constitution of Thailand B.E. 2017 s44 guarantees freedom of assembly in section 44 but it omits the "necessary in a democratic society" criteria. The section states:
A person shall enjoy the liberty to assemble peacefully and without arms.
The restriction of such liberty under paragraph one shall not be imposed except by virtue of a provision of law enacted for the purpose of maintaining security of the State, public safety, public order or good morals, or for protecting the rights or liberties of other persons.
[162] Human Rights committee 'Concluding Observations on the seventh periodic report of Ukraine' (22 August 2013) CCPR/C/UKR/CO/7, para 21.
[163] ibid para 4.1.

meet the criteria set out in Article 21 of the Covenant.[164] The CCPR saw that there was a violation because the state did not explain why such restriction was necessary. In both *Belyazeka* and *Kovalenko,* the State party's restrictions on public assembly were in accordance with the domestic law but the State failed to explain how, in practice, these restrictions meet criteria set out in Article 21 of the ICCPR.[165] These two cases reaffirm that the state has the burden to show a rational connection between the legitimate aim and specific restrictions on the exercise of freedom of assembly. In the same way, the ECtHR reviews the grounds for restriction indicated under ECHR Article 11(2). In *Hyde Park and Others v Moldova (No.4)*, the Court explains:

> When carrying out its scrutiny under Article 11 the Court's task is not to substitute its own view for that of the relevant national authorities but rather to review under Article 11 the decisions they have delivered in the exercise of their discretion. This does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see, *mutatis mutandis*, *Jersild v Denmark*, 23 September 1994, § 31, Series A no. 298).[166]

Regarding the quality of domestic law, in *Nepomnyashchiy v Russian Federation*, the CCPR explained that legislation must be sufficiently precise to allow an individual to regulate their behaviour accordingly.[167] Similarly, the ECtHR has held that the standard "prescribed by law" includes the clarity of the law (not merely whether a legal provision exists).[168] In *Hashman and Harrup v The United Kingdom* , the Court established that the law (in this case, a binding over

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[164] *Belyazeka* (n 125), para 11.8.
[165] *Kovalenko* (n 96), para 8.8; *Bazarov v Belarus* (29 August 2014) Communication No. 1934/2010 CCPR/C/111/D/1934/2010, para 7.5.
[166] *Hyde Park and Others v Moldova (No.4)* App no 18491/07 (ECtHR, 7 April 2009), para 52.
[167] *Nepomnyashchiy v Russian Federation* (23 August 2018) Communication No 2318/2013 CCPR/C/123/D2318/2013, para 7.7.
[168] *Hashman and Harrup v The United Kingdom* App no 25594/94 (ECtHR, 25 November 1999), para 29.

order to keep the peace and be of good behaviour) must state what 'the subject of the order might or might not lawfully do'.[169] Laws governing public assemblies must at least provide sufficient precision letting the people know how to act lawfully. The Court noted that one of the reasons that restrictions must be prescribed by law is that this creates certainty and foreseeability.[170] This condition offers a safeguard against arbitrariness from the authorities. Having laws that are either too subjectively or too vaguely worded can greatly limit the ability to enjoy freedom of assembly. In *Gillan and Quinton v The United Kingdom*, the ECtHR held that the law, under ECHR, must be 'adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct.'[171] Although the Court did not assess whether Article 11 had been violated in *Gillan and Quinton*, it is clear that its ratio extends to cover the laws governing public assemblies.[172]

2.3.1 Impermissibility of content-based restrictions

International standards provide that content-based restrictions must be carefully scrutinised as they can greatly affect the democratic character of a society. The CCPR and the ECtHR have allowed content-based restrictions in several areas: 'the expressive freedoms relating to obscene material, defamation of private individuals and judges, national security, reckless incitement of imminent violence, inciting the abolition of institutions of democracy and racial or religious invective.'[173] However, the CCPR has consistently expressed the view that content-based restriction is one of the most serious forms of interference. Often, such concerns arise in the context of public assemblies that seek to challenge entrenched societal norms concerning gender and sexuality. In *Alekseev v The Russian Federation*, for example, the complainant requested that he be allowed to hold a picket in front of the Iranian Embassy in Moscow to raise public awareness and call for a ban on the execution of homosexuals in Iran. It was refused on the ground that the picket would trigger a negative reaction in society. The CCPR found that the restriction was based solely on the content of the picket.[174] Although the State party could argue that such restriction was for public safety, the Committee pointed out that the State had

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[169] ibid para 30.
[170] ibid para 31.
[171] *Gillan and Quinton v The United Kingdom* App no 4158/05 (ECtHR, 12 January 2010), para 76.
[172] ibid paras 77, 79.
[173] Brabyn J, "The Fundamental Freedom of Assembly and Part III of the Public Order Ordinance.' ' (2002) 32 Hong Kong LJ 271, 291-292.
[174] *Alekseev v The Russian Federation* (2 December 2013) Communication no. 1873/2009 CCPR/C/109D/1873/2009, para 9.6

a positive duty to protect picketers from violent parties. The State did not explain why the police would not be able to prevent the violence. Hence, the restriction was not necessary in a democratic society.[175]

In *Youbko v Belarus*, the complainant requested to hold a picket of around 50 participants with an aim to draw public attention to the work of the judiciary. They proposed to display posters saying: "For Justice", "The President-Guarantor of Constitutional Rights", "We Are Against Bureaucracy in Courts and the Prosecutor's Office", and "Why Are Innocent People Convicted and Real Murderers Remain Free?". The request was denied because the picket was considered to be an attempt to influence court rulings.[176] Because the burden of showing the necessity of a restriction is always on the state, the CCPR found that the restrictions did not pass strict tests of necessity and proportionality because the local authorities failed to explain why criticism of a general nature regarding the administration of justice would jeopardize the court rulings.[177] In *Evrezov v Belarus*, the domestic authorities rejected the complainant's request to protest the imprisonment of a political figure on the ground that its purpose would contradict a court's verdict on the prisoner.[178] The CCPR found that this rejection was unduly restrictive to freedom of assembly. The national authorities failed to demonstrate how the complainant's picket would jeopardise national security, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.[179] The ECtHR expressed, in *Primov and Others v Russia,* that 'the government should not have the power to ban a demonstration because they consider that the demonstrators' "message" is wrong'.[180] In this case, the authority that had the power to authorise or deny the public assembly was the main target of criticism. Hence, the Court emphasised that content-based restrictions on freedom of assembly in the case should be subject to the most serious scrutiny.[181]

2.3.2 Presumptive disproportionality of blanket-bans

One way in which states can fulfil their negative obligation not to unduly interfere with assemblies is to avoid imposing blanket-bans on time and location.[182] Their prohibitive,

[175] ibid.
[176] *Youbko v Belarus* (24 April 2014) Communication no. 1903/2009 CCPR/C/110/D/1903/2009, para 2.2.
[177] ibid paras 9.3-9.4.
[178] *Evrezov v Belarus* (17 August 2015) Communication No.1988/2010 CCPR/C/114/D/1988/2010, para 7.5.
[179] ibid.
[180] *Primov and Others v Russia* App no 17391/06 (ECtHR, 12 June 2014), para 135.
[181] ibid.
[182] UN Human Rights Council, UN Doc A/HRC20/27 (n 76), para 39.

indiscriminate and far-reaching nature make such bans presumptively disproportionate. Blanket-bans often cover iconic locations such as historical sites, parliaments, presidential palaces, and memorials. They should be considered as public spaces where people can organise a peaceful assembly. In *Pavel Levinov v Belarus*, the CCPR held that the restrictions that limited pickets to certain designated locations, requiring a one-person picket to contract additional services in order to hold a picket, do not conform with the standards of necessity and proportionality under the Covenant.[183] There are many cases in which the ECtHR ruled against blanket bans prohibiting assemblies in a specific location. For example, blanket bans near parliaments in *Nurittin Aldemir and Others v Turkey* and *Sáska v Hungary*, bans near government buildings in *Christian Democratic People's Party v Moldova, Özbent and Other v Turkey*, bans near courts in *Kuznetsov v Russia, Maloffeyeva v Russia,*and *Kakabadze and Others v Georgia*, and bans near the residence of a prime minister in *Patyi and Others v Hungary*.[184] In *Lashmankin and Others v Russia*, the Court noted that Russian law imposed a statutory blanket ban on holding public events at certain locations such as in the immediate vicinity of court buildings, detention facilities, the residences of the President of the Russian Federation, dangerous production facilities, railway lines and oil, gas or petroleum pipelines.[185] The Court explains a general ban on demonstrations can be considered as being necessary under the scope of the Article 11 Convention if it has two components: (a) the assembly pose a real danger to public order, and (b) it is clear that the security concern outweighs the unavoidable negative effects from the assembly even after applying narrow bans on location and duration.[186]

The authorities in many countries have used blanket bans to curtail the exercise of the right to freedom of assembly – often, to gain some degree of political advantage. For the purposes of this thesis (and as later chapters demonstrate), this is certainly true of hybrid regimes, where IHRL has limited traction. This creates a double problem – not only do blanket bans greatly limit the exercise of freedom of assembly, but because they are generally enacted in primary legislation (not merely imposed by way of police discretion), there is little possibility to mount a legal challenge against them: international mechanisms generally avoid reviewing in abstract the human rights compatibility of domestic legislation because of the principle of subsidiarity.

[183] *Levinov v Belarus* (14 July 2016) Communication no 2082/2011 CCPR/C/117/D2082/2011, para 8.3.
[184] Kiai (n 139) 46.
[185] *Lashmankin and Others v Russia* App no 57818/09 and 14 others (ECtHR, 7 February 2017), para 432.
[186] ibid para 434.

2.3.3 Notification and authorisation

The permissible rationales for requiring prior notification of assemblies is that States have a positive obligation to facilitate and to protect peaceful assemblies. In order to be able to facilitate an assembly effectively, the authorities need to know some information regarding the assembly such as time, place and the possibility of counter-demonstrators. This should be the main objective of a notification procedure (and notification procedures are thus preferable to authorisation procedures).[187] Holding a peaceful assembly should not be subjected to authorisation by the authorities because states should recognise the presumption in favour of holding peaceful assemblies.[188] Moreover, states should always protect and facilitate peaceful spontaneous assemblies[189] – those where the organisers are unable to fulfil the notification requirements or where there are no identifiable organisers. Domestic laws should provide an exemption for such assemblies from any standard prior notification requirement.[190]

The CCPR and the ECtHR take different approaches towards notification and authorisation. Generally, both agree that notification is preferred over authorisation[191] – though neither has yet explicitly outlawed authorisation requirements.[192] The CCPR has further held that authorisation procedures must not be used to prevent people from organising a peaceful assembly, and in *Youbko v Belarus* and *Bazarov v Belarus*, the CCPR held that authorisation or notification procedures must comply with the Covenant.[193] Similarly, under the ECHR, prior notification is permissible as a lawful restriction if it is not contrary to the spirit of Article 11.[194] In *Kuznetsov v Russia*, the ECtHR expressed its view that 'the subjection of public assemblies to an authorisation or notification procedure does not normally encroach upon the essence of the right as long as the purpose of the procedure is to allow the authorities to take reasonable and appropriate measures in order to guarantee the smooth conduct of any assembly.'[195]

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[187] *Vyerentsov v Ukraine* App no 20372/11 (ECtHR, 11 April 2013), para 95.
[188] UN Human Rights Council, UN Doc A/HRC20/27 (n 76) paras 27-28.
[189] Organisation for Security and Co-operation in Europe (n 76) Section A, para 4.2, and Section B ('Explanatory Notes'), paras 125-131.
[190] UN Human Rights Council, UN Doc A/HRC20/27 (n 76) para 29.
[191] Hamilton, 'Towards a General Comment 37…' (n 110) 25-26.
[192] ibid.
[193] *Younko v Belarus* (24 April 2014) Communication no 1903/2009 CCPR/C/110/D/1903/2009, para 9.5; *Bazarov* (n 165), para 7.5.
[194] *Éva Molnár v Hungary* App no 10346/05 (ECtHR, 7 October 2008), para 35.
[195] *Kuznetsov v Russia* App no 10877/04 (ECtHR, 23 October 2008), para 42.

Importantly, however, the CCPR has held that a notification requirement is a *de facto* interference with the right to freedom of peaceful assembly under the ICCPR.[196] This implies that states must be able to explain why the notification procedure is justifiable under the strict tests of necessity and proportionality.[197] This view is shared with the Special Rapporteur and the OSCE/ODIHR Panel of Experts on Freedom of Assembly.[198] In contrast, the ECtHR does not automatically consider authorisation or notification procedures to be an interference with the right to freedom of assembly. Here Mead comments that if authorisation or notification procedures are not even regarded as an interference, then there will not be any scrutiny by the ECtHR on the proportionality of the authorisation/notification process because there must be an interference before the Court can assess the proportionality of such process.[199]

According to international standards, it can be argued that there are three characteristics that prior-notification procedures in a democratic society should have: (1) it is not necessary for all assemblies to be subjected to a notification procedure, (2) spontaneous assemblies should be exempted from a notification procedure, and (3) a failure to comply with a notification requirement does not justify dispersal as long as it remain peaceful. Each of these will be dealt with here in turn.

2.3.3.1 Not all assemblies need notification – and the challenge of 'horizontalism'

Notification should not be required automatically for all assemblies. An assembly that does not cause much disturbance or that consists of only a small number of participants or which takes place in an indoor/private space should be exempted from the procedure. [200] In *Aleksandrov v Belarus,* the CCPR held that a prior-authorisation for a street march in which only three persons intended to participate was not necessary in a democratic society.[201] In *Lozenko v Belarus,* a prior-authorisation requirement for holding meetings in a private space was held to be unnecessary.[202]

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[196] Hamilton, 'Towards a General Comment 37…' (n 110) footnotes 176-177 citing UN Human Rights Committee, *Concluding observations on the fourth periodic report of Azerbaijan* (16 November 2016) CCPR/C/AZE/CO/4, para 38; UN Human Rights Committee, *Concluding observations of the Human Rights Committee Morocco* (1 November 1999) CCPR/C/79/Add.113 para 24.
[197] *Androsenko v Belarus* (11 May 2016) Communication no 2092/2011 CCPR/C/116/D2092/2011, para 7.6.
[198] ibid.
[199] Mead (n 133) 80.
[200] Hamilton, 'Towards a General Comment 37' (n 110) 25.
[201] *Aleksandrov v Belarus* (29 August 2014) Communication No 1933/2010 CCPR/C/111/D/1933/2010, para 7.4.
[202] *Levinov* (n 183), para 7.7.

Furthermore, it is difficult (if not impossible) to require a notification or a permit for an assembly which has neither an organiser nor leader. Identifying who should be responsible for fulfilling the notification requirement can be problematic in relation to public assemblies that are based on horizontalism, a social movement concept that rests on the logic of flattened hierarchies, differentiated equality and non-representation.[203] Horizontalism was claimed to be a motivational influence in the American Occupy Wall Street protests[204], the Spanish *Indignados*, the Greek *Aganakitismenoi*, and the Turkish *Gezi* protests.[205] Critical Mass bicycle rides are another type of leaderless protests. It has been accepted as an event with no fixed route, no end-time and no pre-determined destination.[206] These are all decided by the participants on the day. The random nature of Critical Mass makes an advance notification impossible.[207]

Such amorphous forms of organisation, lacking formal leadership hierarchies or structures – in combination with the technical capacity to multiply and expand participation far beyond what was previously possible – are creating both opportunities and challenges for assembly participants and state authorities alike. Indeed, in both established democracies and authoritarian regimes, messaging apps and online digital media platforms, initially embraced as a tool for mobilisation, have quickly themselves become a target for governmental regulation and a means of tracking and imposing liability on protesters.[208] This is an area in which international human rights standards are lagging behind practice 'on the ground' – though perhaps inevitably so.[209] On this issue, later chapters further argue that the definition of

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[203] Nina Marolt, 'Beyond Hierarchies : Horizontalism, Space and Prefigurative Politics' (Ph.D. Thesis University of Sussex 2009) 1.

[204] Ishaan Tharoor, 'Occupy Wall Street: a new era of dissent in America?' (*TIME*, 12 October 2011) <http://world.time.com/2011/10/12/occupy-wall-street-a-new-era-of-dissent-in-america/> accessed 8 November 2018.

[205] Alen Toplišek and Lasse Thomassen, 'From Protest to Party: Horizontality and Verticality on the Slovenian Left' (2017) 69 Europe-Asia Studies 1383.

[206] Mead (n 133) 176 citing *Kay v Commissioner of the Police of the Metropolis* [2007] EWCA Civ 477 and [2006] EWHC 1536 (Admin).

[207] *Kay v Commissioner of the Police of the Metropolis* [2008] UKHL 69 at [67].

[208] See for example, the use of location tracking during the anti-government protests in Hong Kong in June/July 2019. See, Lily Kuo, 'Hong Kong's digital battle: tech that helped protesters now used against them', *The Guardian* (14 June 2019) <https://www.theguardian.com/world/2019/jun/14/hong-kongs-digital-battle-technology-that-helped-protesters-now-used-against-them> accessed 1 July 2019.

[209] Though note in this regard the 2019 report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, 17 May 2019, 'The exercise of the rights to freedom of peaceful assembly and of association in the digital age', A/HRC/41/41 <https://www.ohchr.org/Documents/Issues/FAssociation/A_HRC_41_41_EN.docx> accessed 2 July 2019.

'organisers' in hybrid regimes are too broad. Such definitions allow the authorities in hybrid regimes to impose the notification/authorisation duty upon assumed organisers. There have been several instances where a post on online media, inviting the public to a public event, has made the owner of the account liable for failing to notify the authorities.

2.3.3.2 Spontaneous assemblies should be exempted from a notification procedure

There should be an exemption for spontaneous assemblies because they are logistically impossible to meet notification requirements.[210] To deny this form of public assemblies means to deny the essence of the freedom of assembly. The CCPR, in *Popova v The Russian Federation*, has held that spontaneous demonstrations cannot be subjected to a lengthy procedure of notification.[211] In this case, an organiser was prosecuted for holding an unauthorised public event. She argued that her gathering was a direct and immediate response to the announcement of the parliamentary electoral result. It was impossible to meet the prior notice requirement.[212] The Committee found her gathering was a spontaneous peaceful protest, which was protected under the ICCPR.[213] In *Bazarov v Belarus*, the CCPR found that the prior authorisation for holding a peaceful street march in which only three persons intended to participate was not necessary in a democratic society.[214] The CCPR emphasised that a state may introduce a system of prior notification but it must not operate against the object and purpose of ICCPR Article 19 and 21.[215]

In *Navalnyy v Russia*, the ECtHR found that the notification system in Russian law is formulated in rigid terms providing no room for any spontaneous assembly.[216] The system has an unusually long statutory time-limit which makes it more difficult to follow the law. The Court has held that, in special circumstances such as an immediate response to a current event, the right to hold a spontaneous may override the notification requirements.[217] In *Lashmankin*

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[210] According to the OSCE/ODIHR guidelines, 'a spontaneous assembly is generally regarded as one organized in response to some occurrence, incident, other assembly or speech, where the organizer (if there is one) is unable to meet the legal deadline for prior notification, or where there is no organizer at all. Such assemblies often occur around the time of the triggering event, and the ability to hold them is important because delay would weaken the message to be expressed'; Organisation for Security and Co-operation in Europe (n 76) 67.

[211] *Popova v The Russian Federation* (17 April 2018) Communication No. 2217/2012 CCPR/C/122/D/2217/2012, para 7.5.

[212] ibid para 7.2.

[213] ibid para 7.6.

[214] *Bazarov* (n 165), para 7.5.

[215] ibid para 7.4.

[216] *Navalnyy* (n 54), para 140.

[217] ibid para 153.

and Others v Russia, the Court considered that 'the automatic and inflexible application of the notification time-limits without any regard to the specific circumstances of each case could by itself amount to interference without justification under Article 11§ 2 of the Convention.'[218] In *Vyerentsov*, the Court referred to the OSCE Guidelines on Freedom of Peaceful Assembly that the notification timeframe should not be 'unnecessarily lengthy (normally no more than a few days)'.[219] The Court has identified that the violation of Article 11 arose from the implementation of a former Decree of the Presidium of the Supreme Council of the USSR, which had a repressive nature.[220] *Vyerentsov* demonstrates that a legal frameworks which has a repressive nature and does not comply with the obligation under IHRL can effectively create chilling effects and deter people from exercising freedom of assembly.

In addition, although the peaceful nature of an assembly may override the need to notify or to seek permission from the authorities, a spontaneous demonstration must be warranted by a special circumstance.[221] ECtHR uses 'the special circumstance test' to evaluate whether a spontaneous should be allowed. In *Éva Molnár*, the Court established:

> the right to hold spontaneous demonstrations may override the obligation to give prior notification to public assemblies only in special circumstances, namely if an immediate response to a current event is warranted in the form of a demonstration. In particular, such derogation from the general rule may be justified if a delay would have rendered that response obsolete.[222]

This issue raises the important of judicial review in identifying special circumstances allowing spontaneous assemblies. In later chapters, this study argues that the lack of adequate judicial review in hybrid regimes renders spontaneous assemblies which have not made an application very susceptible to state interference. Notification requirements in hybrid regimes can be enforced strictly upon certain groups, and very flexibly on others, leading to claims of differential, and thus, arbitrary policing of particular groups. Without adequate judicial review to establish the scope of special circumstance, spontaneous assemblies practically depend on the authorities' discretion.

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[218] *Lashmankin and Others* (n 185), para 456.
[219] *Vyerentsov* (n 187), para 41.
[220] ibid.
[221] *Mehtiyev and Others v Azerbaijan* App no 20589/13 (ECtHR, 6 April 2017), para 46.
[222] *Éva Molnár* (n 194), para 38.

2.3.3.3 A failure to comply with a notification requirement does not justify dispersal as long as the assembly remains peaceful.

If the permissible rationale for requiring the submission of prior notification is to enable the state to facilitate and protect peaceful assemblies, then failing to notify the authorities should not entitle law enforcement officials to disperse an assembly automatically. [223] Neither criminal law nor administrative law should not impose punishments on organisers for failing to notify the authorities.[224] In *Bukta and Others v Hungary*, the ECtHR emphasised the peaceful nature of an assembly that had failed to satisfy the lawful notification requirements. The Court has established that states cannot disperse a peaceful public assembly solely because the organisers have failed to notify the authorities.[225] In *Kudrevičius and others*, the ECtHR stated that: 'the absence of prior authorisation and the ensuing "unlawfulness" of the action do not give *carte blanche* to the authorities; they are still restricted by the proportionality requirement of Article 11'.[226] In other words, a system of prior notification cannot become an end in itself.

In addition, the authorities should provide an effective opportunity to the participants to an assembly to convey their message before interfering. In *Oya Ataman v Turkey*, the ECtHR found that the police operation to disperse an assembly was disproportionate because there was no evidence showing that the participants posed a danger to public order.[227] In *Éva Molnár*, the ECtHR found that the police had displayed the necessary tolerance towards protesters by allowing them to show solidarity for several hours before dispersing their assembly. This interference was not unreasonable because protesters had a sufficiently long time to show solidarity.[228] The main difference in these two cases is that the dispersal in *Oya Ataman* was quite prompt while the police in *Éva Molnár* waited for several hours to allow the protesters to convey their message before dispersal.[229]

To sum up, states are allowed to impose restrictions on freedom of assembly but these must satisfy the three-prong test: prescribed by law, pursue a legitimate aim, and be necessary in a

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[223] UN Human Rights Council, UN Doc A/HRC20/27 (n 76), para 29; Commisioner for Human Rights Council of Europe, *Follow-up memorandum of the Commissioner for Human Rights on freedom of assembly in the russian federation* (5 September 2017), para 24.
[224] Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai* (24 April 2013) A/HRC/23/39, 51.
[225] *Bukta and Others v Hungary* App no 25691/04 (ECtHR, 17 July 2007), para 36.
[226] *Kudrevičius and Others* (n 51), para 151.
[227] *Oya Ataman v Turkey* App no 74552/01 (ECtHR, 5 December 2006).
[228] *Éva Molnár* (n 194), para 43.
[229] ibid.

democratic society. International standards also emphasize that content-based restriction[230] and blanket-bans should be avoided.[231] Finally, a prior-notification procedure must have the main objective to facilitate public assemblies rather than to prevent them. Most importantly, it must be justifiable under strict tests of necessity and proportionality. In later chapters, the relevance of these particular international standards will become clear. This thesis will demonstrate that hybrid regimes curtail the scope of freedom of assembly to gain political advantages through content-based restrictions, blanket-bans, and prior notification requirement.

2.4 Public order policing

Public order policing (revisited in chapter 5) is a key determinant of how freedom of assembly is exercised in a jurisdiction. The police are responsible for protecting and facilitating peaceful assemblies – and thus for upholding the state's positive obligations in this regard. Indeed, local authorities and officials exercising law enforcement duties are at the frontline of fulfilling these obligations. Public order policing involves not only protecting political freedoms (such as freedom of expression and freedom of assembly) but also entails upholding other absolute rights such as freedom from torture or other inhuman or degrading treatment. Having a good legal framework governing public assemblies does not guarantee that people can enjoy their right to peaceful assembly. Public order policing must also comply with international standards.

This part aims to explore international standards on public order policing. It argues that police duties towards freedom of assembly are created by the positive obligation under IHRL. Hence, all police policies and operations should aim to facilitate and protect public assemblies rather than unnecessarily restricting the freedom. This part explores international standards on the core police operations namely surveillance, arrest and detention, dispersal and use of force. It then explores international standards aiming to hold the police accountable such as derogation (a procedural element of which entitlement is that state provide an explanatory justification), judicial review and remedies.

[230] *Primov and Others* (n 180), para 135.
[231] Organisation for Security and Co-operation in Europe, *Guidelines on Freedom of Peaceful Assembly*, 16.

2.4.1 General duties of the police: facilitation and protection

The general duties of the police towards assemblies in a democratic society arise primarily from the State's positive obligations to facilitate and protect the right to freedom of peaceful assembly. [232] It is helpful to consider these two obligations separately.

2.4.1.1 Facilitation

According to the CCPR, states can facilitate a peaceful assembly by providing protesters with access to public space and protecting them, without discrimination.[233] Some participants such as women, children, and disabled persons may need special protection from intimidation or gender-based violence. Local authorities and law enforcement agents should establish and maintain effective communication with protesters. In addition, basic services, including traffic management, medical assistance, and clean-up cost should be the state's responsibility.[234] On this issue, in *Pavel Levinov v Belarus,* the CCPR has noted that '[o]rganisers should not be held responsible for the provision of such [basic] services, nor should they be required to contribute to the cost of their provision.'[235] The CCPR has expressed that when imposing any restriction to the freedom of assembly, 'the State party should be guided by the objective of facilitating the right rather than seeking unnecessary or disproportionate limitations to it'.[236] Similarly, the ECtHR has stated that 'the essential object of Article 11 is to protect individuals against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of this rights.'[237] Hence, it is the state's responsibility to provide appropriate security measures. This includes the presence of on-site first-aid services and the management of traffic in the surrounding area.[238] Organisers of a public assembly should not be held responsible for the cost of basic public services such as policing and first-aid services. By charging fee for these services, there will be no rights to

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[232] UN Human Rights Council, Joint report of the Special Rapporteur (n 59) para 14 citing *Plattform Ärzte für das Leben* (n 68).
[233] Human Rights Council, Resolution 25/38 The promotion and protection of human rights in the context of peaceful protests (11 April 2014) (n 76) 3.
[234] UN Human Rights Council, *Joint report of the Special Rapporteur* (n 59), para 40.
[235] *Levinov* (n 201), para 8.3.
[236] *Statkevich and Matskevich* (n 147) para 9.4; *Praded v Belarus* (25 November 2014) Communication No 2029/2011, para 7.8.
[237] *Oya Ataman* (n 227), para 36.
[238] *Frumkin* (n 81) para 96; *Oya Ataman* (n 227), para 39.

peaceful assembly for those who cannot afford to pay.[239] The fee will create an exclusive zone for protesters with wealthy sponsors and state sponsored social movements.

The obligation to facilitate includes a duty to train police to uphold IHRL. Police training is one of the major factors contributing to the success of enabling public assemblies. The UNSRFAA has urged that states adequately train their law enforcement officials to facilitate public assemblies.[240] Police must have proper knowledge of the laws governing public assemblies, crowd facilitation techniques and human rights, including some soft skills such as effective communication, negotiation and mediation to avoid escalation of violence and conflict.[241] Effective communication between organisers of a protest and police, both before and during the events, enables the authorities to perform more effectively in public assemblies policing.[242] In addition, the ECtHR has considered, in *İzci v Turkey*, that State parties must provide adequate training to their law enforcement personnel and their supervisors on the necessity, proportionality and reasonableness of any use of force.[243] Therefore, having a police force that does not understand its obligations under IHRL can pose severe threats to the right to peaceful assembly.

2.4.1.2 Protection

States have duties to take measures preventing those exercising their rights from interference by others.[244] In *Alekseev*, the CCPR ruled that states have a duty to protect participants against violent parties even if the content of their event is offensive. [245] The reason is that if states do not offer protection to less popular or offensive ideas, the democratic process would be impaired because views belonging to the minorities or dissenting opinions could not be heard. The

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[239] David Mead, 'Quis debiet ipsos custodes? The real costs of the cost of protest' (*Protestmatters*, 11 February 2015) <https://protestmatters.wordpress.com/2015/02/11/quis-debit-ipsos-custodes-the-real-costs-of-the-cost-of-protest/> accessed 29 August 2019

[240] UN Human Rights Council, *Joint report of the Special Rapporteur* (n 59), para 42.

[241] For instance, the Committee has recommended that South Korean authorities should train their police officials accordingly. See UN Human Rights Committee, *Concluding observations on the fourth periodic report of the Republic of Korea* (3 December 2015) CCPR/C/KOR/CO/4, paras 52-53.

[242] Joint Committee on Human Rights, the House of Lords and and the House of Common, 'Facilitating Peaceful Protest: Tenth Report of Session 2010-211' 25 March 2011) <https://publications.parliament.uk/pa/jt201011/jtselect/jtrights/123/123.pdf> accessed 22 November 2018, 7.

[243] *İzci v Turkey* App no 42606/05 (ECtHR, 23 July 2013), para 99.

[244] UN Human Rights Council, *Joint report of the Special Rapporteur* (n 59), para 25 citing *Ozgur Gundem v Turkey* App no 23144/93 (ECtHR, 16 March 2000), paras 42-43; *Plattform 'Ärzte für das Leben'* (n 68).

[245] *Alekseev* (n 174), para 9.6,

ECtHR has ruled a similar principle in *Ziliberberg*, as long as they remain peaceful, participants to a public assembly do not cease to enjoy their right because someone else causes violence.[246] The ECtHR has held that force used must be directed only at violent individuals. In *Solomou and Others v Turkey*, Mr. Solomou was killed by state agents during the dispersal of a violent demonstration. Solomou had been unarmed until he was shot. The ECtHR found that the violence caused by others cannot justify the shooting and killing of one who is not posing a threat.[247]

In *Stankov and the United Macedonian Organisation Ilinden,* the Court insisted that police should have made an extra effort to accommodate two opposing commemorative events in the same place and at the same time, particularly if the location had a crucial factor to the organisers, i.e. having a link to a particular event in their history.[248] *Öllinger v Austria* reflects similar reasoning. Two groups wanted to hold commemorative events at the same cemetery at the same time. One was to commemorate Jews killed by the SS during the WWII. The other was to commemorate the SS who were killed during the War. The Jewish assembly was planned as a counter-demonstration. The local authorities banned the Jewish commemoration on the ground that it would endanger public order and offend the religious feelings of uninvolved visitors.[249] The ECtHR found that the ban was disproportionate because the authorities were still able to provide protective measures such as deploying police officers to a degree that would sufficiently keep both of the commemorative events safe from each other.[250] In *Plattform "Ärzte für das Leben",* the Court has expressed that the obligation under Article 11 is 'an obligation as to measure to be taken and not as to results to be achieved'.[251] The Court concerned that the international standards do not impose unrealistic burdens on the authorities. They are regarded as a minimum baseline protecting freedom of assembly. Nonetheless, the authorities still have a duty to provide adequate public order policing resources to protect participants and other individuals in a peaceful assembly.[252]

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[246] *Ziliberberg* (n 92), para 155.
[247] *Solomou and Others v Turkey* App no 36832/97 (ECtHR, 24 June 2008), para 78.
[248] *Stankov and the United Macedonian Organisation Ilinden* (n 84), para 109.
[249] *Öllinger* (n 137), para 29.
[250] ibid para 48.
[251] *Plattform "Ärzte für das Leben"* (n 68), para 34.
[252] OSCE, *Report Monitoring of Freedom of Peaceful Assembly in Selected OSCE Participating States (May 2013 – July 2014)*, 17 December 2014), paras 13, 180.

2.4.2 Surveillance and identity checks

The UN Human Rights Council has confirmed that the collection of personal information in relation to an assembly must not interfere impermissibly with privacy or other rights.[253] Surveillance operations should be conducted only for investigatory purposes rather than for identifying participants. In the Concluding Observations of the Republic of Korea, the Human Rights Committee expressed its concern that South Korean authorities identify participants in assemblies by using "base station investigations" which can identify the user of every mobile telephone near the site of demonstrations.[254] The Committee was further concerned that the Telecommunications Business Act, which allows operators to release their subscribers' information on request without a warrant, should be used for investigatory purposes only. The Committee saw that the authorities' practices of using photographic and video surveillance and identity checks during demonstrations could interfere the right to peaceful assembly.[255] The ECtHR is broadly of the same view on this issue. In *Catt v The United Kingdom,* the ECtHR accepted that the police had a role to monitor protests which were known to be violent and potentially criminal.[256] However, the Court noted that participating in a peaceful protest and acting within the democratic process deserve specific protection under Article 11.[257] The collection and retention of the participants' data revealing a political opinion can cause a chilling effect.[258] Therefore, the retention of such data must be either absolutely necessary or for the purpose of a particular inquiry.[259]

In contrast, the public has the right to observe and to record public assemblies.[260] Since one objective of the right to freedom of assembly is to allow individuals to participate directly and

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[253] UN Human Rights Council, *Joint report of the Special Rapporteur* (n 59), para 36.
[254] UN Human Rights Committee, Concluding observations… (n 241), paras 42-43.
[255] UN Human Rights Committee, *List of issues prior to submission of the fifth periodic report of the Netherlands* (3 May 2017) CCPR/C/NLD/QPR/5, para 29.

[256] *Catt v The United Kingdom* App no 43514/15 (ECtHR, 24 January 2019), para 118.
[257] ibid para 123.
[258] for example, the Chinese government used digital surveillance extensively to monitor demonstrations against the extradition bill in Hong Kong in June 2019. Such system created fear of prosecution and discourage people from joining the protest. See Rob McBride, 'Surveillance-savvy Hong Kong protesters go digitally dark' (*Aljazeera,* 18 June 2019) <https://www.aljazeera.com/news/2019/06/surveillance-savvy-hong-kong-protesters-digitally-dark-190618104439415.html> accessed 21 July 2019.
[259] *Catt* (n 256), para 124.
[260] Kiai (n 139) 110.

effectively in political life, freedom of expression and free media must be protected.[261] A democratic society needs free media that are able to inform the public without unreasonable restraint.[262] The CCPR, in *Zhagiparov v Kazakhstan*, has affirmed that arresting a journalist for performing his duty in a public assembly and penalising him for being critical of his government or of the political social system is unjustified under Articles 19 and 21.[263] By contrast, the ECtHR, in *Pentikäinen v Finland*, while recognising that the media could play a role as a watchdog by providing information on how the authorities handle public assemblies and hold them accountable[264], and insisting that 'any attempt to remove journalists from the scene of demonstrations must, therefore, be subject to strict scrutiny'[265] nonetheless found no violation. The Court viewed that the police can order a press photographer to leave the scene of a demonstration that had become a riot was necessary in a democratic society.[266] The Court has more recently expounded a more welcome and more favourable view, from the point of view of protesters. In *Butkevich v Russia*, Russian police arrested a Ukrainian journalist while covering a street protest in St Petersburg on the ground that he disobeyed an order from a police officer.[267] He was ordered to stop taking pictures and stop participating in an unlawful public event. The applicant argued that his arrest and detention infringed the public's right to be informed and created a chilling effect.[268] The third parties' submissions, the Media Legal Defence Initiative et al, argued that the principle in *Pentikäinen* should not be interpreted in a manner that would create an unintended chilling effect on journalists covering protests or place media personnel in serious danger.[269] They raised the issue that any requirement to wear clothing to distinguish media from protesters would undermine the concept of journalism and the realities of reporting on protests. They pointed out that mandatory licensing or registration of journalist and a requirement to wear distinctive clothing were incompatible with the freedom of expression under the ECHR.[270] The ECtHR found that the domestic courts did not apply

[261] UN Human Rights Committee, *General comment adopted by the human rights committee under article 40, paragraph 4, of the international covenant on civil and political rights* (27 August 1996) CCPR/C/21/Rev.1/Add.7, para 25.
[262] UN Human Rights committee, *General comment No.34* (n 20) para 13.
[263] *Zhagiparov v Kazakhstan* (8 November 2018) Communication no.2441/2014, para 13.6.
[264] *Pentikäinen v Finland* App no 11882/10 (ECtHR, 20 October 2015), para 89.
[265] ibid.
[266] ibid 114.
[267] *Butkevic v Russia* App no 5865/07 (ECtHR, 13 February 2018).
[268] ibid para 115.
[269] ibid para 119.
[270] ibid paras 119-120.

standards which conformed with the ECHR Article 10.[271] His arrest was unlawful. The Court saw that taking photographs and collecting information of a public assembly with an intention to "impart" that information was an essential preparatory step in journalism, protected under Article 10.[272]

In later chapters, this thesis argues that the authorities in hybrid regimes use surveillance and identity checks to harass participants to a public assembly. Such surveillance is especially problematic in hybrid regimes because there are also prohibitions on who can be an organiser or participant (including restrictions based on minimum, citizenship, and unregistered or banned organisations).

2.4.3 Arrest and detention

Punishing protesters by arrest or detention for participating in an event interferes with freedom of assembly as much as banning in advance.[273] International standards establish that arrest, including stop-and-search power, must be authorised by law and subjected to necessary and proportionate principles.[274] The CCPR has interpreted the term "arrest" as 'any deprivation of liberty, and is not limited to formal arrest under domestic law'.[275] Article 9 of ICCPR stipulates that 'no one shall be subjected to arbitrary arrest or detention.' In the context of assemblies, criminalising of assemblies can lead to unreasonable arresting, especially when the laws governing assemblies are illegitimate.[276] For example in *Sviridov v Kazakhstan*, the complainant was arrested for holding an unauthorised demonstration in front of a commercial centre.[277] Despite it being a single-person protest, the domestic courts convicted him for failing to comply with the authorisation procedure.[278] In addition, the ECtHR, in *Gillan and Quinton*, has emphasised that the law authorising stop-and-search power should provide a limitation to the discretion of the authorities. Officers should not be allowed to exercise this power based exclusively on their "hunch" or "professional intuition".[279] The Court further explained that

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[271] ibid para 138.
[272] ibid para 123; It is worth noting that Butkevich claimed that he did not participate in the protest. Butkevich's claim relied on the protection of the press under Article 10. Therefore, the ECtHR did not examine the case under Article 11.
[273] Mead (n 133) 77 citing *Ezelin* (n 97), para 37.
[274] UN Human Rights Council, *Joint report of the Special Rapporteur* (n 59), para 43.
[275] ibid 44.
[276] ibid 45.
[277] *Sviridov v Kazakhstan* (5 September 2017) Communication No2158/2012 CCPR/C/120/D/2158/2012, para 2.4.
[278] ibid, para 2.6.
[279] *Gillan and Quinton* (n 171), para 83.

when the legislation grants broad discretion to the police officer, it comes with a greater risk of it being used discriminately 'against demonstrators and protester in breach of Article 10 and/or 11 of the Convention.'[280]

In addition, states should avoid employing mass arrest because it is an indiscriminate and arbitrary arrest. [281] When an arrest was made, the authorities have the duty to treat detainees in a humane manner and with respect of their dignity.[282] In *Austin and Other v The United Kingdom*, the ECtHR has established that crowd-control strategies relying on containment such as kettling or corralling are permissible where there is a real risk of serious injury or damage and where less intrusive means are ineffective.[283] In other words, these tactics must be employed exceptionally under two conditions: (1) it is necessary to prevent serious damage or injury and (2) there is no less restrictive police tactic available.

As discussed earlier (at 2.2.2.2), the ECtHR has established that individuals who remain peaceful do not lose their right to peaceful assemblies.[284] Therefore, it is a police duty to separate violent parties from the peaceful assemblies. Police must be trained to handle *agents provocateurs* and remove them rather than banning or dispersing an assembly on the ground that it has become violent.[285]

States should avoid using intrusive pre-emptive measures unless there is a clear imminent danger. For example, arresting public assembly goers on their way to join a demonstration is interference with freedom of assembly. In *Evrezov, Nepomnyaschikh, Polyakov and Rybchenko v Belarus,* the CCPR found that arresting and detaining a group of people marching with placards to join a demonstration violated their right to peaceful assembly.[286] In *Kudrevičius and Others,* the ECtHR has held that a refusal to allow an individual to travel for the purpose of attending a meeting amounts to interference to freedom of assembly.[287] In *Kasparov v Russia,* the applicant was travelling to join a march in another city. He was arrested and detained

[280] ibid, para 85.
[281] UN Human Rights Council, *Joint report of the Special Rapporteur* (n 59), para 45.
[282] ibid, para 46.
[283] *Austin and Others v The United Kingdom* App nos 39692/09 40713/09 41008/09 (ECtHR GC, 15 March 2012), para 66; OSCE, *Report Monitoring of Freedom of Peaceful Assembly in Selected OSCE Participating States (May 2013 – July 2014)*, para 55, 282; UN Human Rights Council, UN Doc A/HRC20/27 (n 76), para 37.
[284] *Ziliberberg* (n 92), para 2.
[285] UN Human Rights Council, *Joint report of the Special Rapporteur* (n 59), para 61.
[286] *Evrezov, Nepomnyaschikh, Polyakov and Rybchenko v Belarus* (25 November 2014) Communication No. 1999/2010 CCPR/C/112/D/1999/2010, para 9.
[287] *Kudrevičius and Others* (n 53), para 100.

unlawfully at an airport on the ground of using forged tickets. As his passport and tickets were seized, he was prevented from joining the rally. As the Court found that his arrest was not prescribed by law, his right to freedom of assembly was interfered.[288]

Notwithstanding that the authorities may make lawful arrests under other laws unrelated to public assembly, such interventions may still be considered as an interference with the right to freedom of assembly. In *Huseynli and Others v Azerbaijan,* the applicants were arrested a few days before a planned demonstration against the government. While the charges against them were unrelated to the assembly they were attending, they claimed that their arrests were to prevent them from attending an opposition demonstration.[289] The Court noted that pre-emptive and/or retaliatory arrests and convictions were used on a massive scale in order to repress the opposition.[290] Several legal grounds were initiated to detain the opposition activists namely possession of drugs, possession of arms, evading military service, resistance to arrest and hooliganism, failing to obey police's orders, traffic offences, and disturbing public order.[291] Under such circumstances, the Court believed that the administrative proceedings against the applicants were aimed at preventing them from participating in the planned demonstration.[292] Moreover, they were part of the authorities' measures to create a chilling effect deterring other opposition supporters from participating in anti-government demonstrations.[293] This case confirmed that even in the case that arrests and convictions are not expressly related to freedom of assembly, the authorities can still be held responsible for breaching the freedom of assembly. It is worth noting that the ECtHR has not ruled out pre-emptive arrests to prevent a breach of the peace. In *Eiseman-Renyard and others v The United Kingdom* , eight peoples were arrested prior to the wedding of the Duke and Duchess of Cambridge.[294] The police explained that these people were arrested to prevent imminent breaches of the peace and were released after the wedding was over. The ECtHR decided that these cases were inadmissible on the ground that they were manifestly ill-founded. Based on the principle of subsidiarity, the Court saw that the domestic courts had sufficiently conducted a judicial review on the preventive detentions and

[288] *Kasparov v Russia* App no 53659/07 (ECtHR, 11 October 2016), para 69.
[289] *Huseynli and Others v Azerbaijan* App nos 67360/11 67964/11 69379/11 (ECtHR, 10 February 2016), para 85.
[290] ibid, para 89.
[291] ibid.
[292] ibid, para 97.
[293] ibid, para 99.
[294] *Eiseman-Renyard and Others v The United Kingdom* App nos 57884/17 and 7 others (ECtHR, 5 March 2019).

struct a fair balance between the right to liberty and the prevention of public disorder.[295] In this regard, later chapters argue that hybrid regime incumbents, relying on carefully crafted legal frameworks, use arbitrary arrests and detentions to intimidate organisers and assembly participants. Also, Courts in hybrid regimes refrain from conduct proper judicial review on the arbitrary arrests and detentions of protesters.

2.4.4 Dispersal and use of force

Under international standards, the former UN Special Rapporteur on the rights to freedom of assembly and of association, Maina Kiai, pointed out that there are three factors determining whether a dispersal may be justified:

> (1) whether there is a risk to public order or another legitimate aim that cannot be managed; (2) whether the participants in the assembly are given an effective opportunity to manifest their views; (3) whether the authorities refrain from the use of unnecessary force or the imposition of disproportionate sanctions.[296]

When using force, states have an obligation to prevent arbitrary killing in their territories, especially by their own security forces.[297] International standards direct that the use of force must comply with the principles of legality, precaution, necessity, proportionality and accountability.[298] Under the principle of legality, it is important that domestic legal frameworks governing the use of force must comply with international standards. The laws must stipulate how the authorities may have recourse to the use of weapons and tactics during public assemblies.[299] The principle of precaution demands that states must take precautionary measures to avoid the use of force against public assemblies.[300] Officers must be well-trained to facilitate and accommodate participants to a public assembly.[301] Any use of force must adhere to the principle of necessity and proportionality. [302] Officials assigned to perform crowd control should be equipped with appropriate gears such as protective equipment and less-lethal

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[295] ibid paras 46-47.
[296] Kiai (n 139) 60.
[297] Hamilton, 'Towards a General Comment 37…' (n 110) 33.
[298] UN Human Rights Council, *Joint report of the Special Rapporteur* (n 59), para 50.
[299] ibid para 51.
[300] for example, when only a small number of participants become violent, force should be used against particular individuals. Authorities should attempt to separate agents provocateurs from peaceful participants rather that dispersing the assembly right away.
[301] UN Human Rights Council, *Joint report of the Special Rapporteur* (n 59), para 52.
[302] ibid para 57.

weapon rather than lethal firearms. Under these principles, 'firearms may be used only against imminent threat either to protect life or to prevent life-threatening injuries.[303] Therefore, using lethal firearms to disperse an assembly indiscriminately is always unlawful.[304]

In *Güleç v Turkey*, the ECtHR found that the force used to disperse an unauthorised demonstration was not "absolutely necessary". [305] The applicant's son was shot while he was returning home from his school. The Government claimed that there were masked terrorists firing randomly while using women and children as a human shield. The ECtHR noted that the Government failed to produced evidence supporting this claim. The force used was unjustified because the gendarmes employed very powerful weapons against civilians. Disorder could be foreseen as the area was in a state of emergency. However, the state cannot use the lack of proper crowd control equipment as an excuse to resort to lethal-weapons.[306] Last, the principle of accountability requires that effective reporting and review procedures must work effectively to hold state officers into account when force is used. This includes having transparent record keeping of decisions made by command officers and equipment deployed (especially firearms and ammunition).[307]

In the case that dispersal is unavoidable, the authorities must warn participants of their intention to use force. Participants should be allowed sufficient time to voluntarily leave the area.[308] In *Olmedo v Paraguay*, police and military personnel use lethal force to disperse a demonstration.[309] The CCPR ruled that 'States parties should take measures not only to prevent and punish deprivation of life by criminal acts but also to prevent arbitrary killing by their own security forces.[310] When the use of force results in a violation of human rights, a criminal investigation and effective (and enforceable) remedies should be available for those who affected by it. States have a responsibility to investigate all allegations arising from the use of

[303] ibid para 59.
[304] ibid para 60.
[305] ibid para 73.
[306] *Güleç v Turkey* App no 54/1997/838/1044 (ECtHR, 25 July 1998), paras 71-72.
[307] UN Human Rights Council, *Joint report of the Special Rapporteur* (n 59), para 66.
[308] Organisation for Security and Co-operation in Europe (n 76), para 168.
[309] *Olmedo v Paraguay* (26 April 2012) Communication no. 1828/2008 CCPR/C104/D/1828/2008, paras 2.4-2.6; The author claimed that the state failed to investigate and punish the officers involved in her husband's death. The author's husband was shot in his back from close range after he surrendered.
[310] ibid para 7.3 citing the Committee's general comment No.6, on the right to life (article 6 of the Covenant).

force in good faith.[311] Without effective investigation, prosecution, and system of remedies; the CCPR concerned that states created a culture of impunity.[312]

In *Giuliani and Gaggio v Italy*, the ECtHR has explained that any use of force to disperse a demonstration must be "absolutely necessary" under Article 2 and "necessary in a democratic society" under Article 11 of the Convention.[313] Therefore, dispersal methods and the amount of force used must correspond to the level of the threat. In *Primov and Others*, police officers surrounded the demonstrators and fired automatic rifles above the demonstrators' heads. As a result, a person was shot dead and five demonstrators were severely injured. Several dozen people were injured either by tear-gas explosions or by being beaten by the police.[314] The ECtHR concluded that the authorities' overall response was not disproportionate because many demonstrators were violent. [315] Although some police officers use firearms, they did not deliberately shoot to kill or to wound the protesters. Nevertheless, the Court did not examine the proportionality of the use of gas grenades as there was no complaint from the injured persons nor from their relatives. If it was the case, throwing tear gas grenades directly into the crowd causing injuries from the explosion could be considered as deliberately used to wound demonstrators. In *Abdullah Yaşa and Others v Turkey*, the ECtHR has considered firing a tear gas grenade directly at demonstrators, flat-trajectory shot as an impropriate police action because it could cause serious injuries.[316] Later in this thesis, it is argued that hybrid regime incumbents have retained the legal means to employ excessive force to crush anti-regime protesters.

2.4.5 Derogation

ICCPR Article 4 allows states to take measures derogating from the obligations under the Convention in time of public emergency, which threatens the life of the nation and the existence. However, they have an obligation to explain the exigencies of the situation when they invoke the right to derogate from the Covenant. Therefore, when a state suspends the right to peaceful assemblies, it must be able to justify all their measures derogating from the

[311] ibid para 7.5.
[312] UN Human Rights Committee, *Concluding observations of the Human Rights Committee Thailand* (8 July 2005) CCPR/CO/84/THA, para 10.
[313] *Giuliani and Gaggio v Italy* App no 23458/02 (ECtHR, 25 August 2009), para 204.
[314] *Primov and Others* (n 198), para 18.
[315] ibid para 163.
[316] *Abdullah Yaşa and Others v Turkey* App no 44827/08 (ECtHR, 16 July 2013), para 48.

Covenant.[317] Siracusa principles to the ICCPR explain that 'internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogation under Article 4.'[318] A threat to life of the nation needs to meet two criteria: (1) affect the whole of the population in a part of the territory, and (2) threatens the physical integrity of the population, the political independence or the basic functioning of institutions safeguarding the rights under the ICCPR.[319] Any derogation must be terminated as soon as the emergency ends.[320] The principle of strict necessity and proportionality must be applied to all derogation measures.[321] Similar to the ICCPR, ECHR Article 15 directs that the right to derogate can be invoked only in time of war or other public emergency threatening the life of the nation. In *Denmark, Norway, Sweden and The Netherlands, v Greece*, the European Commission of Human Rights found that the military junta's derogation violated Article 15 because the public emergency (the military junta had taken power in April 1967) did not exist.[322] In relation to this issue, later chapters demonstrate that hybrid regime incumbents initiate emergency laws to switch from public order policing to more military style policing. However, when doing so they do not generally invoke the formal derogations requirements as set out in the ICCPR. As such, the overreliance on emergency powers, in the absence of a formally declared and time-limited emergency, represents a significant departure from IHRL standards.

2.4.6 Effective judicial review

According to international standards, police operations must be subject to a competent, independent judicial review.[323] The right to peaceful assembly can become substantially limited when effective appeal mechanisms are not available. Mechanisms, such as judicial and administrative procedures to address potential violations, should be established by domestic legislation.[324] The UN Human Rights Committee demands that states parties ensure that

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[317] UN Human Rights Committee, *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency* (31 August 2001), para 5.
[318] Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights Annex, UN Doc E/CN.4/1984/4 (1984), para 40.
[319] ibid para 39.
[320] ibid para 48.
[321] ibid para 54.
[322] *Denmark, Norway, Sweden and The Netherlands, v Greece* App nos 3321/67 and 3 others (ECHR, 5 November 1969).
[323] Human Rights Council, Resolution 25/38 (n 76) 2.
[324] UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (26 May 2004), para 15.

everyone has access to effective judicial review. [325] Also, states must bring those responsible for the violation are brought to justice, either under domestic or international law.[326] In *Sudalenko v Belarus*, the complainant's request to hold a picket was rejected by the authorities.[327] He claimed that the impossibility of challenging the lawfulness of the Law on Mass Events in the Court of Justice deprived him of an effective remedy under ICCPR. However, due to the principle of subsidiarity, the CCPR decided that this claim was inadmissible because the Constitutional Court could review the legality of the law.[328] Nevertheless, the CCPR was able to review the rejection of the complainant's request. Regarding the violation in this case, the CCPR noted that the legislation should be revised to comply with the ICCPR, to provide an effective and enforceable remedy.[329]

In *Evrezov v Belarus*, the complainant claimed that his right to freedom of assembly was violated because neither the executive authorities nor the courts attempted to explain why his request to hold a picket was rejected. The CCPR found that Belarus failed to give any explanation and accepted the author's claim that it was based on his political motive. Although the domestic courts had ruled that the restriction conformed with the Law on Mass Events, the CCPR saw that they did not provide any justification for the restriction.[330] It is the state's obligation to justify the limitation of the right protected by the ICCPR.

Likewise, the ECtHR, in *Lashmankin and Others,* directed that domestic courts had an obligation to examine the question of whether the refusal to approve time, place and manner of a public assembly had been well reasoned.[331] The Court has emphasised that domestic courts must apply the necessity and proportionality test to balance freedom of assembly and other legitimate interests. In this case, the ECtHR found a violation because the scope of judicial review under Russian legal frameworks did not include any test of the necessity and proportionality. To this point, the later chapters argue that domestic courts in hybrid regimes do not sufficiently consider the test of necessity and proportionality. Judicial review processes in hybrid regimes are ineffective and fail to deliver substantive rulings in a timely fashion.

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[325] UN Human Rights Committee, *Concluding observations of the Human Rights Committee Poland* (15 November 2010), para 23.
[326] UN Human Rights Committee, *General Comment No.31* (n 321), para 18.
[327] *Sudalenko* (n 121).
[328] ibid para 7.4.
[329] ibid para 11.
[330] *Evrezov* (n 178), para 7.3.
[331] *Lashmankin and Others* (n 185), para 358.

To sum up, international standards direct that police have duties to facilitate and to protect peaceful public assembly. Therefore, when the authorities impose any restriction on the freedom of assembly, they should be guided by the objective to facilitate rather than to seek unnecessary or disproportionate restrictions. They must be able to justify their restrictions or interventions according to their obligation under IHRL. All public order policing operations, such as surveillance, arrest, detention, dispersal, use of force, and derogation are subjected to the strict test of necessity and proportionality. International standards demand that there must be effective judicial review mechanisms to balance the freedom of assembly against other legitimate interests. If there is any violation, affected parties should have access to a review system to seek timely and enforceable remedies.

2.5 Conclusion

This chapter illustrates that international judicial institutions like the CCPR and the ECtHR have expanded the right of peaceful assembly. Without this significant body of jurisprudence, the scope of this 'fundamental' right would likely be regarded as relatively insignificant. From the case law, we can conclude that IHRL reflects a certain image of democracy. At the minimum, a democratic society must uphold three democratic values namely pluralism, tolerance, and open-mindedness. A mechanism to defend its core values is needed in order to survive the democratic dilemma – people cannot participate in politics effectively when the political system is too restricted. Thus, a democratic society can be sustained by upholding IHRL. It is worth nothing that IHRL is effective when there are international judicial institutions to adjudicate the rights standards. Nonetheless, the power of the CCPR and the ECtHR is limited under the principle of subsidiarity/margin of appreciation, and this ultimately leaves the implementation of IHRL mainly to domestic institutions.

This chapter has identified basic principles and standards on governing public assemblies laid down by the CCPR and the ECtHR. As a general principle, they agree that states are required to fulfil not only a negative obligation to abstain from unnecessarily interfering with freedom of assembly but also a positive obligation to facilitate and protect public assemblies. This chapter categorises the international standards into three groups: the protected composition of a public assembly, the power to impose restrictions, and public order policing. Overall, we can conclude that these standards aim to sustain the core values of a democratic society. They prevent states from arbitrarily depriving individuals and groups of their right to freedom of assembly. Indeed, any restriction on freedom of assembly must satisfy the well-known three-

prong test: conforming with the law, pursuing a legitimate aim, and being necessary in a democratic society. In a similar vein, public order policing must have the primary objective to facilitate and protect public assemblies.

Nevertheless, IHRL is not only limited because of the principle of subsidiarity. Regime type is also one of the determinants of the effectiveness of human rights protection. In hybrid regimes, where IHRL does not have much traction, arbitrariness is a serious problem. Here, domestic courts review only the *lawfulness* of law enforcement decisions and fail altogether to give appropriate weight to the peacefulness of the assembly in question. They also often fail to review the necessity and proportionality of any restrictions imposed.[332] Cases in the CCPR and the ECtHR, especially those having Russia or Belarus as a party, present a pattern demonstrating that laws governing public assemblies operate in a way that significantly limits the ability to assemble publicly. For example, the notification/authorisation systems in these countries operates in a way that activists are allowed to assemble only in designated locations. Their proposals are routinely rejected and relocated to the outskirts of their cities, while those of pro-government groups are allowed in the city centres.[333] These restrictions were found to be legitimate under domestic courts but the CCPR and the ECtHR found them to be incompatible with international standards. Arbitrariness in the legal frameworks of hybrid regimes allows the authorities to impose time, place and manner restrictions or even blanket bans on any particular undesired public assembly in order to gain and secure political advantage. Furthermore, where domestic legislation does not provide any special appeal procedure for disputes regarding public assemblies, organisers have to face lengthy legal procedures or find themselves unable to obtain an enforceable ruling before their proposed date of their event.[334] If they decide to proceed with their plans peacefully but without authorisation, the police may treat unlawful assemblies in the same way as criminal activities.[335] Worse, their events could be hijacked or interfered with by agents provocateurs or be suppressed under anti-terrorism law.[336]

The next chapter explores the politics of protest in hybrid regimes with an attempt to understand how regime types affect the way people exercise freedom of assembly and how states regulate

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[332] Daniel Simons, 'Protest as you like it: time, place & manner restrictions under scrutiny in Lashmankin v. Russia' (20 February 2017) <https://strasbourgobservers.com/2017/02/20/protest-as-you-like-it-time-place-manner-restrictions-under-scrutiny-in-lashmankin-v-russia/> accessed 24 April 2017.

[333] ibid.

[334] *Alekseyev v Russia* App nos 4916/07, 25924/08 and 14599/09 (ECtHR, 21 October 2010).

[335] *Navalnyy* (n 54), para 145.

[336] *Makhmudov v Russia* App no 35082/04 (ECtHR 26 July 2007), paras 32-33.

the freedom. It discusses the politics of protest in hybrid regimes from both a legal perspective and a social science perspective and argues that these regimes benefit from the loose traction of IHRL as they significantly curtail freedom of assembly through legal frameworks and public order policing.

Chapter 3 Protest in Hybrid Regimes

This chapter aims to explore the role of public assemblies in hybrid regimes through the lens of sociology and political science. It argues that these disciplines have largely overlooked the role of law and its institutions. This chapter starts by discussing the role of public assemblies in the political process – public assemblies are tools for marginalised individuals to collectively express their demands. Then, this chapter unpacks the concept of 'contentious politics' which dominates the field of social movement studies. Drawing on the notion of 'repertoires of contention', it discusses how collective action can open political opportunities, and protest cycles can potentially lead to democratisation. However, some forms of collective actions can disrupt democracy. Therefore, this chapter argues that consolidated democracies have sought to ensure that protest cycles remain within the democratic sphere. These efforts have been bolstered by international human rights standards on public assemblies which (as chapter 2 explained) similarly emphasize the connection between assemblies and democracy. Democratising countries have, in turn, incorporated (or reflected) these standards in domestic laws.

Nevertheless, some states have been able to withstand waves of democratisation.[1] Some such states fit the description of 'hybrid regimes'– enjoying some of the benefits that flow from allowing the exercise of freedom of assembly while simultaneously minimising the political effect of street protests. This study uses, but develops, Graeme Robertson's theory of the politics of protest in hybrid regimes to identify the incentives that drive incumbents in hybrid regimes to restrict freedom of assembly. It argues that Robertson himself has not taken sufficient account of legal variables in his theory, and that a more granular focus on the particularities of domestic legal provisions – and the corresponding methods of public order policing – is required. In other words, these legal provisions (and their operation in practice) must also be regarded as key determinants when seeking to fully understand the form and extent of protest in hybrid regimes. Fleshing out Robertson's theory with legal perspectives reveals that contentious politics in hybrid regimes can be controlled through legal frameworks and public order policing. This chapter later demonstrates that Putin's Russia has curtailed the scope of freedom of assembly through legal mechanisms, something which Robertson does not really address in his study. It attempts to show that the Putin administration has controlled organisational ecology through the laws governing public assemblies, and controlled state

[1] Samuel Huntington, *The third wave : democratization in the late twentieth century* (The Julian J Rothbaum distinguished lecture series: vol 4, Norman ; London : University of Oklahoma Press, 1993).

mobilisation strategies through the legal framework governing public assemblies and public order policing.

3.1 Freedom of assembly is a political tool for marginalized individuals

Freedom of assembly plays an important part in the political process because it offers a political tool for marginalized individuals to come together and make a collective demand to their rulers. For centuries, village and town halls have served as venues for informing, discussing public issues and making requests to the authorities. Freedom of assembly serves at least four functions within the political process: offering cheap and effective means to express political views, offering alternative channels of influence outside institutional politics, providing early warning of public dissatisfaction, and providing an opportunity for networking which can lead to a forming of new organisations.

Firstly, freedom of assembly offers cheap and effective means to express political views. In a situation where the majority of the population do not have much means to communicate political messages, freedom of assembly enables them to make their voice heard.[2] Although some jurisdictions require that broadcast media must balance their programmes, some public issues may be overlooked just because they have no commercial value. Issues outside the mainstream politics can be left out from the public debate. However, a demonstration with enough participants can attract journalists' attention to cover the event and demonstrators' political messages.[3] Freedom of assembly is particularly important for those who cannot influence their government through press and broadcast media.[4] It allows them to communicate to the public and government at low cost. Moreover, an outdoor assembly is a unique form of political participation because face-to-face experiences generate strong motivation and political commitment.[5] Unlike radio broadcasting, parades and meetings provide opportunities to convey messages directly to a target audience with pressure and strength from supporters.

Secondly, freedom of assembly offers alternative channels of influence outside institutionalised politics.[6] Goldstone argues that social movement activities are not alternative to the system but

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[2] Richard Stone, *Textbook on civil liberties and human rights* (10 edn, Oxford University Press 2014) 386.

[3] ibid.

[4] Eric Barendt, 'Freedom of Assembly' in J Beatson and V Cripps (eds), *Freedom of Expression and Freedom of Information* (Freedom of Expression and Freedom of Information, OUP 2000), 169.

[5] Tabatha Abu El-Haj, 'All Assemble: Order and Disorder in Law, Politics, and Culture' (2014) 16 University of Pennsylvania Journal of Constitutional Law 949, 952.

[6] Barendt E M, *Freedom of speech* (2nd edn, Oxford University Press 2007).

rather serve as a complementary mode of political action.[7] He points out that the number of protest activities increases in linear proportion to the increase of democratic institutions.[8] Emerging democracies in Eastern Europe, South America and Southeast Asia were the results of collective actions seeking democratisation and greater civil rights.[9] In a representative democracy, freedom of assembly offers a means to keep elected-representatives in check and to publicly express a particular opinion or demand to their representatives.[10] On this point, Barendt emphasises that minorities, whose interests are not presented properly by political parties, can effectively voice their demands through public assemblies.[11] Public assemblies allow individuals to exercise their autonomy to resist against majoritarian standards and thus preserve social diversity.[12] They are tools for outsiders and opponents of the political representation system to seek political changes or social reforms.[13] Alternatively, public assemblies can accompany other actions such as filing lawsuits, submitting petitions and influencing individuals to pursue their goals.[14] Hardt and Negri see 'representation' as a mechanism that separates the population from power especially in an environment in which corruption and transparency detach the representatives' responsibility from the people.[15] Public assemblies can be very useful when representatives do not respond to the common interests of the marginalised groups.[16]

Thirdly, freedom of assembly acts as a safety-valve detecting and providing a vent for people's dissatisfaction. Barendt argues that any liberal society should be able to accommodate some small-scale disorder in order to prevent serious inevitable violence.[17] Public assemblies act as a social safety-valve providing early warning of public dissatisfaction before it turns to

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[7] Jack A Goldstone, *States, parties, and social movements* (Cambridge studies in contentious politics, Cambridge : Cambridge University Press 2003) 6.

[8] ibid.

[9] Jack A Goldstone, *More Social Movements or Fewer? Beyond Political Opportunity Structures to Relational Fields* (Kluwer 2004), 337.

[10] Helen Fenwick, *Fenwick on civil liberties and human rights* (Routledge 2017).

[11] Barendt, *Freedom of Assembly* (n 4) 165-6.

[12] John D Inazu, *Liberty's refuge : the forgotten freedom of assembly* (Yale University Press 2012) 151.

[13] Goldstone, *More Social Movements or Fewer?...* (n 9) 336.

[14] ibid.

[15] M. Hardt and A. Negri, *Declaration* (Argos Navis 2012) cited in Alexandros Kioupkiolis and Giorgos Katsambekis (eds), *Radical democracy and collective movements today : the biopolitics of the multitude versus the hegemony of the people* (Farnham, Surrey, England : Ashgate 2014), 219.

[16] See, for example, Marina Prentoulis and Lasse Thomassen, 'Autonomy and Hegemony in the Square: The 2011 Protests in Greece and Spain' in Kioupkiolis and Katsambekis (eds) (n 15) 217.

[17] Barendt, *Freedom of speech* (n 6) 169-170.

violence.[18] The US Supreme Court has expressed in *Whitney v California* that it is dangerous to discourage thought, hope and imagination because fear breeds repression. [19] Then, repression breeds anger and frustration, which eventually affects the stability of the government. Public assemblies provide opportunities to respond to any grievance and propose a remedy. Hence, public assemblies are warning signs to which the authorities need to respond.

Last but not least, freedom of assembly provides an opportunity for networking which leads to the forming of new organisations sustaining the movement. According to Della Porta and Diani, there are three steps in generating a social movement: conflictual collective action, dense informal networks, and collective identity.[20] First, conflictual collective action refers to actors whose claims damage the interests of the other actors. This leads to the identification of common targets for collective actions. Second, dense informal networks happen as a result of collective actions. Individuals and organisations participating in a collective action negotiate the means to their common goal.[21] Last, they create a collective identity on the shared commitment and common purpose. Forming a new collective identity pushes organisations and individuals to pursue their common goal rather than stick to their specific interests.[22] Thus, public assemblies are the first milestone of sustained social movements.

It can be concluded that public assemblies are a political means for individuals, especially to those who do not possess much political influence in their society. It offers a chance to voice their demands to the public and to the actors in institutionalised politics. The minority may come out demanding better treatment while the majority may protest to demand that political institutions fulfil their promises. Here, Tilly notes that both democratisation and social movements stand on the same principle; 'ordinary people are politically worthy of consultation'. [23] Protests put pressure on political representatives according to the level of their popularity.[24] Ultimately, public assemblies and protests can affect the outcomes of elections. The following part examines further into the relationship between public assemblies and regime types from the perspective of social movement studies and drawing upon the concept of

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[18] ibid 170.

[19] *Whitney v California* 274 US 357, 375-8 (1927).

[20] Donatella Della Porta and Mario Diani, *Social movements : an introduction* (Oxford : Blackwell, 2006) 21.

[21] ibid 21.

[22] ibid 22.

[23] Charles Tilly, *Popular contention in Great Britain, 1758-1834* (Cambridge, Mass. ; London : Harvard University Press 1995) cited in Goldstone (n 9) 342.

[24] ibid.

contentious politics. It attempts to unpack the concept and argues that social movement theorists do not take legal factors sufficiently into consideration.

3.2 Contentious politics and legal factors

Regime types are a key determinant of the nature of public assemblies. Public assemblies, as a type of collective action, are usually peaceful in democracies because the political system regards them as a part of political process. Peaceful public assemblies are standardised to keep them support the democratic process. In contrast, non-democracies limit the scope of freedom of assembly in order to consolidate their political power. Different regime types perceive the value and the role of public assemblies differently. Thus, to understand the relationship between a regime type and its nature of public assemblies, the following parts explore the concept of contentious politics (CP) and argue that consolidated democracies set up minimum standards on public assemblies in order to keep public assemblies supporting the democratic process.

CP was proposed by Tilly in the 1970s. It focuses on the relational mechanisms surrounding contention allowing social scientists to study social movements and institutional politics more interactively. CP focuses on investigating (1) the dynamics between actors such as claim-makers, their allies, their opponents, the government, the media, and the mass public; (2) the transformations from one form of contention to another; and (3) the forms of collective action, which arise from the struggles.[25] Tarrow states that 'routine interactions between government and political actors produce political opportunities…'[26] Such interactions also form 'repertoires of contention' where all parties to contention persuade, negotiate, collaborate, block, and punish each other. He further explains that a 'collective action becomes contentious when it is used by people who lack regular access to institutions, who act in the name of new or unaccepted claims, and who behave in ways that fundamentally challenge others or authorities'.[27] Contention leads organisers to exploit political opportunities, create collective identities, gather like-minded people together, form organisations and mobilise them against the authorities.[28] In some regimes, collective action is the only means for ordinary people to fight stronger opponents or more powerful state actors.

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[25] Della Porta D and Diani M, *The Oxford Handbook of Social Movements* (Oxford University Press 2015) 87.
[26] ibid 88.
[27] Sidney G Tarrow, *Power in movement : social movements and contentious politics* (2nd edn, Cambridge University Press 2008) 3.
[28] ibid 3.

Contention and opportunities for collective action are closely linked.[29] Tarrow explains that there are two major conditions contributing to the increase in contention. First, contention increases when options to escape compliance are available and there are opportunities to use them. Second, contention increases when people's sense of injustice exceeds its limit.[30] Public demonstrations create political opportunities for elites in both a negative sense and a positive sense.[31] In a negative sense, violent protests and direct actions provide solid grounds for repression. In a positive sense, politicians may seize the opportunities created by challengers and establish themselves as popular leaders or champions of people's rights.

Tarrow has observed that there are three basic types of collective actions in the repertoire of contention: violence, disruption, and convention. First, violence will make the authorities employ superior force in return. Violence can lead to polarisation in which people are forced to choose sides.[32] The repertoire is generally nonviolent in democracy because organisers know that if they invoke violence, they will lose legitimacy and support from the public. Organisers and participants who engage in armed conflict are likely to be branded as 'terrorists' which damage their movements both domestically and internationally. Second, disruption is an option to attract others' attention by obstructing routine activities. This form of contention aims to derail the authorities. They are not effective in the situation that elites are united, and police are determined. Disruption is difficult to maintain over a long period without formal organisations. Third, conventional collective actions such as strikes and demonstrations are more institutionalised. Organisers of strikes and demonstrations must follow the procedures and regulations set out in law. Most constitutional states see the advantages provided by demonstrations and strikes as they provide a means to express political views notwithstanding that they are regulated and shaped by the state.[33]

CP arises when groups make claims to political actors in the form of collective actions such as meetings, strikes, processions, picketing, and fighting in armed conflicts. To Tilly, democracy is based on the notion of relatively equal citizenship, strong consultation of citizens and significant protection of citizens from arbitrary action by governmental agents.[34] Therefore, there is legislation governing public assemblies to facilitate political participation. Tilly argues

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[29] ibid 71.
[30] ibid.
[31] ibid 88-89.
[32] ibid 95.
[33] ibid 100.
[34] Tilly, *Regimes and Repertoires* (University of Chicago Press 2006) 25.

that CP in democracies are generally peaceful because the political system provides opportunities for individuals to participate and voice their demands. He lists eight principles allowing the people to challenge the government peacefully.[35] These principles are freedom to form and join organisations, freedom of expression, the right to vote, eligibility for public office, competition by political leaders for support, alternative sources of information, free and fair elections, and institutions for making government policies depend on votes and citizens' preference. Tilly points out that government capacity depends on its ability to coordinate all political actors. However, in most cases, expanding governmental capacity without reinforcing citizenship often promotes top-down tyranny.

In consolidated democracies, representative assemblies, elections, referendums, petitions, courts, mass media, and public assemblies hold the government to its commitments. Social movement activists utilise some mixture of public assemblies, press releases, and petitions rather than employing violent means such as terrorist attacks or hostage-taking. This is because their repertoires allow them to make collective claims peacefully within limited space, time, and methods provided by law.[36] Therefore, I argue that the legal mechanisms that lay down rules governing collective actions should be fully taken into consideration when assessing CP in a regime. The next heading explores the concept of repertoires of contention from the legal perspective.

3.2.1 The concept of 'repertoires of contention' overlooks legal factors

The argument being made in this chapter is that Robertson's study of contentious politics in hybrid regimes is enriched if we pay greater attention to the constraints, and possibilities, posed by law. Here, we can see that this blind spot stems from some of the original theorising on social movements. Tilly's repertoires of contention in different types of regimes can be distinguished by examining legal frameworks in the jurisdiction where contention occurs. Tilly does not expressly emphasise the role of law and its institutions in shaping the "repertoires of contention". He argues that the repertoires of contention vary upon the environment set by political opportunity structures (POS); changes in environment produce changes in contention.[37] Legal factors were not included in Tilly's identified six factors that can cause changes in POS:

[35] ibid 13-14.
[36] ibid 35.
[37] ibid 43-44.

> '(a) the multiplicity of independent centers of power within the regime, (b) the openness of the regime to new actors, (c) the instability of current political alignments, (d) the availability of influential allies or supporters, (e) the extent to which the regime represses or facilitates collective claim-making, and (f) decisive changes in (a) to (e).'[38]

In addition, Tilly's POS has been criticised by many scholars due to its vagueness from encompassing too many different elements.[39] For instance, Meyer has commented that the POS are 'frequently conceptualized broadly but operationalized narrowly, the body of research contains contradictions and confusions.'[40] Gamson and Meyer have pointed out that the POS is 'in danger of becoming a sponge that soaks up virtually every aspect of the social movement environment'[41] Anisin has also noted that the POS does not explain how structure affects agency or how agency affect structure.[42]

Besides, Tilly has accepted that legislation can shape repertoires of contention. In describing a protest movements in Uganda, Tilly noted that laws such as the Anti-Terrorism Law and Public Organisations Law allowed the State to shape civil society activities.[43] He claimed that 'both democratic and nondemocratic governments typically control demonstrations through legislation governing freedom of assembly, freedom of speech, and public order, with police as the main enforcers.'[44] Yet, Tilly did not explain precisely how these legal factors shape repertoires of contention. In my opinion, they are the major factors determining the nature and extent of public protest in a given context.

For instance, a crucial distinction can be noted between consolidated democracies and authoritarianism –the very concept of worthiness, unity, numbers, and commitment (WUNC) is premised on a broad commitment to popular sovereignty. Consolidated democracies have legal frameworks that enable people to exercise their autonomy to influence decision makers

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[38] ibid 44.
[39] Alexei Anisin, 'State repression, nonviolence, and protest mobilization' (DPhil Thesis, University of Essex 2016) 59.
[40] David S. Meyer, 'Protest and Political Opportunities' (2004) 30 Annual Review of Sociology 125, 141.
[41] William A. Gamson and David S. Meyer, 'Framing political opportunity' in Doug McAdam, John D. McCarthy and Mayer N. Zald (eds), *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings* (Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings, Cambridge University Press 1996), 275.
[42] Anisin (n 39).
[43] Tilly, *Regimes and Repertoires* (n 34) 82-83.
[44] ibid 191.

and members of parliament. In contrast, if the governing legal frameworks do not accept the principle of popular sovereignty, some forms of contention are eliminated from the public sphere altogether.[45] As such, the nature of contention in authoritarian regimes is very different from that in democracies because their POS is much smaller. There are fewer (a) independent centres of power within the regime and (b) to (f) are heavily restricted to prevent any challenger from posing threats against the regime. Authoritarian regimes commonly forbid a wide range of political claim-making performances.[46] Only a few political performances are available for activists to drive their movements. Tilly notices that high-capacity non-democratic regimes 'typically exclude contentious issues and actors from prescribed and tolerated forms of claim-making'.[47] Here, I argue that many of these constraints are imposed systematically through legal mechanisms.

Given this blind spot in the social movement literature, this thesis posits that social movement activities are confronted with restrictions imposed by law and through public order policing. In other words, it is often the law that either limits the choices available or incentivizes particular responses. Although it could be implied that legal factors are acknowledged within the element of (e) in Tilly's factors that change the POS, I see that there is not any explanation of how the role of law and its institutions cause changes in the POS. The marginalisation of the importance of law as an affective factor, this thesis argues, is a significant gap in the political science literature on social movements.[48] Therefore, a study focusing specifically on legal mechanisms and their enforcement mechanisms can help further reveal the structural determinants of contention.

3.2.2 Democratisation, protest cycles, and standardisation of collective actions

The standardisation of collective actions is a result of democratisation. It comes with an aim to keep protest cycles within democratic parameters. This part attempts to explore the relationships between democratisation processes, protest cycles, and the standardisation of

[45] For example, Malaysia Peaceful Assembly Act 2012 (up to 2019) banned "street protest" and Thailand NCPO Order 3/2558 2015 banned "political gathering of five or more persons".

[46] Tilly, *Regimes and Repertoires* (n 34) 76.

[47] ibid.

[48] In addition, the insufficiency of attention towards legal factors such as legal frameworks and public order policing is common among social movement scholars. For instance, famous textbooks in this field rarely take legal factors into consideration. i.e. Snow et al (eds), *the Whiley-Blackwell Companion to Social Movements* (2nd ed Whiley-Blackwell, 2019), and Della Porta and Diani, *Social Movements: An Introduction* (2nd ed Blackwell, 2006) contain no index entry for any legislation relating to laws governing public assemblies.

collective actions. First, it points out that democratisation is a process that comes with reverse effects. Then, it unpacks the notion of protest cycles proposed by social movement scholars before arguing that consolidated democracies develop their legal frameworks and adopt international standards governing public assemblies precisely to keep the protest cycle travelling within the democratic sphere.

3.2.2.1 Protest cycles as parts of a political process

Democratisation is a global phenomenon. Huntington explains that there have been waves of democratisation.[49] The first wave began after the American and French revolutions. The second wave came during the WWII and early 1960s. The third wave started in 1974 and moved through southern Europe, Latin America, former Soviet bloc, and Asia in less than two decades.[50] Waves of democratisation come with reverse waves, which make some of the transformed countries revert back to non-democratic rule.[51] The first reverse wave happened around the WWI where countries returned to their traditional forms of authoritarian rule or the new forms of totalitarianism. The second reverse wave started in the early 1960s. Huntington estimated that around one-third of working democracies were reversed by military coup d'états.[52] He argues that the characteristics of the society are the reason why countries swing between authoritarian and democracy.[53] For example, in Western Europe during the nineteenth century, the pressure towards democratisation came from economic development, industrialisation, urbanisation, the emergence of the middle class, the working class organisation development, and the decrease in economic inequality.[54] On the other hand, countries which have populist democratic governments and conservative military regimes, such as Thailand, swing between democratic and authoritarian systems.[55] Such dynamics might, for example, follow the following pattern: under an elected government, the opposition and dissenters launch anti-government protests accusing the prime minister of corruption. Protests escalate to disorder, usually by the intervention of agent provocateurs. Then, the military seizes this opportunity to overthrow the elected government and establish a military regime. A new constitution will be introduced along with a new election system. Afterwards, the military

[49] Huntington (n 1) 15.
[50] ibid 25.
[51] ibid 16.
[52] ibid 19, 21.
[53] ibid 34.
[54] ibid 39.
[55] ibid 41.

government fails to manage the country's economy effectively. Eventually, the politicians reclaim their office through either winning the general election or through public mass protests. Then, the cycle continues.

Democracy is a form of government which is ruled by the people who have citizenship to elect their representatives and their rulers. Democracy is also defined as 'a process, which has to be continually reproduced, for maximizing the opportunities for all individuals to shape their own lives and to participate in and influence debates about public decisions that affect them'.[56] In other words, democracy is a process in which protest cycles can cause social and political changes.[57] As a cycle of protest develops, social movement activists may decide to change their tactics according to the POS and the strategic choices of other social movement activists. [58] However, to maintain democracy, it is necessary to make sure that the protest cycles are not damaging to democratic values.

Social movements can be used to degrade democracy. According to Tilly, 'democratisation promotes the formation of social movements, but by no means do all social movements advocate or promote democracy'.[59] For example, the Nazi Party was a political party that started from a radical nationalist/racist movement.[60] Hitler adopted this social movement's ideology and transformed it to become the foundation ideology for the Nazi Party. [61] Hitler gained popularity and rose to power through the use of propaganda techniques, political violence, and most importantly the ability to mobilise a mass electoral base.[62] The strong Nazi army started from organised groups which were responsible for protecting its meetings.[63] Hitler Youth was so popular that by 1935 more than half of the German young males were members of the

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[56] M Kaldor, 'Democracy and globalisation in M Albrow and others (eds), *Democracy and globalization* (Global civil society 2007/8: Communicative power and democracy, Sage 2008) 35.

[57] Sidney Tarrow, 'Cycles of Collective Action: Between Moments of Madness and the Repertoire of Contention' (1993) 17 Social Science History 281, 284. Tarrow points out that there are five steps of protest cycles: heightening conflict across the social system, diffusing sectoral and geographic boundaries, introducing new social movement organisations and empowering the old ones, creating a meaning for mobilisation, and expanding repertoires of contention.

[58] Donatella Della Porta, *Mobilizing for democracy. comparing 1989 and 2011* (Oxford scholarship online, Oxford : Oxford University Press 2014) 16.

[59] Tilly, *Regimes and Repertoires* (n 34) 182.

[60] Tim Kirk, *Nazi Germany* (Routledge Abingdon 2013) 16.

[61] Encyclopaedia Britannica, 'National Socialism' (2016) <https://www.britannica.com/event/National-Socialism> accessed 13 September 2016.

[62] Kirk (n 64).

[63] Encyclopaedia Britannica, 'Nazi Party' (6 August 2015) <https://www.britannica.com/topic/Nazi-Party> accessed 13 September 2016.

movement.[64] Hitler's National Socialism movement gained vast support which eventually brought him a majority in the parliament and ended the democratic republic. This shows that mobilisation can be used as a tool to achieve elites' political goals rather than pursuing democratisation. Therefore, from the perspective of democratic rulers, there is a continual need to keep social movements travelling within the democratic boundaries.

3.2.2.2 Standardisation of collective actions to sustain the democratic process through legal frameworks

Democracies standardise collective actions through the legal frameworks governing public assemblies and law enforcement practices to keep protest cycles traveling within the boundaries of peaceful protest and democratic values. They need to ensure that all collective actions support the democratic process and uphold democratic values. Therefore, collective actions are legalised with an aim to enable the democratic process. For example, strikes were legalised in many European countries as a means of industrial action for labourers. It was a by-product of bitter labour struggles.[65] Strikes were illegal until politicians realised that they could not resist the tide and that making concessions better served their interests. Tilly pointed out that the rules and the repertoires of collective action change when the balance of power changes.[66] As such, I see that the rules and their implementation are the tangible evidence showing how political actors fought for power. In contrast, the legal frameworks governing public assemblies in non-democracies restrict freedom of assembly and limit the role of civil society actors stopping them from participating in the democratisation process. Because large-scale protests can lead to democratic struggles and a revolution, mobilisation in non-democracies is generated by the state exclusively.

Opportunity for democratisation in authoritarian regimes comes when the state is unable to contain social protests or cannot repress the population effectively. In this situation, an authoritarian state may break the cycle of contention by reorganising and applying new techniques of repression or finding new sources of legitimation.[67] Thus, legal frameworks in non-democracies aim to restrict any form of social movements that can cause a regime change. Nevertheless, there are states that manage to appear to follow some democratic values (like

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[64] Encyclopaedia Britannica, 'Hitler Youth' (6 September 2015) <https://www.britannica.com/topic/Hitler-Youth> accessed 13 September 2016.
[65] Charles Tilly, *From mobilization to revolution* (Addison-Wesley 1978), 161.
[66] ibid.
[67] Jean Grugel, *Democratization: A Critical Introduction* (Palgrave 2002) 98.

democracies) while still having recourse to repressive measures (like authoritarian regimes). This thesis labels them as "hybrid regimes".

3.3 Robertson's theory on the politics of protest in hybrid regimes

In the previous section, we noted that social movements scholars pay little attention to legal factors in their analysis. Even when law is discussed, much scholarship makes claims about law without clearly thinking through the complex, multiple dimensions of what law is and how it operates.[68] It points out that consolidated democracies have standardised collective actions through legal frameworks and international standards to keep collective actions broadly within the democratic process. However, hybrid regimes appear to adopt democratic principles of legitimation but do not always comply with them in practice. Unlike in authoritarian regimes where the leaders do not compete in elections, hybrid regime incumbents partly concede to the principle of popular sovereignty by holding periodic elections and allowing the opposition to display itself publicly. Therefore, the continuity of hybrid regimes depends on the leaders' ability to control the outcomes of elections as well as their ability to manage public protests.[69] Under this premise, this part aims to unpack the politics of protest hybrid regimes proposed by Robertson. Then, it explores the incumbents' incentive to curtail freedom of assembly to maintain the status quo.

3.3.1 The politics of protest in hybrid regimes

Robertson argues that hybrid regimes tend to feature protests which are different from protest patterns in a democracy.[70] He points out that literature from political scientists such as Meyer and Tarrow, Goldstone, and Tilly all agree that 'protest in democracies is both a normal and frequent element of political life'.[71] In contrast, authoritarian regimes ban or severely repress most forms of public protest and impose heavy penalties to control their citizens because allowing the opposition to protest may signal the regimes' weakness. Therefore, protest patterns in authoritarian regimes will likely either use everyday forms of resistance to avoid directly challenging the authorities or take direct action, including using violence and armed insurrection.[72] However, Robertson found that these protest patterns are inaccurate to explain the patterns in hybrid regimes. The following part unpacks Robertson's argument and his three

[68] For examples, see footnote 48.
[69] Robertson GB, *The Politics of Protest in Hybrid Regimes: Managing Dissent in Post-Communist Russia* (New York: Cambridge University Press 2011).
[70] ibid 4.
[71] ibid 19.
[72] ibid 21.

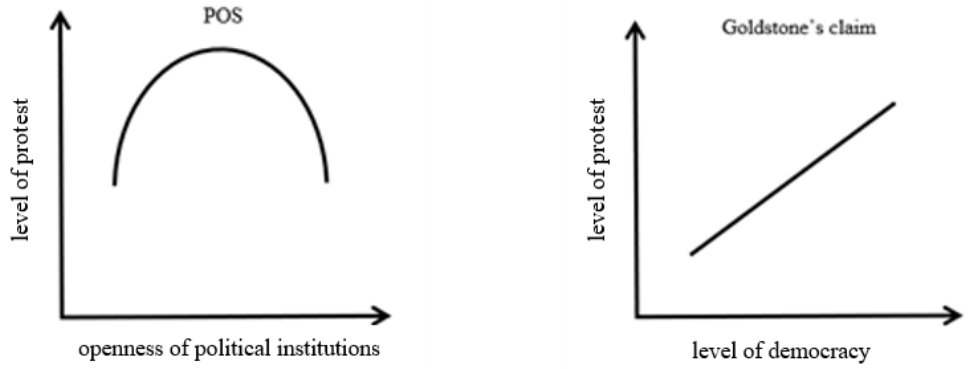
variables effecting protest patterns in hybrid regimes. Then it discusses the dilemma for allowing freedom of assembly in hybrid regimes.

3.3.1.1 A new perspective in social movement theories

Robertson argues that hybrid regimes have taken some steps towards democratisation, but they do not intend to achieve the goal of becoming a consolidated democracy. His research, 'the Politics of Protest in Hybrid Regimes', illustrates how politicians and elites in Russia have monopolised the public arena and curtail the freedom of assembly to sustain their regime.[73] Robertson argues that Tilly's POS and Goldstone's argument that "more democracy brings more protests" do not fully explain the pattern of protest in hybrid regimes. On the one hand, Tilly's POS explains that the openness of political institutions to external influence has a curvilinear relationship with protest (see figure 1).[74] Protest levels are low when the openness is very limited. This is because there is little chance of success in encouraging the public to protest. Protest levels are also low when the openness is very high because there is little need to protest when political institutions work effectively. Therefore, protest levels are high only in the middle because people have sufficient incentive to use protests to influence political actors.[75] On the contrary, Goldstone claims that an increase in the level of democracy leads to a corresponding increase in protest.[76] He argues that the degree of access to political institutions is directly proportional to the number of protests. Higher democratic levels bring more protests because the access to political institutions is wider. Robertson argues that neither side is correct. Both explanations are ambiguous and contradictory. He suggests that protests in a hybrid regime do not depend on regimes' openness or its level of democracy.[77] They are rather driven by three variables: organisational ecology, state mobilisation strategies, and elite competition.[78]

[73] ibid.
[74] ibid 23.
[75] ibid.
[76] ibid 24 citing Jack A Goldstone, 'Toward a Fourth Generation of Revolutionary Theory' (2001) 4 Annual Review of Political Science 139.
[77] Robertson (n 69) 24.
[78] ibid 6.

Figure 1: Tilly's POS and Goldstone's claim



3.3.1.2 Robertson's three variables affecting protest patterns

Robertson suggests that organisational ecology, state mobilisation strategies, and elite competition affect protest patterns in hybrid regimes. First, the organisational ecology refers to the nature of social movement organisations. [79] This includes the level of their development and their working environment. Democracies allow independent organisations to dominate civil society while closed authoritarian regimes allow only state-sponsored organisations. Therefore, independent organisations in a democracy are the driving force while independent organisations in authoritarian regimes are either powerless or non-existent.[80] Civil society in hybrid regimes is a blended formula between state-sponsored organisations and independent organisations. They are allowed to operate with little civil rights under narrow constitutional guarantees of freedom of association, organisation, and assembly. At the same time, states impose restrictions that allow the authorities to arbitrarily terminate independent organisations while giving special treatment to state-sponsored organisations.[81] As a result, mobilisations are sometimes carried out without social movements.[82]

Second, the state mobilising strategies refer to the degree of states' involvement in mobilisation. As the incumbents in hybrid regimes face some degree of open political competition, they need to be able to mobilise a large number of supporters to vote and to discourage potential challengers.[83] Unlike closed authoritarian regimes or totalitarian regimes, in which political

[79] ibid 24.
[80] ibid 26.
[81] ibid.
[82] ibid 27.
[83] ibid 31.

organisations are monopolised by the states, hybrid regimes do not have total control over political organisations. The options available for hybrid regimes are not only to repress or to allow oppositions to mobilise. Similar to 'astroturfing' in many democracies[84], hybrid regimes go further by creating ersatz social movements that campaign and mobilise like genuine social movements but act as political vehicles –they are often tasked with duties to dominate the streets and to seize the political opportunity from opposition groups.[85] These ersatz social movements can be mobilised to create the impression of dominance and invincibility.

Third, there is sometimes a significant degree of competition among elites.[86] When elites are competing to hold state's power, they may have an incentive to mobilise their supporters to win over the opponent. The higher degree of elite competition, the more mobilisation there is.[87] The level of public elite competition is high when central leadership is weak, or the leader's popularity is low. In contrast, the level of elite competition is low when there are signs that the leadership is strong and is likely to remain in office for a long time. However, the level of public elite competition cannot be translated in a linear fashion into protests on the streets. High levels of public elite competition do not always produce more street protests because elites' strategic choices depend on whether mobilisation offers better political opportunities. By choosing to mobilise, elites risk creating political opportunities for other competitors and risk giving people real experiences from protests on the street. These may backfire later because the protesters will have opportunities to expand their networks and later organise new movements that the elites cannot control. According to Robertson, when organisational ecology is dominated by the state and state has a demobilising strategy, states will make sure that bottom-up mobilisation remains weak and difficult to be expanded. Under this condition, elites are likely to remain demobilised.[88] Thus, a high level of public elite competition does not always produce frequent protests.

Robertson points out that these three variables (organisational ecology, state mobilisation strategies, and elite competition) allow us to examine contention in hybrid regimes better. The following section discusses how these variables work together giving a particular characteristic of contention (see table 2). Protests in a consolidated democracy and in an authoritarian regime

[84] Astroturfing is an attempt to create a fake impression of widespread grassroots support where there is none. It is secretly funded by the government or private companies to form a particular opinion on someone or something.
[85] Robertson (n 69) 27, 33.
[86] ibid 34.
[87] ibid.
[88] ibid 206.

usually appear at the extreme ends of the spectrum. For a consolidated democracy, the organisational ecology is dominated by independent organisations. The state has little incentive to mobilise while the public elite competition is always high. This type of contention produces protests that display WUNC. In contrast, an authoritarian regime has a state-dominated organisational ecology, a monopoly of state mobilisation, and a low level of public elite competition. Protests as a form of political contention in authoritarian regimes under this contention are rare and violent.[89] In hybrid regimes, contention can vary depending on the combination of the three factors. Robertson remarks that the contention in a hybrid regime is not only about the contest between pro-regime and anti-regime forces. He argues that we should see a hybrid regime as 'a set of rules designed for the management of competition among elites and for managing pressure from below that might otherwise fracture elite coalitions.'[90] The open and closed nature of the regime is modified through this set of rules in order to deal with political pressure and challenges.[91] In my opinion, Robertson's theory illuminates protest patterns not only in Russia, the focus of his study, but also in the three states that are the focus of this thesis. However, similar to social movement scholars we discussed earlier, Robertson's work only partially acknowledges the role and relevance of law.

3.3.1.3 How do regime types affect the pattern of contention?

Robertson suggests that regime type can affect the pattern of contention. Protests in democratic regimes are usually driven by strong independent organisations. The state is not interested in mobilising and the level of elite competition is relatively high. In such conditions, he explains that the level of contention is high, and protest will likely be peaceful consisting primarily of demonstrations of WUNC.[92] At the other end of the spectrum, closed authoritarian regimes fully control the field of organisational ecology and state mobilisation strategies. As a consequence, public protests are rare and often involve violence or direct action. The organisations in hybrid regimes are mixed between state-sponsored organisations and independent organisations. Hybrid regimes may decide to mobilise or demobilise their supporters corresponding to the level of elite competition. Consequently, protests and demonstrations in hybrid regimes can be peaceful or violent depending on the dynamic of elite politics.[93] A unique feature of protests in a hybrid regime is that protesters can be very active

[89] ibid 35.
[90] ibid 39.
[91] ibid.
[92] ibid 35.
[93] ibid.

in one situation and be extremely passive in another one with similar time and place. For example, the authorities can arbitrarily restrict anti-regime protests while facilitate (or turn a blind eye to) pro-regime gatherings. This is because both pressures from below and elites' politics drive the level of mobilisation.[94]

While Robertson's three variables allow us to make predictions about the nature of contention and protest activity, it is not a fully-fledged account. The argument in this thesis is that the incumbents in hybrid regimes are themselves able to manipulate Robertson's variables through domestic legal frameworks and public order policing so as to control the nature of public protest. These two overarching legal factors provide means to create a condition that produce fewer public protests. According to Robertson's theory (see table 2, rolls 3 & 4), the two conditions that produce fewer public protests are either: (1) state dominated organisational ecology, applying a demobilising strategy, and low level of public elite competition or (2) balanced organisational ecology, applying a demobilising strategy, and low level of public elite competition. When public elite competition is high, hybrid regimes seek to dominate the organisational ecology and applying a demobilising strategy. When the elite competition is low, the regime may decide to apply a mobilising strategy to show that there is freedom of assembly, but such strategies only produce large state-controlled rallies. Therefore, I argue that incumbents in hybrid regimes can manipulate the three variables through legal frameworks and public order policing.

[94] ibid 14.

Table 2. Varieties of Contention in Hybrid Regimes

Organizational Ecology	State Mobilization Strategy	Public Elite Competition	Nature of Contention	Possible Cases
State dominated	Mobilizing	High	Large scale, elite-led mobilizations, isolated pockets of direct action	Russia 1997–2000 Kyrgyzstan 2005
Balanced	Mobilizing	High	Frequent large scale, highly polarized protest, with significant state and independent involvement	Venezuela, Mexico, Ecuador, Bolivia
State dominated	Demobilizing	Low	Little public protest	Russia 2001–2004 Kazakhstan Azerbaijan
Balanced	Demobilizing	Low	Little public protest	Unlikely
State dominated	Mobilizing	Low	Large state-controlled rallies, significant repression of opposition	Russia 2005–2008
Balanced	Mobilizing	Low	Large scale controlled rallies, heavy state repression of non-state actors, high likelihood of non-state violence	Algeria after 1992, Egypt
State dominated	Demobilizing	High	Low mobilization with elites refraining from using mobilization potential	Unlikely
Balanced	Demobilizing	High	Large scale anti-government mobilization	Georgia 2003 Serbia 2000 Ukraine 2004

Source: Graeme Robertson, *The politics of protest in hybrid regimes: managing dissent in post-communist Russia* (Cambridge University Press 2011) 204.

3.3.1.4 Protest presents a dilemma in hybrid regimes

Allowing freedom of assembly presents a dilemma in hybrid regimes. Hybrid regimes are characterised by their uneasy combination of open political competition and authoritarian control.[95] If they allow too much freedom of assembly, the regimes will be vulnerable and open opportunities for elites to break away and mount public protests to challenge the status quo. If they allow too little freedom, their economic and international reputation will suffer. Robertson argues that democracies can resist instability caused by street protests better than authoritarian regimes because they are better equipped with institutional legitimacy and legal procedures.[96] Autocracies are more sensitive to street protests because they do not have any legitimate mechanisms to deal with protests and political leaders often make a decision on less reliable political information than leaders in democracies.[97] Likewise, hybrid regimes are also

[95] ibid 173.
[96] ibid 170.
[97] ibid 169.

vulnerable to street protest. Hybrid regimes are more vulnerable to small-scale protests than democracies and authoritarian regimes.[98]

Unlike democracies where small protests are part of everyday life, street protests in hybrid regimes and authoritarian regimes can illustrate a regime's weakness and open political opportunities for opposition groups. While opposition forces decide to mobilise a large number of people to destabilise the government in an election, a protest with little participants can cause great embarrassment.[99] Street protests can generate political momentum, which could eventually lead to a breakdown of elite consensus. While authoritarian regimes can straightforwardly use excessive force without hesitation, hybrid regimes have a tendency not to totally censor or use excessive public violence.[100] Hybrid regimes have some open political competition and civil society to pick up the momentum from small-scale protests. This condition creates a dilemma for hybrid regimes that is 'to allow significant political freedoms without signalling weakness to potentially disaffected segments of the elite'.[101] Robertson saw that this was the reason why Russia developed techniques of repression that increase the state's capacity to suppress demonstrators and mobilise pro-regime activists.[102]

3.3.2 How do hybrid regimes manage street protests?

The argument being made in this chapter is that Robertson has given insufficient weight to the capacity of law as an agent of control or as a factor that animates his three variables. To make the case, we need to further investigate how protests are managed in his one typical hybrid regime, Russia. Robertson identifies that coercion and channelling are the main techniques creating street-proof mechanisms. The first method, coercion, refers to the use of force such as intimidation and direct violence.[103] Apart from security forces such as police and military, Russian authorities also assign special units and regime supporters to carry out attacks and harassment.[104] The aim is to publicly intimidate public protest participants and to discourage potential participants.[105] The second method, channelling, refers to indirect repression aiming

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[98] ibid 168.
[99] ibid 185.
[100] William Cohen, 'How Hybrid Regimes Respond to Mobilized Protest', MA Thesis, Central European University 2012) 20.
[101] Robertson (n 69) 174.
[102] ibid 170.
[103] Jennifer Earl, *Tanks, Tear Gas, and Taxes: Toward a Theory of Movement Repression* (Blackwell Publishers 2003), 48.
[104] Robertson (n 69).
[105] ibid 174.

to affect the forms of protest available such as restrict time allowed to protest, limit the flows of resource, impose tax restrictions on organisers, etc.[106] Putin's regime has developed techniques for channelling energy away from the opposition by manipulating the media, licensing civil society, and developing ersatz social movements to support the regime.[107]

Putin's regime restrained from using severe violence against street protesters. The authorities prefer to silence opposition groups by using proactive intervention such as detaining or harassing organisers prior to a demonstration, intimidating potential participants, employing undercover agents, and closing down gathering venues.[108] The key was to prevent targeted troublemakers from taking part in any demonstration. For example, during the G8 summit in St. Petersburg in 2006, hundreds of people were detained to ensure that they could not disturb the event.[109] Another technique was to harass activists for "disrespecting the President".[110] When these arrests or charges are employed, activists are detained and released rather quickly due to insufficient evidence. The Putin administration uses excessive force against public demonstrations only when it is necessary. Overall, coercion is considered a short-term strategy.[111] It is likely to be employed when channelling (see further the following paragraph) fails to give desirable results. For example, in an environmental protest to stop a highway construction in Khimki forest, environmental activists were beaten by both police and armed thugs.[112] Some journalists who wrote articles criticising the project were also attacked severely.[113] Pre-emptive harassment of activists is often carried out by the authorities while more explicit forms of violence are executed by networks of pro-regime actors with whom the government easily deny responsibility.[114]

Channelling under Putin's regime focuses on three techniques namely, manipulating the media, imposing a licensed civil society, and mobilising pro-regime supporters. The government manipulates the media through both state ownership and through private oligarchy owners who

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[106] Earl (n 103) 48.
[107] Robertson (n 69) 174.
[108] ibid 189.
[109] ibid.
[110] ibid 190.
[111] ibid 21.
[112] Adam Federman, ' Russia's Khimki Forest Threatened by Highway Project' (*The Nation*, 24 May 2011) <https://www.thenation.com/article/russias-khimki-forest-threatened-highway-project/> accessed 18 August 2016.
[113] Cohen (n 100) 24.
[114] ibid 25.

response to Putin's political interests.[115] In 2001, the regime bought Vladimir Gusinsky's NTY and Boris Berezovsky's ORT. Three years later, all major TV stations and publishing houses were controlled by the regime. Consequently, the media reported favourably pro-Kremlin news and heavily criticised the opposition.[116] After taking control of the media, the government moved on to curtail civil society. In 2006, the Kremlin channelled potential supporters away from the opposition by amending legislation on NGOs - the Federal Law No.18-FZ. Foreign NGOs were required to register within six months after the promulgation of the law. The government demanded higher qualifications – purportedly, as an attempt to eliminate fake organisations disguised as NGOs such as commercial-oriented groups and criminal gangs.[117] As a result, the law gave the authorities vast discretionary power (to not grant approval to some targeted NGOs). This legislation clearly serves as a tool for discouraging NGOs from challenging the authorities.[118]

After Putin's re-election in March 2012, the government enacted the Federal Law Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-commercial Organisations Performing the Function of Foreign Agent. The law requires all non-commercial organisations (NCOs) to register with the Ministry of Justice before receiving funding from any foreign source. As a result, USAID was halted on the ground that it provided grants for election monitoring.[119] On 23 May 2014, Putin signed the Federal Law No.129-FN on Amendments to Certain Legislative Acts of the Russian Federation, known as 'the Law on Undesirable Organisations' which gives power to the Prosecutor General to outlaw any NGO that s/he considered a threat to national security. Any person participating or associating with it will face administrative and criminal penalties. On 6 July 2016, Russia enacted two federal laws, known as the "Yarovaya Package", which were designed to enhance counter-terrorism and protect public safety. These laws provide vast discretion for the security forces to apply criminal and administrative measure against any suspect. Telephone and internet providers are ordered to store all communications and activities of all users and make it available for inspection up to six months. This measure caused a significant chilling effect

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[115] E. Mickiewicz, *Television, Power, and the Public in Russia* (Cambridge University Press 2008) 42.
[116] Cohen (n 100) citing Alessandra Stanley, 'On Russian TV, It Isn't All About the Strongman' (New Yorker, 22 January 2012) < http://www.nytimes.com/2012/02/14/arts/television/putins-rivals-in-russia-gain-a-place-on-the-air-for-now.html?pagewanted=all>.
[117] Robertson (n 69) 192-193.
[118] ibid 193.
[119] The International Center for Not-for-Profit Law, 'NGO Law Monitor:Russia' (30 July 216) <http://www.icnl.org/research/monitor/russia.html> accessed 18 August 2016.

among NGOs operating in Russia because they are worried that the regime would arbitrarily use these laws against them.[120]

While existing civil society organisations are kept on a tight rein, Putin's regime filled the missing organisational space with ersatz social movements.[121] The government created pro-regime organisations to supply mass mobilisation upon request. This strategy provides the government with an option to counter street protests. For example, in 2000, brothers Vasilii and Boris Iakemenko founded Moving Together (*Idushchie vmeste*), which later became known as the "Putin Youth movement".[122] The organisation became popular and transformed to the "Nashi" movement aiming to turn young citizens to pro-regime supporters. Such organisation boosts its popularity through networks of regional commissars and annual summer training camps. Nashi has been mobilised to show pro-regime supports and to harass anti-regime demonstrators. By 2007, Nashi became Putin's personal mobilising unit.[123]

3.3.3 Implications of Robertson's theory in Thailand, Malaysia, and Cambodia

In a previous part, this thesis noted that Robertson's three variables are the main factors affecting protest patterns in hybrid regimes. It also argued that Robertson overlooks the role of law and law enforcement in shaping the nature of contention. Hence, this part attempts to establish that Robertson's theory can be applied to understand contention in Thailand, Malaysia, and Cambodia. This chapter further illustrates that these hybrid regimes have used similar techniques to curtail freedom of assembly through legal frameworks and public order policing.

3.3.3.1 Thailand

Considered in light of Robertson's theory, Thailand during 2007- 2014 arguably had a balanced organisational ecology. The state did not attempt to dominate civil society organisations. Hence, both Yellow-shirts and Red-shirts established their own organisations to generate ersatz social movements. This increased their ability to sustain long-term rallies. Both also possessed their own satellite channels which were less regulated than normal TV stations, and became the main tools for communicating with their supporters and attracting potential followers; ASTV for the Yellow-shirts and UDD TV for the Red-shirts. Social media, online newspapers and

[120] ibid.
[121] Robertson (n 69) 194.
[122] ibid 195.
[123] ibid 196.

community radio stations also been used to generate ersatz social movements. Supporters tended to follow only their camp's media rather than receiving information extensively from many sources.[124] Therefore, they were easily flamed by biased news and propaganda. In terms of state mobilisation strategy, Thailand has a mix of state and independent mobilisation strategies. The ruling parties often mobilised their supporters against the opposition protests. Counter protests, by opposition camps, usually came after mass mobilisation against the government. According to Robertson, in the circumstances that state balancing of organisational ecology, mobilisation, and the degree of public elite competition is high, the pattern of protest tends to be frequent, large scale and highly polarised. The contention between the Red and Yellow Shirt movements supports Robertson's theory. Both camps were managed by Thai elites, and both were being mobilised precisely when these elites were in conflict.

3.3.3.2 Malaysia

Viewed through the lens of Robertson's theory, prior to 2008, Malaysia fell into the category in which the state dominated organisational ecology (but independent organisations continued to exist), engaged in demobilisation, and had a high degree of elite competition. These conditions produced little public protest because elites refrained from using the potential of street mobilisation. After 2008, however, the state engaged in a mobilisation strategy and the level of elite contention rose. In these conditions, the resulting protests involved large scale elite-led mobilisations. The two Bersih movements are good examples. The first Bersih protests (2007) and Bersih 2.0 (2011) involved large rallies being met with significant State repression. Later, when the movements developed to Bersih 4.0 (2015), the degree of public elite competition became higher still. The protest pattern changed from one of demobilisation pre-2008 (with State control exercised primarily through the domination of organisational ecology) to large scale elite-led mobilisation. The movement was openly supported by the opposition leaders. The state employed coercion techniques (further discussed in chapter 4 and 5) such as preventing public expression of opposition, threatening and harassing organisers in advance of the protest dates and discouraging potential participants. A series of laws have been used to channel civil society away from the public sphere while the state mobilised ersatz social movements to support the regime. Mass media has been tightly controlled by the state. Internal security law has been used to suppress political dissenters.

[124] Duncan McCargo, 'Thai Politics as Reality TV' (2009) 68 The Journal of Asian Studies 7, 13.

3.3.3.3 Cambodia

Again, considering Robertson's theory, Cambodia might be argued to provide an example of balanced organisational ecology because it allows some (minimal) space for NGOs and opposition groups to exercise civil rights and freedoms, despite the government's effort to limit and strictly control organisations which pose a threat to the regime. Cambodia has a mobilising strategy as the Cambodian People's Party (CPP) had shown that they can mobilise their supporters through networks of officials and youth groups as well as using nationalist groups to boost popularity for the CPP. The degree of public elite competition has been high as the CPP significantly lost seats to the opposition in the 2013 general election. This condition produces a protest pattern that involves '*frequent large scale, highly polarised protest, with significant state and independent involvement*'.[125] Nevertheless, the difference between Cambodian and Thai politics is that Hun Sen is the Cambodian strongman who has the military completely under his control, while the Thai civilian leaders rarely had full control over the military. When protests escalated, the Thai military seized the opportunity to launch a coup d'état. In contrast, Hun Sen's regime has a higher capability to restrain the military.

Thailand, Malaysia and Cambodia are geographically linked. Social movements and street protests in one country can inspire citizens in neighbouring countries to behave in a similar fashion. For example, the anti-government protests, both of the Red-shirts and of the Yellow-shirts in Thailand inspired Bersih movements in Malaysia. Bersih movements wore yellow-shirts as their identity while the pro-government (UMNO) groups dressed in red. Similar accusations relating to corruption and unfair election procedures were raised. Afterwards, activists in the opposition in Cambodia demanded free and fair elections and called for a "colour revolution". Political conflicts in these three countries have become deeply polarised between the pro-government groups and the opposition. Similarly to Russia, governments of these three countries recently introduced legislation on public assembly as an attempt to shape the scope of freedom of assembly: the Public Assembly Act 2015 (Thailand), Peaceful Assembly Act 2012 (Malaysia), and Law on Peaceful Assembly 2009 (Cambodia). Moreover, the three states have been employing similar techniques of coercion and channelling in order to reduce or eliminate the effects of public assemblies. They dominate or heavily influence civil society. Ersatz social movements are used to protect the regimes and gain popularity from their people.

[125] Robertson (n 69) 204.

Furthermore, as can be seen from table 3, the level of public elite competition in all three countries was relatively high during the past decade.

Table 3. Varieties of Hybridity is Thailand, Malaysia, and Cambodia

	Organisational Ecology	State Mobilisation Strategy	Public Elite Competition	Nature of Contention
Thailand	Balanced	Mobilising (2007-2014)	High	frequent large scale, highly polarised protests (2007 – 2014)
	Balanced	Demobilising*: (2014 - 2018) *Under Military Junta	High	Large scale anti-government mobilisation (2017 – 2018)
Malaysia	Dominated but independent organisations exist	Demobilising (prior to 2008)	High	Elites refraining from using mobilisation (prior to 2008)
	Dominated but independent organisations exist	Mobilising (2008 - 2018)	High	Large scale, elite-led mobilisation (2008-2018)
Cambodia	Balanced	Mobilising	Low (prior to 2013)	Large scale controlled rallies, heavy state repression (prior to 2013)
	Balanced	Mobilising	High (2013 - 2018)	Frequent large scale protest, highly polarised protest (2013-2018)

In this section, we can conclude that Robertson's three variables offer a new perspective to understand protest patterns and the nature of contentious in hybrid regimes. Moreover, this section demonstrated that Robertson's theory can be applied to three hybrid regimes in Southeast Asia. Just as the Putin administration managed street protests through coercion and channelling, we can expect to see similar techniques to manage street protests in these regimes. We noted, however, that Robertson has largely overlooked the role of law and legal institutions. Hence the following heading explores Robertson's theory from a legal perspective.

3.4 Looking at Robertson's theory from a legal perspective

Robertson has overlooked legal mechanisms governing public assembly which, in my opinion, give direct effect to his three variables. He has also missed considering the role of legal institutions in framing the repertoires of protest. This part attempts to explore Robertson's theory from a legal perspective. It argues that Robertson's observations help us to better understand the logic that underlies the imposition of restrictions on public assemblies in hybrid regimes and can reveal the characteristics of legal mechanisms governing public assemblies in hybrid regimes.

3.4.1 Unexplored areas in Robertson's politics of protest in hybrid regimes

Robertson does not fully incorporate a legal perspective to explain the politics of protest in hybrid regimes. I suggest that an appreciation of the (often) structuring role played by legal mechanisms is needed, especially an understanding of how the rules in hybrid regimes curtail the scope of freedom of assembly through law and law enforcement. There are at least two legal issues that tacitly underpin Robertson's theory that are worth exploring. The first is the potential that law has to shape the capacity for social movement actors to take to the streets in order to seek change. The second is the role of legal institutions.

Robertson has not fully explored the interaction between on the one hand legislation, rules and regulations that govern public assemblies and on the other, those actors involved in public protests which thus then frame the exercise of freedom of assembly. That is, he pays scant regard to the legal management of contention in hybrid regimes. For instance, when he explained the theory of declining in protest frequency, he followed Meyer's and Minkoff's approach which explains variation in protest through the effect of formal rules and of political

signals that players received.[126] Instead of evaluating law and regulations governing public assemblies, Robertson examines the result of implementing a mixed electoral system which decreases the elites' incentives to mobilise their protesters.[127] Here, I suggest that legal frameworks and public order policing are major factors shaping the incentives of both genuine civil society organisers and of elites in terms of whether to use the streets to challenge the incumbent government. Hybrid regimes may impose punitive sanctions and disproportion responsibilities to discourage organisers and participants from mobilising.

Looking at Robertson's theory from a legal perspective can reveal how hybrid regimes systematically create street-proof mechanisms through law. For instance, when Robertson examined coercion tactics under the Putin administration, he did not make many references to the laws that were used to harass participants in public demonstrations.[128] That said, when he explained the organisational ecology in Russia, he did examine the Federal Law No. 18-FZ (the NGO reform law) which drew the parameters within which civil society and other NGOs in Russia could operate.[129] However, he overlooked the Federal Law No.54-FZ on Gatherings, Meetings, Demonstrations, Processions and Picket when he assessed the state mobilisation strategies and the level of public elite competition. He simply accepted that hybrid regimes had legal frameworks guaranteeing a significant degree of civil rights, but that they also had restrictions, both de jure and de facto, limiting NGOs' ability to conduct some activities.[130] As such, he did not explain much about how these laws affect protesters' ability to assemble on the street. It is argued here, though, that legal frameworks on public assembly and public order policing are the key factors affecting protest organisers incentive and ability to hold a demonstration. A further study on the interaction between these legal restrictions and Robertson's politics of protest theory will fill the theoretical gap.

Secondly, Robertson leaves unexplored the role of legal institutions. He noticed the relationship between the judiciary and the police, but did not closely investigate court judgments or the dynamics of public order policing. How law enforcement and the judiciary see their roles in fulfilling a State's obligations under IHRL can greatly affect the repertoires of protest. When Robertson investigated the politics of protest in Russia, the practice of judicial review (both its

[126] ibid 131-132 citing David S Meyer and Debra C Minkoff, 'Conceptualizing Political Opportunity' (2004) 82 Social Forces 1457.
[127] ibid 145-146.
[128] ibid 188-189.
[129] ibid 192.
[130] ibid 26-27.

quality and the role of judges in safeguarding freedom of assembly) are missing from his analysis. Furthermore, despite Russia having had many freedom of assembly and association cases against it heard before the ECtHR, Robertson did not investigate the role of the ECtHR and its effects on the domestic protection of protest in Russia. It is argued here that legal research on this matter can support Robertson's theory in further explaining elite decisions - as Robertson already pointed out, the degree of competition among elites depends on the different strategic choices that elites are able to choose from.[131] Unquestionably, legal frameworks governing public assembly and public order policing are factors influencing these elite choices.

It is worth noting that Robertson was looking to correct the previous sociological skew in social movement scholarship, by providing the perspective of a political scientist looking to a characterise the nature of protest and explain the dynamics that underlie protest patterns, not to provide a comprehensive theory, one which would encompass law (and other disciplines and approaches too). He admits that most of the literature on contentious politics has been written by sociologists rather than political scientists.[132] Sociologists are likely to pay attention to the effect of political institutions on protest in a general sense rather than comparing the effects of particular institutional arrangements under the constitution and its legal frameworks. Robertson's theory is thus an example of political science research discussing the nature of protest based on political incentives and the interaction between political players. In a similar way, this thesis comes primarily from a legal perspective and argues that legal research on public assembly provides an evidential basis for better understanding the politics of protest in hybrid regimes – specifically, how contention is shaped through legal frameworks and public order policing. It is suggested that this legal perspective (and its more granular focus on the operation of specific legal provisions) is necessarily part of the full picture.

3.4.2 What can we learn from Robertson's theory on the politics of protest in hybrid regimes?

By examining Robertson's politics of protest through a legal perspective, we can better understand how the legal framework governing public assemblies and public order policing effects political contention in hybrid regimes. Robertson's theory identifies key factors that explain political contention and protest patterns in hybrid regimes.[133] His theory explains that protests in hybrid regimes are driven not only by civil society but also by the state and the elites. Robertson's theory offers a framework to understand how contention in hybrid regimes is

[131] ibid 34.
[132] ibid 131.
[133] ibid 6.

managed by explaining the incumbents' incentive to manage street protests. If Robertson's observation is correct, there is a tension inherent at the heart of the management of contention in hybrid regimes; elites will impose restrictions limiting the ability of political dissenters to mount public protests but, at the same time, will allow pro-regime movements to mobilise and dominate civil society.[134] If so, and as has been argued here and in chapter 2, the legal restrictions in hybrid regimes serve a different purpose than laid down by IHRL (and the particular conception of 'democracy' upon which it is premised).

3.4.2.1 The logic of imposing restrictions on public assemblies in democracies

Democracies restrict freedom of assembly to ensure that public assemblies support their democratic process and uphold democratic principles.[135] The rules regarding protests are substantively neutral, neutral as to the outcome and result, seeing protest and public assemblies as essential elements of not in opposition to, democracy. Restrictions in democracies are designed to protect and facilitate peaceful protests which are seen as legitimate means to make demands.[136] Political institutions encourage citizens to participate in decision making both through electoral-methods and non-electoral methods. One of the important characteristics of public assemblies is that they are performed to influence decision-makers who fear losing their electoral popularity. Hence, protesting in a form of public gathering can influence elected representatives.[137] If a protest successfully sets an agenda in motion with sufficient social support, politicians cannot easily ignore it. Upon this logic, Tilly claims that politicians in a representative democracy are more likely to respond to protests when protesters display a significant degree of WUNC.[138] Similarly, Della Porta and Diani agreed that the fear of losing electoral support can make elected representatives change their position, either to avoid losing popularity or to attract new supporters.[139]

3.4.2.2 The logic of imposing restrictions on public assemblies in authoritarian regimes

In closed authoritarian regimes, public assemblies are not an essential part of their political process. Although there are state-sponsored public assemblies to boost the regime's popularity,

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[134] ibid 27.
[135] we had discussed this point in 2.2.
[136] Della Porta and Diani, *Social movements : an introduction* (n 20) 29.
[137] Ruud Wouters and Stefaan Walgrave, 'Demonstrating Power: How Protest Persuades Political Representatives' (2017) 82 American Sociological Review 361, 362.
[138] Charles Tilly, *Social movements, 1768-2004* (London : Paradigm 2004); Wouters and Walgrave, 'Demonstrating Power: How Protest Persuades Political Representatives', 366.
[139] Della Porta and Diani, *Social movements : an introduction* (n 20) 171.

genuine public assemblies are usually banned or significantly restricted by the authorities. Harsh restrictions enable the regimes to retain a monopoly on public participation. Strict social control and law enforcement in authoritarian regimes make public assemblies rare and dangerous.[140] Independent organisations or social movements outside ruling-party control are usually forbidden or insignificant.[141] Authoritarian regimes fear that a public assembly may spark uprisings or ignite a revolution. Mass protests also signal that a regime is facing a crisis of legitimacy.[142] Such a decline in legitimacy, if left continue, could eventually lead to regime transition.[143] Therefore, authoritarian regimes have the incentive to make contention localised and make it harder to sustain a long-term protest, which in return reduces the degree of threat to the regimes. For instance, Lorentzen points out that China, as an authoritarian regime, has the incentive to tolerate regular small-scale protests because they serve as useful indicators in monitoring corruption at local government and identifying discontent and citizen preferences.[144] He argues that the information on corruption makes the regime stronger and more efficient.[145] Lorentzen coined the term 'loyalist protest' to describe a pattern of protest, which is healthy for authoritarian regimes. The loyalist protests are collective actions of small well-defined groups whose claims are narrow in scope. They do not seek to escalate but instead focus only on their groups' grievance and local interest. Above all, they do not challenge the legitimacy of the rulers or challenge to topple their general policy.[146]

3.4.2.3 The logic of imposing restrictions on public assemblies in hybrid regimes

Hybrid regimes, in contrast, need somehow to contain challenges from both elites and the partly-freed civil society.[147] They have an incentive to retain the capacity to repress anti-regime protesters and to mobilise pro-regime activists to shield the regime from opposition (and thereby enhance the likelihood of continued electoral success). As an attempt to curb the

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[140] Robertson (n 69) 20.
[141] ibid 22.
[142] Kressen Thyen and Johannes Gerschewski, 'Legitimacy and protest under authoritarianism: explaining student mobilization in Egypt and Morocco during the Arab uprisings' (2017) Democratization 1, 2 citing Juan J. Linz and Alfred C. Stepan, *Problems of democratic transition and consolidation : southern Europe, South America, and post-communist Europe* (Baltimore ; London : Johns Hopkins University Press, 1996).
[143] ibid citing Michel Crozier, Samuel P. Huntington and Jōji Watanuki, *The crisis of democracy : report on the governability of democracies to the Trilateral Commission* (New York: New York University Press, 1975).
[144] Peter Lorentzen, 'Regularizing Rioting: Permitting Public Protest in an Authoritarian Regime' (2013) 8 Quarterly Journal of Political Science 127, 129.
[145] ibid 128.
[146] ibid 131.
[147] Robertson (n 69) 173.

capacity of people to protest, they use public assembly restrictions together with other relevant legislative provisions to shape the public sphere and to reduce the threat from political challengers.

Hybrid regimes benefit from having laws and public order policing that are not fair to other political competitors. Political competition takes place in an unfair environment but freedom of assembly is not simply prohibited outright. These regimes restrict the freedom unfairly to protect their political dominance. Under these conditions, Tilly's WUNC framework does not fully explain protesters' incentive to pressure their representatives via protests because the incumbents usually have an election-proof mechanism allowing the incumbents to maintain their majority in Parliament. Protests displaying WUNC have less impact on institutionalised political actors in hybrid regimes.

If Lorentzen's observation of protest in authoritarian regimes is correct[148], hybrid regimes should have a similar incentive to tolerate regular small-scale protests because they operate without accurate information on public opinion. According to Robertson, small-scale protests are harmful to hybrid regimes because they can embarrass the authorities and generate a real political problem.[149] This is because civil society in a hybrid regime is partly open and there is at least the appearance of real political competition. By contrast, in an authoritarian regime there is semblance of open political competition and no civil society exists to sustain opposition momentum. Therefore, I see that hybrid regimes need a mechanism filtering out real threats while keeping the political competition partly open. The underlying logics for imposing restrictions on freedom of assembly in a hybrid regime are (1) to limit dissenters' capability to protest while having a mix of real social movement organisations and ersatz social movement organisations in its civil society, and (2) to allow the incumbent ruler to mobilise pro-regime supporters to display their dominance.[150]

In short, we can conclude that the logic of imposing restrictions on public assemblies in hybrid regimes is to limit dissenters' capability to protest lawfully while allowing pro-regime supporters to mobilise. This logic contradicts that in a consolidated democracy where restrictions are (or at least, ought) only to be imposed to keep public assemblies within democratic boundaries. Robertson's theory provides a rationale explaining what patterns of political contention are desired in hybrid regimes. I see that Robertson's theory can be used to

[148] Lorentzen (n 144) 128.
[149] Robertson (n 69) 185.
[150] ibid 27.

explain the characteristics of legal mechanisms governing public assemblies in hybrid regimes because they are the tools for curtailing freedom of assembly limiting the capacity of the opposition groups and discouraging other elites to challenge the incumbents' status quo.

3.4.3 Characteristics of the legal mechanisms governing public assemblies in hybrid regimes

The logic of imposing restrictions on public assembly dictates the characteristics of the legal mechanism. I argue that legal frameworks and public order policing are relied upon to produce an ecology in which hybrid regime incumbents have the advantage. According to Robertson's theory of organisational ecology in hybrid regimes, the state can mobilise ersatz social movements to display dominance. From a legal perspective, we can expect that the law governing civil society (such as the NGO law) excessively restricts the ability to form and operate a civic organisation against the interests of a dominant state. The state must have a legal mechanism to control 'organisational ecology' in order to screen out NGOs that might destabilise the regime.

When considering the legal frameworks governing public assemblies, we can expect to find legal frameworks that allow them to arbitrarily restrict dissenters' ability to protest, while at the same time enabling pro-regime supporters to mobilise (See table 4). The legal frameworks in hybrid regimes should provide the authorities with broadly framed legal grounds to restrict freedom of assembly allowing them to exercise their discretion arbitrarily. On the matter of law enforcement, we should expect to find that public order policing in hybrid regimes lacks insulation from political power and has a bipolar characteristic: Authorities can switch their public order policing style between a democratic approach and an authoritarian approach. The police must adhere to the incumbents' orders rather than to human rights standards. Also, judicial review in hybrid regimes serves as a mechanism for consolidating rather than challenging power, bolstering the legitimacy of the incumbent.[151]

[151] O O Varol, 'Stealth authoritarianism' (2015) 100 Iowa Law Review 1673, 1687.

Table 4. Characteristics of legal mechanisms governing public assemblies in hybrid regimes

	Democracy	Hybrid regimes
Legal frameworks governing NGOs	NGOs work relatively free from state intervention.	Licensing of civil society Civil society dominated by ersatz social movements. NGOs work in a restricted environment.
Legal frameworks governing public assemblies	Grounds for restriction aim to support the democratic process The strict test of necessity and proportionality is a mandatory Uphold international human rights standards	Provide overly broad legal ground to restrict freedom of assembly Do not provide the strict test of necessity and proportionality Lack of adequate judicial review
Public order policing	Insulated from political influence Consider state positive obligations	Lack insulation from political influence Diverge between the cultural norms of the police and international human rights norms

Overall, Robertson's theory reveals the incentives operating upon hybrid regime incumbents in shaping the sphere of freedom of assembly. His work provides a foundation to examine why such regimes introduce certain types of legal mechanism to produce the desired pattern of political contention. The following part examines how hybrid regimes curtail freedom of assembly through the modification of law and legal institutions. In order to show how such an argument fits with Robertson's work, it takes Russia as a case study – arguing that Putin's regime modified the legal mechanism governing public assembly precisely in order to shape the nature of political contention in Russia.

3.5 Curtailing freedom of assembly in hybrid regimes

Earlier in this chapter it was argued that Robertson has overlooked the importance of legal mechanisms shaping the repertoires of protest. The next section attempts to demonstrate that laws governing NGOs and freedom of assembly, together with legal institutions (including public order policing) are the tools through which States manipulate organisational ecology and state mobilisation strategy. For this reason, this part explores the legal framework and public order policing in Russia (with brief introductions also to the equivalent frameworks in Thailand, Cambodia and Malaysia) to lay a foundation for the extensive discussion in the subsequent chapters.

3.5.1 Controlling organisational ecology through legal frameworks governing NGOs

Hybrid regimes can limit the right to organise and to participate in a public assembly through laws governing NGOs. Robertson has observed that the Putin administration controlled the organisational ecology by licensing civil society and by inserting ersatz social movements into the civic space. The licensing measure enables the regime to screen out unwanted NGOs. After Putin became the president in 2000, the parliament, regional governments, political parties, and television networks were bought under executive dominance.[152] Civil society was also brought under his control and was mobilised to support his regime.[153] The organisations funded by the regime became known in the academic literature as 'government-organised nongovernmental organisations (GONGOs)'.[154] In January 2006, the government enacted the Federal Law No. 18-FZ On Introducing Changes to Several Legislative Acts of the Russian Federation to tailor NGOs and curb civil society in Russia.[155] The law has imposed a system of licensing civil society which provides vast discretionary power enabling the authorities to discriminately limit potential threats from NGOs.[156] All NGOs were required to re-register with the authorities and the law provided several grounds to refuse any application.[157] Moreover, the government can

[152] Stephen K Wegren (ed), *Putin's Russia : Past Imperfect, Future Uncertain* (Sixth edn, Lanham : Rowman & Littlefield 2016) 106.
[153] ibid.
[154] ibid 107.
[155] Robertson (n 69) 192.
[156] ibid 193.
[157] ibid.

demand unlimited information documenting day-to-day management and can send agents to any NGO's event or any internal meeting without the NGO's invitation.[158]

After Robertson published *The Politics of Protest in Hybrid Regimes* in 2011, the government's attempt to limit the civil society continued. As a response to the large-scale election protests in December 2011, the Putin administration enacted the Federal Law No. 121-FZ 'On Amendments to Legislative Acts of the Russian Federation Regarding the Regulation of the Activities of Non-profit Organisations Performing the Functions of a Foreign Agent' (the Foreign Agents law).[159] It aimed to either eliminate or marginalise dissenters' ability to organise themselves against the regime.[160] This law was a part of a series of amendments designed to gain control over the civil society: the amendment to the criminal code and the laws 'On Public Associations', 'On Non-commercial Organisation', and 'On Combating Money Laundering and the Financing of Terrorism'.[161] Large numbers of NGOs were listed as 'foreign agents' in a discriminatory manner; for example, the law restricted organisations which advocated 'discrimination, the protection of women's and LGBT rights, the preservation of historical memory, academic research, criminal justice and prison system reform, consumers' rights, and environmental issues'.[162] All materials distributed by a foreign agent must be labelled as 'products of foreign agents'. As a foreign agent NGO, permission is required before participating in any political activity. Without it, foreign agents could face a heavy fine or face two years imprisonment.[163] Plausibly, the heavy fines under this law were designed to bankrupt targeted NGOs.[164]

A legal technique allowing the authorities to act arbitrarily upon the regime's signal is to make the law ambiguous. For example, the definition of 'political activity' in the Foreign Agents law

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[158] Katherin Machalek, 'Factsheet: Russia's NGO laws' <https://freedomhouse.org/sites/default/files/Fact%20Sheet_0.pdf> accessed 18 April 2017.

[159] It is worth noting that the Foreign Agents Law was modelled after the 1938 US Foreign Agent Registration Act (FARA) which enable the US government to limit Nazi activities during the pre-WWII period. Later, the U.S. judiciary and the Congress significantly narrow the scope of the law through amendments and case law. This check and balance system is missing in Russia.

[160] Wegren (n 152) 116.

[161] Machalek (n 158).

[162] Amnesty International, 'Russia: Four years of Putin's 'Foreign Agents' law to shackle and silence NGOs' (18 November 2016) <https://www.amnesty.org/en/latest/news/2016/11/russia-four-years-of-putins-foreign-agents-law-to-shackle-and-silence-ngos/> accessed 18 April 2017.

[163] Machalek (n 158).

[164] Vladislava Vojtíšková and others, *The Bear in Sheep's Clothing Russia's Government-Funded Organisations in the EU* (Wilfried Martens Centre for European Studies 2016) 20.

is too loose and too broad. It allows the authorities to wield vast discretionary power.[165] The definition includes any activity seeking to influence government policy or public opinion with regard to government policy.[166] Such a definition allows the Russian authorities wide discretion to arbitrary restrict and harass NGOs that criticise the authorities and advocate the values of a democratic society If a body in receipt of international funding refuses to register, it will be banned from participating in any public demonstration. Its bank account will be frozen. Its personnel can be fined or imprisoned.

The Venice Commission has pointed out that the Foreign Agents law did not comply with international standards because it did not provide necessary legal certainty.[167] This law also went against the protected political speech—any restriction on political speech must comply with the scope under ECHR Article 10 (2).[168] Furthermore, on 23 May 2014, President Putin enacted the Federal Law No. 129-FZ (known as 'The Law on Undesirable Organisations'). This law provides the Prosecutor General or the Prosecutor General's Deputies power to declare any foreign or international NGO 'undesirable' as a threat to national security. All activities under such undesirable organisations are banned, any persons participating in their activities is then subjected to administrative and criminal penalties.[169]

While civil society organisations were heavily restricted, Putin's regime filled the civil society with ersatz social movement organisations in the form of GONGOs. In 2004, he proposed the establishment of the Public Chamber of the Russian Federation in order to bridge the relationship between the state and civil society.[170] The Chamber consisted of presidentially appointed members who were regarded as the representatives of organisations in Russian civil society. These members were less likely to raise any issue that would threaten the regime's stability.[171] For example, Brechalov, who was elected as the head of the Chamber in 2013, was

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[165] European Commission for Democracy Through Law, *Opinion on federal law N. 121-FZ on non-commercial organisations ("law on foreign agents"), on federal law N. 18-FZ and N. 147-FZ...* (27 June 2014) Opinions no. 716-717/2013 CDL-AD (2014) 025, para 73.
[166] Machalek (n 158).
[167] European Commission for Democracy Through Law, *Opinion on the Federal Law N.121-FZ* (n 165), para 53.
[168] *Feldek v Slovakia*, App no 29032/95 (ECtHR, 12 July 2001), para 74.
[169] International Center for Not-for-Profit Law (ICNL), 'Civic Freedom Monitor: Russia' <http://www.icnl.org/research/monitor/russia.html> accessed 19 April 2017.
[170] Wegren (n 152) 107.
[171] ibid.

the co-chair of the All-Russian Popular Front which was in charge of mobilising regime supporters to vote for the ruling party.[172]

In 2013, the number of demonstrators in Moscow reduced by around five times partly because participants were in fear of public persecution.[173] Another contributing factor was that activists did not believe that their efforts on the streets would make any substantial change.[174] The loss in the public participation matches the explanation under the POS which requires activists to believe that they have both power and opportunity to bring about a change.[175] By closing down the opportunity to achieve a goal, the degree of participation went down as a result. It was clear that the Putin administration was sending a strong message to protesters to choose between abstaining from politics or facing legal prosecutions.[176] According to Robertson's theory, the reduction in public participation was caused by restrictions that changed the organisational ecology. The civil society in Russia became dominated by ersatz social movements.

Russian anti-NGO law and law suppressing freedom of assembly and expression inspired other authoritarian regimes to follow.[177] Similar legal techniques using NGO laws to silence protests from pro-democracy activists and human rights groups can be found in the three Southeast Asian regimes. In Cambodia, Prime Minister Hun Sen introduced the Law on Associations and Non-Governmental Organisations (LANGO) in 2015. Similar to the Russian style of NGO law, it requires all NGOs, both domestic and international organisations to register to the authorities. The law imposes burdensome registration requirements such as requiring that international NGOs must have signed a Memorandum of Understanding with the Government before initiating any activity.[178] For foreign NGO applicants, it requires that they must obtain a letter issued by the public authority to support their proposing projects.[179] Moreover, the law excludes NGOs from politics by requiring that all NGOs shall maintain 'political neutrality' and refrain

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[172] ibid.
[173] ibid 115 citing O V Kryshtanovskaia, V I Shalak, M I Korostikov, and N S Evengeeva, "Analiticheskii otchet o provednii sotsiologicicheskogo issledovaniia 'Dinamika protestnoi aktivnosti: 2012-2013,'" *Gefter* (2 August 2013) 12.
[174] ibid.
[175] Della Porta and Diani, *Social movements : an introduction* (n 20) 18.
[176] Melissa Hooper, *Russia's Bad Example* (Free Russia Foundation 2016) 7.
[177] ibid.
[178] Mark Sidel and David Moore, 'The Law Affecting Civil Society in Asia: Developments and Challenges for Nonprofit and Civil Society Organizations' December 2016) <http://www.icnl.org/research/resources/regional/The%20Law%20Affecting%20Civil%20Society%20in%20Asia%20(Dec%202016).pdf> accessed 21 April 2017, 31.
[179] Law on Associations and Non-Governmental Organisations s15.

from supporting political parties.[180] Rhona Smith, UN Special Rapporteur on the situation of human rights in Cambodia, has commented: 'it is difficult to understand why civil society organisations and trade unions must be politically neutral. Civil servants, the police and the military, on the other hand, should be politically neutral.'[181]

The Minister of the Interior has vast discretion to refuse any application on the grounds of 'endangering the security, stability and public order or jeopardise the national security, national unity, cultures, tradition, and custom of the Cambodian national society'. [182] The Minister of Foreign Affairs and International Cooperation has similar power to terminate the validity of any MOU given by foreign NGOs.[183] If the MOU is terminated by the Minister, foreigners in the NGO will face expulsion measure under the Law on immigration.[184] With several vaguely worded provisions, the message to NGOs is nonetheless crystal clear – they should keep their activities away from politics if they want to continue to enjoy legal status in the country. LANGO creates a significant chilling effect on domestic NGOs. It forces them to operate under the fear of arbitrary shutdown because there have been no guidelines on how LANGO would be implemented.[185] The law was seen as a tool to contain independent organisations, especially before and during the election period. For instance, the National Democratic Institute (NDI), a US-affiliated NGO, was ordered to shut down in August 2017 due to its failure to register under LANGO. The institute had been promoting democratisation in Cambodia since 1992. The NGO filed an application to register 15 months before it was ordered to shut down.[186] The government also threatened to shut down several domestic and international NGOs, including independent media to create chilling effects before the next general election in July 2018.[187] Between April 2016 to March 2017, the authorities initiated LANGO to prevent NGOs from holding meetings

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[180] The international Center for Non-for-Profit Law, 'Civic Freedom Monitor: Cambodia' (1 November 2016) <http://www.icnl.org/research/monitor/cambodia.html> accessed 19 April 2017.

[181] Rhona Smith, 'Statement by the United Nations Special Rapporteur on the situation of human rights in Cambodia by Professor Rhona Smith' (*OHCHR*, 18 August 2017) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22046&LangID=E> accessed 14 January 2019.

[182] Law on Associations and Non-Governmental Organisations 2015 (Cambodia) s30.

[183] ibid s35.

[184] ibid s34.

[185] Janelle Retka, 'Two years on, NGO law remains ambiguous' (*The Cambodia Daily*, 13 July 2017) <https://www.cambodiadaily.com/news/two-years-on-ngo-law-remains-ambiguous-132456/> accessed 1 January 2019.

[186] Ben Sokhean and George Wright, 'NDI Banned, Foreign Staff Face Forcible Explusion' (*The Cambodia Daily*, 24 August 2017) <https://www.cambodiadaily.com/news/ndi-banned-foreign-staff-face-forcible-expulsion-2-133964/> accessed 1 January 2019.

[187] ibid.

and gathering.[188] On 2 October 2017, the Ministry of Interior issued a directive requiring every association and NGO wishing to organise activities in a specific city or province to inform the Ministry about the nature of the activities three days in advance.[189] This initiative fits the pattern that the government was curtailing its civil society before the general election in 2018.[190]

In Malaysia, the state imposes an extensive set of restrictions to limit social movements to ensure that the regime will survive any threat from civil society.[191] Historically, the legal framework governing NGOs originated from the British campaign against Chinese secret societies during its colonial rule.[192] It was an attempted to channel dissenters who would challenge the government to organise as a political party rather than forming an NGO.[193] The Societies Act of 1966 requires that only registered organisations are allowed to function as societies.[194] The definition of a society under this law is very broad.[195] This definition in turn confers a powerful discretion on the authorities. The law states that the Minister has absolute discretion to declare any societies unlawful if he/she sees that it is 'being used for purposes prejudicial to or incompatible with the interest of the security of Malaysia…'[196] The Registrar has the power to order any registered society to remove all persons who are not Malaysian citizens and to prohibit any affiliation, connection, communication, or other dealing with any other body outside Malaysia.[197] The law also grants unfettered discretion to the police to exercise powers of entry and search. Any police officer of or above the rank of Inspector may use force to enter any house or building which he has a reason to believe that there is a meeting of an unlawful society or there is a member, publication, insignia, arms, or articles of an unlawful society.[198] Under this framework, many NGOs in Malaysia choose to register as companies or businesses instead.[199]

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[188] United States Department of State, 'Cambodia 2017 Human Rights Report' (*Bureau of Democracy, Human Rights and Labor,* 2017) <https://www.state.gov/documents/organization/277315.pdf> accessed 14 January 2019, 16.

[189] Mech Dara, 'Ministry ups scrutiny of NGOs' (*The Phom Penh Post,* 10 October 2017) <https://www.phnompenhpost.com/national/ministry-ups-scrutiny-ngos> accessed 15 January 2019.

[190] ibid.

[191] S. Giersdorf and A. Croissant, 'Civil society and competitive authoritarianism in Malaysia' (2011) 7 Journal of Civil Society 1 10.

[192] Meredith L. Weiss and Saliha Hassan, *Social Movement Malaysia* (Routledge 2003) 31.

[193] ibid.

[194] Societies Act 1966 (Malaysia) s4.

[195] ibid s2.

[196] ibid s5(1).

[197] ibid s13A(1).

[198] ibid s65(1).

[199] Weiss and Hassan (n 192) 33.

In addition, human rights NGOs in Malaysia have long been perceived by the government as threats to national interests.[200] For example, in 1981, the Mahathir administration amended the Society Act 1966 to classified NGOs into two categories, "political" and "friendly".[201] The amendment has prevented a large number of NGOs from seeking to influence government policy. To further discourage NGOs and their supporters, the Societies Act, the Police Act and other laws upholding freedom of speech, freedom of press and freedom of assembly were also amended.[202]

Turning to Thailand, Thai NGOs first flourished between 1973 and 1976 when a parliamentary democracy shortly replaced a military rule.[203] When the military came into power, NGOs which were seen as leftist or anti-military government were routinely suppressed. Nevertheless, Thai NGOs played an important role in facilitating the democratisation process such as campaigning against corruption, participating in election monitoring, calling for constitutional revision, and demanding political and electoral reform.[204] The Thai legal framework on NGOs provides vast discretionary power to pursue involuntary termination or liquidation as a means to shut down organisations that advocate disagreement with or threaten the state's stability.[205] The Civil and Commercial Code of Thailand (CCC) requires that all associations must be registered.[206] However, it is not enforced consistently.[207] The CCC provides the authority with discretion to deny an association's application on the ground that the object of the association is contrary to the law or good morals or likely to endanger public order or national security.[208] The registrar also has the power to order involuntary termination and liquidation of any association when the object of the association or its activity is contrary to the law or public moral or is likely to endanger public peace or national security. [209] These involuntary termination and liquidation proceedings present two (related) problems for NGOs.[210] The first is that officials can exercise

[200] Khoo Ying Hooi, 'The NGO-Government Relations in Malaysia: Historical Context and Contemporary Discourse' (2013) 1 Malaysian Journal of Democracy and Election Studies 76, 77.
[201] ibid 80.
[202] ibid 83.
[203] G. Clarke, *The Politics of NGOs in Southeast Asia: Participation and Protest in the Philippines* (Taylor & Francis 2006) 31.
[204] S. Kim, 'NGOs and Social Protection in East Asia: Korea, Thailand and Indonesia' (2015) 23 Asian Journal of Political Science 23, 35.
[205] Sidel and Moore (n 178) 20.
[206] Civil and Commercial Code s78.
[207] Sidel and Moore (n 178) 12.
[208] Civil and Commercial Code s82.
[209] ibid s102.
[210] Sidel and Moore (n 178) 21.

discretion in deciding whether the detailed requirements and procedures have been complied with. The second is that politics can easily affect the authority's decision to terminate anti-government NGOs.

Foreign organisations operating in Thailand must obtain permission from the Ministry of Labour and Social Welfare. The committee granting this permission is composed of several members from the Ministry of Labour and Social Welfare and several representatives from the national security and intelligence agency. In granting a permission for a private organisation to operate/establish a regional office, the committee must consider the policy of economic and social development, national security, the good relationship between Thailand and other countries.[211] The permission to operate is granted for one year for the first application. Then it must be renewed every two years.[212] Foreign organisations are prohibited from having an objective to generate profit or political purpose.[213] Their objectives must be in conformity with the development policy and security of Thailand and have operational plans that are not contrary to the policy of the Thai Government.[214] Their activities shall not be contrary to morals, Thai custom and culture.[215] Only permitted activities shall be carried out.[216] Under the conditions listed above, foreign organisations' freedom to initiate their activities is very limited and they risk facing political sanctions from the authorities.

From the evidence presented above, it can be concluded that it is through the legal framework governing NGOs that, what Robertson terms, 'organisational ecology' is shaped. We can see that legal frameworks in four hybrid regimes excessively restrict the ability to form and operate a civic organisation that seeks to challenge the State or hold its officials to account. There are legal mechanisms to screen out 'undesirable' NGOs. The common grounds for restrictions are nationality and threats to national security. NGO law and Foreign Agent law which requires periodical registration allow the authorities to keep political activists under surveillance. Also, they allow the authorities to selectively ban or prosecute activists perceived to destabilise political arrangements. When the civil society can only manoeuvre in limited space, the hybrid regime rulers preserve the option to mobilise their ersatz social movements to enrich their

[211] Rule of the Ministry of Labour and Social Welfare on the Entry of Foreign Private Organisations to Operate in Thailand B.E.2541 1998 Clause 10.
[212] ibid Clause 16.
[213] ibid Clause 12 (1).
[214] ibid Clause 12 (2).
[215] ibid Clause 14 (2).
[216] ibid Clause 14 (3).

popularity. Lacking in a strong and active civil society, the government has the advantage in stirring public opinion.

3.5.2 Controlling state mobilisation strategies through legal frameworks governing public assemblies and public order policing

Robertson's state mobilisation strategies are fundamentally controlled and shapted by legal frameworks governing public assemblies and public order policing. In Russia, many pieces of legislation were introduced systematically to restrict freedom of assembly (after Robertson's study in 2012). In his later work, Robertson noticed this missing part and accepted that legislatures were used to reduce social protests.[217] Hamilton highlights three factors limiting the freedom of assembly in post-Soviet hybrid regimes: the excessive discretion power of regulatory authorities, procedural problems, and the punitive sanction.[218] The Russia legal framework governing public assemblies is a good example of his claim. The legal framework gives broad discretionary power to the executive authorities to restrict public assemblies. The authorities then translate such power into restrictions on time, place, and manner that undermine the value of peaceful assemblies.

The government curtailed the scope of freedom of assembly through the Federal Law on Gatherings, Meetings, Demonstrations, Processions and Picket, No. 54-FZ of 19 June 2004 (Russian PAA). Spontaneous assemblies are prohibited. The law gives that an organiser of a public event, except a single-participant picketing, must notify the authority no earlier than fifteen days and no later than ten days before the date of the event.[219] An absence of a prior notification makes a public event unlawful, regardless of whether it is a peaceful spontaneous gathering. The ECtHR found, in *Navalnyy v Russia*, that this legal provision becomes the main justification for the authorities to routinely place administrative charges and arrest participants.[220] The notification system also presents another problem. Although the law uses the term "notice of intent", the authority considers it as "authorisation" in practice. Section 5 of the law provides that the authorities may suggest an alternative choice or modify the proposal. Then, the organiser needs to negotiate with the authorities to reach an agreement. If there is no

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[217] Ora John Reuter and Graeme B. Robertson, 'Legislatures, Cooptation, and Social Protest in Contemporary Authoritarian Regimes' (2015) 77 The Journal of Politics 235.

[218] Michael Hamilton, 'Practices relating to freedom of assembly in the former Soviet Union' in Adam Hug (ed), *Sharing worst practice: How countries and institutions in the former Soviet Union help create legal tools of repression* (The Foreign Policy Centre 2016) 49.

[219] The Federal Law No.54-FZ on Gatherings, Meetings, Demonstrations, Processions and Picket 2004 (Russia PAA) (Russia) s7.

[220] *Navalnyy v Russia* App nos 29580/12 and 4 others (ECtHR GC, 15 November 2018), para 87.

agreement, the event cannot take place.[221] As a result, the organisers are forced to accept the conditions for an assembly – they must "take it or leave it".[222] These requirements substantially dictate how a street protest is planned and executed. On this issue, the Venice Commission points out that such requirement goes far beyond the legitimate aims under the ECHR which is to facilitate public assemblies.[223] Therefore, the Commission takes the view that the Russian PAA imposes a de facto authorisation procedure.[224]

Valery Teterin's case is a good example. He sent a notification to hold a public demonstration to the Irkutsk administration on 7 October 2018. His notification was returned without consideration because he did not define the forms and methods of ensuring public order. He argued that he indicated his intention to inform the participants at his event about the telephone numbers of the police and ambulance. However, the local courts ruled that his measure did not constitute specific measures according to the PAA. Later, Teterin challenged the constitutionality of the Russian PAA (s5 and s7) which allowed the authorities to determine arbitrarily whether the notification of a public event meets the requirements for specifying the forms and methods of ensuring public order and medical aid. On 8 June 2019, the Constitutional Court ruled that the provisions were constitutional.[225] However, the Court banned the authorities from refusing to permit public assemblies on grounds either of uncertainty regarding the notification form or failure to put in place specific methods to ensure public order. [226] The Court has noted that measures taken by the authorities to ensure freedom of peaceful assembly should not lead to excessive state control over organisers or unreasonable restrictions. In this case, the authority has the obligation to consider the submitted notice and is obliged to send reasoned proposals for change to the organiser if the authority sees that the notification does not meet the requirements in the PAA. Afterwards, if there is no agreement between the organiser and the authority, the organiser can apply for a judicial review. Nonetheless, the effectiveness of the Russian judicial review procedure remains problematic. The Venice

[221] Russia PAA s5.5.
[222] Hug (n 218) 51.
[223] European Commission For Democracy Through Law, *Opinion on the Federal Law No. 54-FZ of 19 June 2004 on Assemblies, Meetings, Demonstrations, Marches, and Picketing of the Russian Federation* (20 March 2012), para 21.
[224] ibid.
[225] Constitutional Court of the Russian Federation, Judgement of 18 June 2019 No. 24-П/2019.
[226] Constitutional Court of the Russian Federation, 'On 18 June 2019 the Constitutional Court of the Russian Federation pronounced its Judgement in the case regarding the review of constitutionality of certain provisions of the Federal Law "On Assemblies, Meetings, Demonstrations, Processions and Picketing"' (*Constitutional Court of the Russian Federation,* 18 June 2019) <http://www.ksrf.ru/en/News/Pages/ViewItem.aspx?ParamId=2150> accessed 15 July 2019.

Commission has noted earlier that the appeal procedure under the Russian law was unlikely to produce an injunction before the notified date.[227] The lengthy appeal procedure under Russian law can render judicial review useless.

The Russian PAA imposes blanket-bans and absolute prohibitions to limit the scope of freedom of assembly. The ECtHR has ruled that blanket-bans are disproportionate by their nature because they do not allow for exceptions or consideration of particular circumstances. For example in *Lashmankin and Others v Russia*, the ECtHR found that the Russian PAA imposed blanket bans on locations such as in the immediate vicinity of court buildings, detention facilities, the residences of the President of the Russian Federation, dangerous production facilities, railway lines and oil, gas or petroleum pipelines.[228] The Venice Commission and the Commissioner for Human Rights in the Russian Federation have expressed concern that the term "immediate vicinity" is overly broad and could be interpreted widely.[229] Such a term offers opportunities for the authorities to implement the law in a discriminatory manner. The Venice Commission suggests that the law should provide some criteria on circumstances and limitations to prevent danger to sensitive locations rather than simply listing prohibited locations.[230] Section 9 of the law provides a blanket ban on time – any assembly between 11 p.m. and 7 a.m. is prohibited. Some persons are deprived of freedom of assembly due to their age, disability or nationality. Section 5.2 of the law requires that an organiser of a public event must not be a legally incapable person, a non-citizen of Russian Federation, a person age less than 18 years old (for meeting) and 16 years old for rallies. Furthermore, the law bans any form of assembly that does not meet notification requirements, i.e. spontaneous assemblies, simultaneous assemblies, urgent assemblies, and counter-demonstrations.[231]

Apart from the Russian PAA, the government introduced legislation which contains highly ambiguous prohibitions. For example, Federal Law No.135-FZ (the Anti-LGBT Propaganda Law) was adopted in 2013.[232] It contains highly ambiguous wording, such as "non-traditional sexual relationships" and "a non-traditional sexual orientation", which allow the authorities to

[227] European Commission For Democracy Through Law, *Opinion on the Federal Law No. 54-FZ* (n 223)28.
[228] *Lashmankin and Others v Russia* App no 57818/09 and 14 others (ECtHR, 7 February 2017), para 432.
[229] European Commission For Democracy Through Law, *Opinion on the Federal Law No. 54-FZ* (n 223), para 34.
[230] ibid.
[231] Russia PAA s5.5.
[232] The Federal Law No.135-FZ (the Anti-LGBT Propaganda Law) 2013.

ban gay pride parades.[233] This provision was a countermeasure to the ECtHR ruling in *Alekseyev v Russia*.[234] In this case, the City of Moscow and other major cities repeatedly denied requests to organise gay parades. The government claimed a wide margin of appreciation on the issue relating to the treatment of sexual minorities. The ECtHR denied the claim and stated the ban on the events did not meet a pressing social need and were not necessary in a democratic society.[235] Three years later, the government enacted the Anti-LGBT law. It does not use the term "homosexuality" but rather uses "the promotion of non-traditional sexual relationships". The law imposed a fine of up to a million rubles for a violation. The law was challenged in the Russian Constitutional Court. The Court found that it was justified on the ground of protection of morals. ECtHR, in *Bayev and Others v Russia*, ruled that the Anti-LGBT law violated ECHR Article 10 because it does not serve the legitimate aim of the protection of morals.[236] The ECtHR found that the vagueness of the terminology enables the unlimited scope of their application which allows the authorities to encourage homophobia and to damage the principle of equality, pluralism and tolerance in a democratic society.[237]

In addition, Varol argues that the Putin administration deployed judicial review as a mechanism to consolidate his power and bolster his regime's democratic credentials.[238] He authorised federal courts to strike down any regional law considered to be inconsistent with the federal constitution. This may look normal for a democratic country. However, Putin's agenda was to reduce the vertical checks on his power by regional governments through the federal courts.[239] Moreover, Varol claims that Putin enlisted support from the Constitutional Court, especially

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[233] Article 6.21 of the Federal Law No.135-FZ states:

> 1. The promoting of non-traditional sexual relationships among minors, expressed in the dissemination of information aimed at creating in minors a non-traditional sexual orientation, promoting the attractiveness of non-traditional sexual relationships, creating a distorted image of the social equivalence of traditional and non-traditional sexual relationships, or imposing information about non-traditional sexual relationships, arousing interest in such relationships, if these activities do not contain acts punishable under criminal law…

[234] *Alekseyev v Russia* App nos 4916/07, 25924/08 and 14599/09 (ECtHR,21 October 2010).
[235] ibid, paras 86-87.
[236] *Bayev and Other v Russia* App nos 67667/09 and 2 others (ECtHR, 13 November 2017)
[237] ibid, para 83.
[238] Varol (n 151)1689.
[239] ibid.

through its chairman Valery Zorkin.[240] As a result, the Constitutional Court upheld pro-government legislation and safeguarded the interests of the authoritarian elites.[241] Although human rights violation cases in Russia can be reviewed by the ECtHR, the Court has been unable to prevent a large number of systematic human rights violations because the regime makes little effort to improve the situation.[242]

Turning to the role of public order policing, Robertson has not yet explored sufficiently how public order policing affects state mobilisation strategy. For example, after the presidential election of 2011-2012, there were widespread protests in both the capital and other major cities. Putin ordered a significant crackdown on political activists who could organise mass protests challenging his regime.[243] It was a lesson learned from the coloured revolutions in the neighbouring countries. The 2011-2012 movements attacked Putin and his United Russia Party. Their common goal was to bring down the regime. Although many protests received permits, the key opposition figures were harassed and arrested.[244] To reduce threats from potential protesters, Russian police exercised a combination of aggressive tactics, provided by the legal frameworks, such as selective prosecution, vigorous crackdowns on attempted protests and arbitrary enforcement of laws and regulations.[245] For instance, when arresting participants in a public assembly, Russian police have discretion whether to press charges under Article 20.20 of the Russian PAA which contains a fine or to press administrative charges under Article 19.3 of the Code of Administrative Offences which may result in up to 15 days of detention.[246] These two charges require a different standard of proof; administrative cases demand a lower degree of proof than in criminal cases. The police need to prove that the arrested participants had resisted his/her legitimate order. This leads the police to use administrative charges as their pre-emptive measure against political dissenters. Amnesty International reported that the Russian police treated unauthorised public assemblies as unlawful, however peaceful or undisruptive they may be.[247] If a participant in the assembly failed to obey the police order to 'leave

[240] ibid.
[241] ibid 1691.
[242] ibid 1697.
[243] Robert Person, 'Balance of threat: The domestic insecurity of Vladimir Putin' (2017) 8 Journal of Eurasian Studies 44.
[244] ibid 56.
[245] Mark Kramer, 'Why Russia Intervenes' (*Carnegie Corporation of New York*, 2014) <https://perspectives.carnegie.org/us-russia/russia-intervenes/> accessed 22 September 2017; Karrie J. Koesel and Valerie J. Bunce, 'Putin, Popular Protests, and Political Trajectories in Russia: A Comparative Perspective' (2012) 28 Post-Soviet Affairs 403, 415.
[246] Amnesty International, *A Right, Not a Crime* (2014) 26-27.
[247] ibid 15.

immediately and unquestioningly', the police regarded such action as 'resistance to a legitimate order'. Then, they started to arrest the participants discriminately. The arrests of protesters who support the Bolotnaya prisoners, in February 2014, clearly support the accusation.[248]

Politicising the police has been a method to secure political power in Russia. According to Robertson, taking control of the security forces by restructuring the Interior Ministry (MVD) and Federal Security Services (FSB) can secure political power.[249] He points out that 'coercion in Russia is overwhelmingly carrying out by special units of the state apparatus'.[250] The general public regards the police, secret police, and prosecutors as common tools for repression.[251] The Russian police organisation has been highly politicised. When law enforcement reformers called for the transfer of public order policing tasks from the federal to regional police, the proposals were usually rejected by both the MVD and the presidency.[252] Decentralising the public order policing power would mean that the president would lose the opportunity to politicise public assemblies as well as losing the power to contain challenges posed by political dissenters.

Russian police are not subjected to democratic control and their operation thus lacks transparency. The Putin administration politicised its law enforcement by appointing former KGB personnel throughout the bureaucracy. The current law enforcement structure is inherited from the Soviet Union's structure. Therefore, it has the repressive tendency to violate human rights and repress societal forces even when these are not directly encouraged by politicians.[253] The KGB (Committee of State Security), the MVD (Ministry of Internal Affairs), and the General Procuracy (responsible for criminal investigation and prosecution, and for monitoring state agencies) were the key institutions responsible for enforcing the Communist Party's orders. These three institutions have military structures with hierarchical and top-down command traditions.[254] The KGB was a combat division of the Communist Party until the party collapsed in 1991. Then the FSB (Committee for State Security to Federal Security Service) took over its duties and has become the main mechanism of Russian's security services. The FSB is personally overseen by the President but there is no real political control over it. In other

[248] ibid 16.
[249] Robertson (n 69) 152.
[250] ibid 174.
[251] Brian Taylor, 'Law enforcement and civil society in Russia' (2006) 58 Europe-Asia Studies 193, 194.
[252] Brian D Taylor, 'Historical Legacies and Law Enforcement in Russia' (*PONARS Eurasia*, 2011) <https://www2.gwu.edu/~ieresgwu/assets/docs/ponars/pepm_150.pdf> accessed 8 September 2017.
[253] Taylor, 'Law enforcement and civil society in Russia' (n 251).
[254] ibid 199.

words, the FSB is ‘a self-contained and closed system’ which there is no independent organ to check and no court to balance its power.[255]

Having a personal army can prevent threats from the political circle. Putin established the National Guard on top of the regular army to fight the threat of another colour revolution.[256] It is a lesson learned from the failed coup of August 1990, in which the regular army failed to use force against protesters. Moreover, there are political police serving as ‘a reliable instrument for holding on to power.’[257] They are equipped with special powers and permanent legal cover so that they can employ methods outside legal limits such as provocations, arraignment on fabricated charges, use of secret and illegal sources of information, and infiltration of agents.[258] The political police can remove the problem swiftly and effectively without the need to initiate emergency law.

In summary, this part has examined the role of laws and legal institutions affecting Robertson’s variables. It illustrates that legal frameworks governing NGOs, legal frameworks governing public assemblies, and public order policing can shape both the organisational ecology and state mobilisation strategy. It highlights that, in Russia, Putin enacted a series of laws (namely, Federal Laws No.18-FZ, No.121 FZ, No.129-FZ, No.135-FZ and No.54-FZ) with the objective of restricting freedom of assembly and association. Thus, I see that legal frameworks governing public assemblies and public order policing can be used to control these key variables that underpin and determine the nature of political contention.

3.6 Conclusion

Public assemblies are a part of the political process. They are important for marginalized individuals to raise issues or make demands to the authorities. Consolidated democracies have standardised public assemblies to ensure that their conduct remains broadly within the parameters of the democratic process. IHRL and the international standards that we have seen

[255] The Economist, 'Wheels within wheels How Mr Putin keeps the country under control' (22 October 2016) <https://www.economist.com/news/special-report/21708877-how-mr-putin-keeps-country-under-control-wheels-within-wheels> accessed 8 September 2017.
[256] Mette Skak, 'Russian strategic culture: the role of today's chekisty' (2016) 22 Contemporary Politics 324, 325.
[257] Lev Gudkov, 'The Nature of "Putinism"' (2011) 52 Russian Social Science Review 21, 33.
[258] ibid 35.

in chapter 2 provide further evidence for this claim. In contrast, authoritarianism restricts public assemblies because they could lead to democratic and revolutionary struggles.

Historically, social movement scholars have not precisely explained protest patterns in hybrid regimes because these regimes are neither consolidated democracies nor fully authoritarianism. Therefore, Robertson suggests that the incumbents in hybrid regimes have a different incentive – they want to appear as a democracy, but yet also significantly restrict anti-regime protesters' capacity to protest while being able to mobilise pro-regime supporters to mobilise. Robertson's theory suggests a new framework to understand the politics of protest in hybrid regimes. This chapter notes that the role of law and legal institutions have generally been overlooked by social movement and political science scholars. It shows that Robertson paid little attention to the capacity of the law governing NGOs and of the laws governing public assemblies in shaping his three variables. The legal framework and law enforcement practice in Russia directs us to conclude that the Putin regime has sought to curtail freedom of assembly through legal mechanisms. Therefore, looking at Robertson's theory from a legal perspective helps to further understand the mechanics of political contention in hybrid regimes. Specifically, as this chapter has shown by examining Putin's Russia, legal mechanisms have exerted significant influence on the way in which politics occurs by controlling the organisational ecology and state mobilisation strategies. The three legal mechanisms in question are the legal frameworks governing NGOs, the legal framework governing public assemblies, and public order policing. It is clear to me that these legal mechanisms do not comply with IHRL and international standards that we have discussed in chapter 2 because they serve a different purpose than facilitating and protecting freedom of assembly. This chapter also briefly outlined how Robertson's theory might be extended to the three Southeast Asian hybrid regimes that are the focus of this thesis. It demonstrated that laws governing NGOs exhibit similar characteristics across Russia, Cambodia, Malaysia, and Thailand. The next two chapters therefore further examine how the three Southeast Asian regimes use the same techniques that we have identified in Putin's Russia to optimise their political dominance – curtailing freedom of assembly through the legal framework governing public assemblies (chapter 4) and though public order policing (chapter 5).

Chapter 4 Securing the Street through Legal Frameworks

Legal frameworks governing public assemblies can be used to shape the scope of freedom of assembly. This chapter attempts to flesh out the criticisms of Robertson's theory raised in the last chapter – the omission of any real examination of the legal frameworks governing freedom of assembly in hybrid regimes – with specific consideration of three south-east Asian regimes: Cambodia, Malaysia and Thailand. It suggests that these three regimes have legal frameworks constraining freedom of assembly which control the ability of the opposition groups to use public assemblies against the respective regimes. Moreover, there is a complex legislative matrix involving laws directly and indirectly relevant to the exercise of these civil and political rights. Only when these different pieces of legislation are viewed together does their cumulative impact become clear – citizens significantly lose the ability to exercise freedom of assembly.

This chapter attempts to demonstrate that hybrid regimes unfairly limit how anti-government protesters can exercise their right to freedom of assembly. The legal frameworks in hybrid regimes do not fully comply with international standards because hybrid regimes' goal is not to create a democratic society but rather to create a street-proof mechanism. They want to filter out threats while allowing low-level protests. At the same time, these legal frameworks allow the incumbents to mobilise regime supporters to show their dominance. This chapter starts by arguing that the laws governing public assemblies in Cambodia, Malaysia, and Thailand contain special characteristics that enable the incumbents to use it to gain political advantage over their challengers. Then, it argues that the regimes seek to curtail the scope of freedom of assembly by imposing content-based restrictions, blanket bans and onerous notification requirements.

4.1 Characteristics of laws governing public assemblies in hybrid regimes

Laws governing public assemblies in hybrid regimes adopt legal characteristics imitating in both democratic and in authoritarianism polities. On the one hand, they adopt international standards and ratify international standards and that individuals have the right to assemble peacefully. Some explicitly state that their objective is to facilitate assemblies according to IHRL and international standards. On the other hand, the laws give vast discretion to the authorities without any effective review system. This part attempts to illustrate that the laws governing public assemblies in hybrid regimes have two main characteristics allowing the regime incumbents to shape how people exercise freedom of assembly.

The Public Assembly Act/ Peaceful Assembly Act/ Law on Peaceful Assembly (PAAs) in all three Southeast Asian hybrid regimes mentions 'peaceful intention' as a compulsory ingredient of assemblies. However, they ultimately emphasise the lawful rather than the peaceful intention of the organisers or participants. PAAs in these regimes state that their purpose is to enable people to enjoy the right to peaceful assembly as protected under the constitution.[1] However, these laws define a peaceful assembly restrictively.

As chapter 2 highlighted, international standards direct that restrictions on freedom of assembly should not be used to limit the freedom disproportionately.[2] International review bodies have thus used the strict test of necessity and proportionality to determine the degree of restrictiveness.[3] Importantly, the notion of 'peaceful assembly' under international standards emphasizes the *peaceful* nature of the assembly over the *lawfulness* of the actions of participants. the scope of the right to peaceful assembly should not be interpreted restrictively. Moreover, international standards require a system of effective judicial review to protect individuals' rights and freedoms from State restrictions.

A major difference between legal frameworks governing public assemblies in consolidated democracies and in hybrid regimes is that international standards do not have much traction in hybrid regimes. In consolidated democracies, there are both domestic and international institutions to protect freedom of assembly. In contrast, hybrid regimes may have domestic institutions that do not fully appreciate the protection properly afforded to freedom of assembly under international standards. Hence, these regimes may redefine the scope of the right and impose laws that enable the imposition of wide-ranging restrictions. This section aims to establish that legal frameworks governing public assemblies in hybrid regimes adopt some international standards but, at the same time, use legal techniques to open opportunities for the regime rulers to interfere. The legal frameworks shape the scope of freedom of assembly by providing widely-framed legal grounds for restricting the freedom without providing adequate judicial review.

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[1] Law on Peaceful Assembly (Cambodia PAA) 2009 s2, Peaceful Assembly Act 2012 (Malaysia PAA) s2, Public Assembly Act 2015 (Thailand PAA) annotation.

[2] *Kirsanov v Belarus* (5 June 2014) Communication No. 1864/2009 CCPR/C/110/D/1864/2009, para 9.7; *Turchenyak et al v Belarus* (10 September 2013) Communication No.1948/2010CCPR/C/108/D/1948/2010, para 7.4.

[3] *Praded v Belarus* (25 November 2014) Communication No. 2029/2011, para 7.5.; *Kudrevičius and Others v Lithuania*, app no 37553/05 (ECtHR, 15 October 2015), para 91.

4.1.1 Providing overly broad legal grounds for restricting freedom of assembly without providing for the strict test of necessity and proportionality.

According to international standards, laws restricting freedom of assembly must pursue a legitimate aim and must be necessary in a democratic society. A public assembly is presumed peaceful until proven otherwise.[4] However, the restrictions on public assemblies in hybrid regimes do not meet these principles. One of the reasons is that their legal frameworks provide overly broad grounds.

In Cambodia, it was recommended in 2008 that the Government should urgently enact laws on demonstrations.[5] Afterwards, the violation of the freedom of assembly became more frequent because the PAA was implemented in a manner that inconsistent with the country's international human rights obligations. [6] The definition of a peaceful assembly in the PAA meets the international standards that it considers peaceful assemblies must follow forms or means that are peaceful.[7] However, the Cambodian PAA gives the authorities vast discretion to ban or to restrict any assembly. The law requires a notification even when assembling on private property.[8] Upon notification, the authorities may respond negatively toward a notification if there is clear information that the demonstration may cause danger or may seriously jeopardise security, safety and public order. Then, the authorities can call the organisers in for a discussion. If they fail to reach an agreement, the Minister of Interior has the authority to provide a decisive opinion.[9]

The legal grounds for banning an assembly stated in the Cambodian PAA are the security, safety and public order. These legal grounds can be interpreted vastly. By contrast, in *Statkevich and Matskevich v Belarus*, the CCPR reaffirmed that the domestic authority has a duty to explain why the picket on the proposed location would jeopardise national security.[10] However, this principle slips through the legal loophole in the Cambodian PAA. Under the Cambodian legal

[4] Human Rights Council, *First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai,* para 25; Organisation for Security and Co-operation in Europe, *Guidelines on Freedom of Peaceful Assembly* (Second edn, ODIHR 2010) guideline 2.1.

[5] Human Rights Council, *Report of the Special Representative of the Secretary-General for human rights in Cambodia, Yash Ghai* (29 February 2008), para 101.

[6] Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Cambodia, Surya P. Subedi* (11 October 2012), para 240.

[7] Cambodia PAA s4.

[8] ibid s14.

[9] ibid s12.

[10] *Statkevich and Matskevich v Belarus* (16 December 2015) Communication No 2133/2012 CCPR/C/115/D/2133/2012, para 9.4.

framework, referring a case to CCPR for judicial review is not an option. It depends on the domestic court to apply international standards. Furthermore, in the event that an approved peaceful assembly turns violent, the PAA directs that the authorities shall take proper measure to prevent and stop the demonstration immediately.[11] This section provides a vast discretion to the authorities to stop or ban a public assembly. The PAA does not require the authorities to consider whether the violence is coming from the organisers/participants or from agent provocateurs. Such provision goes against the international standards (as discussed in 2.2.2) that a violent public assembly is a result from the violent intention of the organisers or participants and peaceful assemblies should not be stopped because of the violence caused by the others.[12]

The absence of strict tests of necessity and proportionality in Cambodia PAA means that the authorities do not have to consider the democratic quality enshrined in IHRL and the international standards. This characteristic allows the authorities to switch between democratic policing style and authoritarian policing style. For instance, the presumption in favour of holding a peaceful assembly does not exist in the PAA.[13] Although the PAA states that if the authorities fail to give any response to a notification within 3 days, such notification is assumed approved.[14] The PAA uses vaguely worked phrase "shall respond positively… toward the notification letter" to disguise the differences between notification and authorisation.[15] In practice, Amnesty International has reported that Cambodian authorities frequently 'either attempt to impose restrictions on assemblies or ban them outright'.[16] On this issue, Rhona Smith, Special Rapporteur on the situation of human rights in Cambodia, has expressed her concern that the Cambodian government unduly silence political opponents through broadly defined restrictions on freedom of assembly.[17] Especially during the period before the national

[11] Cambodia PAA s20.
[12] *Christians against Racism and Fascism v The United Kingdom* App no 8440/78 (ECHR, 16 July 1980).
[13] cf Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai* A/HRC/23/39, para 50.
[14] Cambodia PAA s10.
[15] Amnesty International, *Taking to the Streets Freedom of Peaceful Assembly in Cambodia* (Amnesty International Ltd 2015) 32.
[16] ibid 33.
[17] OHCHR, 'Cambodia: UN experts concerned at Government moves to silence political opponents' (*OHCHR*, 19 June 2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24711&LangID=E> accessed 31 July 2019.

elections on 29 July 2018, Smith reported that the government had created an atmosphere of fear and causing self-censorship by intimidating the opponents.[18]

The Cambodian PAA s9 empowers the authorities to decline a notification when there is a clear information indicating that the demonstration may cause danger or may seriously jeopardise security, safety, and public order. While s17 of the PAA directs that the authorities shall take measures to protect and shall not interfere with the conduct of the peaceful assembly, s20 directs that the authorities may bring an end to a demonstration if no notification letter has been submitted, regardless of how peaceful the demonstration is.[19] Thus, the lack of precise guidelines on declining a notification makes the provision problematic because the Cambodian authorities have an opportunity to treat organiser and participants discriminately.[20] The PAA provides immense legal grounds for the authorities to ban any anti-government demonstration while the incumbents are able to mobilise their ersatz social movements to display their dominance. On this issue, in 2017, the UN Special Rapporteur on the rights to freedom of assembly and of association (UNSRFAA) has reported that legislation and the judicial system have been used by the Cambodian Government to restrict freedom of assembly without concerning that any restriction on freedom of assembly must meet a strict test of necessity and proportionality. [21]

The Malaysian PAA presents a similar pattern. The PAA states that one of the objectives is to ensure that the exercise of the right to peaceful assembly is subject only to restrictions deemed necessary or expedient in a democratic society in the interest of the security of the Federation or public order or to protect the rights and freedoms of other persons.[22] However, apart from being mentioned as one of the objectives, the PAA does not explicitly mention the strict tests of necessity and proportionality in a democratic society anywhere else. The Malaysian PAA s8 gives vast discretion to the police by stating: 'a police officer may take such measures as he deems necessary to ensure the orderly conduct of an assembly in accordance with this Act and any other written law.'[23] Section 15(1) of the PAA states that the authorities may impose

[18] Human Rights Council, *Report of the Special Repporteur on the situation of human rights in Cambodia* (15 August 2018) A/HRC/39/73, 13.
[19] Cambodia PAA s20, para 3.
[20] Siena Anstis, 'Using Law to Impair the Rights and Freedoms of Human Rights Defenders: A Case Study of Cambodia' (November 2012) 4 Journal of Human Rights Practice 312, 319.
[21] Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association* (31 May 2017) A/HRC/35/28/Add.3, para 306.
[22] Malaysia PAA s2(b).
[23] ibid s8.

restrictions for 'the purpose of security or public order, including the protection of the rights and freedoms of other persons'.[24] However, these objectives do not tell us what can be considered as the "deems necessary" measures under the section 8. It can be seen that the wording here is very subjective and lacks any requirement the officer can only 'deem it necessary' on.

The Malaysian police can interpret the PAA arbitrarily. For example, the PAA defines an assembly as 'an intentional and temporary assembly of a person in a public place, whether or not the assembly is at a particular place or moving.'[25] However, "street protest" under the PAA means 'an open air assembly which begins with a meeting at a specified place and consists of walking in a mass march or rally for the purpose of objecting to or advancing a particular cause or causes.'[26] Before the ban on street protest was lifted in July 2019, these definitions provided the authorities with vast discretion to ban a public assembly without much considering the necessary in a democratic society requirement.

Besides, the police can arrest any organiser or participant who does not comply with any police's restriction under the PAA without a warrant.[27] The police may issue an order to disperse in the circumstance that any person commits an offence under any written law or do not comply with the restrictions and conditions imposed under s15.[28] To enforce the dispersal order, the law directs that the police officer may use all reasonable force.[29] The PAA describes an appealing process on restrictions and conditions under s15 to the Minister in charge of home affairs.[30] It gives the Minister 48 hours to respond to the appeal. However, in the case that police impose restrictions too close to the proposed event or impose them during the event, it would be less useful to appeal to the Minister as the police can enforce the restrictions swiftly and forcefully.

In addition, the lack of necessity and proportionality principle is noticeable when considering blanket bans in the legal frameworks in Malaysia. For example, the Malaysian PAA imposes blanket bans on any person younger than 21 years old from organising an assembly and bans

[24] ibid s15(1)
[25] Malaysia PAA s3.
[26] ibid.
[27] ibid s20.
[28] ibid s 21 (1) (d)-(e).
[29] ibid s 21 (1).
[30] ibid s16.

any person below the age of 15 from participating.[31] This means that the authorities can use this legal ground to suppress student movements. This legal ground goes against the international standards that freedom of peaceful assembly is to be enjoyed equally by everyone.[32] It also violates the Article 15 of the Convention on the Rights of the Child (CRC), which Malaysia ratified in 1995. (blanket bans will be discussed at length in 4.2.2)

The Thai PAA s19(5) empowers the police to restrict freedom of assembly of the organisers or any participant on the ground of (1) facilitating participants or (2) protecting public safety or (3) minimising the effect of an assembly on the traffic and the surrounding communities. I see that the limit causes are absent from this provision, as well as from the rest of the PAA. These three legal grounds do not explicitly limit the police's power to restrict freedom of assembly because they can be interpreted to cover every measure. Moreover, the PAA s24 indiscriminately imposes flagrant offences to anyone presents in the control area without the permission of the authorised official in charge of the public assembly.[33] The PAA s24(4) empowers the police to order the prohibition of certain acts for the benefit of terminating the assembly without listing any limiting criteria. For example, the police need to focus their dispersal measures to only the parties subjected to a court's dispersal order. Arguably, if there are two public assemblies that share the same area, the police can apply dispersal measures to both of them even when the court has only ordered to disperse one of them. Therefore, the incumbents can use this legal gap to disperse a targeted public assembly by mobilising their

[31] ibid s4(1) (d)-(e).
[32] Organisation for Security and Co-operation in Europe (n 4), guideline 2.5.
[33] Thailand PAA s24 states:

> Upon the expiration of the prescribed time period for the participators to vacate the control area, if there is a participator in the control area or enters the control area without permission of the authorized official in charge of the public assembly, such person shall be deemed to have committed a flagrant offence, and the situation controller and person assigned by the situation controller shall take action to enforce the termination of the public assembly pursuant to the court order. In this regard, the situation controller and person assigned by the situation controller shall have the following powers:
>
> (1) Arrest a person in the control area or person who has entered the control area without permission from the authorized official in charge of the public assembly;
>
> (2) Search, seize, attach or remove property used or held for use in the public assembly;
>
> (3) Act as necessary pursuant to the plan or guidelines for public assembly supervision as provided under Section 21;
>
> (4) Order the prohibition of certain acts for the benefit of terminating the assembly.

supporters to cause violent on the assembly area. Then, the police have an opportunity to seek a court dispersal order which can be applied indiscriminately on a particular area.[34]

In addition, the authorities had overly broad legal ground to restrict freedom of assembly when the Thai PAA was enforced alongside the National Council for Peace and Order's order No. 3/2558 (NCPO Order), which prohibited any political gathering of more than 5 participants between 2014 and 2018. The authorities had vast discretion to decide which law would be applied upon whether the gathering expresses any political message.[35] Obviously, there is not any requirement demanding the authorities to consider the strict tests of necessity and proportionality in the NCPO Order.

In short, it can be concluded that the legal frameworks governing public assemblies in Cambodia, Malaysia, and Thailand present the same pattern. First, they provide overly broad legal grounds for the authorities to impose restrictions on freedom of assembly. Second, the strict tests of necessity and proportionality is absent from the PAAs. The authorities are empowered with vast discretion without clear guidelines. In my opinion, these two characteristics provide opportunities for the authorities to apply the law discriminately.

4.1.2 Lacking adequate judicial review

A lack of adequate judicial review can serve to greatly limit freedom of assembly. the judiciary must be able to perform judicial review effectively and be able to deliver enforceable remedies, grounded in the application of the important tests of necessity and proportionality. However, legal frameworks governing public assemblies have been used to reduce and circumvent the judicial power. In *Lashmankin and Others v Russia*, the ECtHR found a violation because the test of necessity and proportionality was absent from the Russia legal frameworks.[36] Lacking adequate judicial review means that the domestic courts do not examine whether restrictions on freedom of assembly are well reasoned and comply with IHRL. This characteristic can be found in all three Southeast Asian states.

The Cambodian PAA provides no procedure regarding the appeal process for a judicial review. It only provides that when a discussion (negotiation) between the organisers and the authorities fail, the Minister of Interior can give a decisive opinion. On this issue, Amnesty International

[34] Thailand PAA s23.
[35] Administrative Court Red No. 2058/2561, 28 September 2018, 11.
[36] *Lashmankin and Others v Russia* App no 57818/09 and 14 others (ECtHR, 7 February 2017), para 358.

reported that the dispute resolution process under the Cambodian PAA is flawed because the PAA does not entitle the organisers to be heard in person to explain their position during negotiations with the local authorities.[37] Moreover, while the Minister of Interior can give a decisive opinion, the PAA does not require the Minister to provide detailed reasons to the appealing organisers. In practice, the local authorities have opportunities to impose restrictions on freedom of assembly or ban public assemblies outright without much scrutiny from the judiciary. The reasons provided for such decisions are often inconsistent with the international standards and IHRL.[38] For example, on 14 January 2014, Mam Sonando sent a notification of his demonstration to Phnom Penh City Hall. He had intention to hold a series of demonstrations daily from Monday to Friday between 7 – 8 a.m. in front of the Ministry of Information. His requests were rejected by the local authority without providing any specific reason. Later, in March 2014, Mam Sonando notified the City Hall to hold a demonstration protesting the Ministry of Information. The local authority banned the demonstration on the ground that it would disturb peace, public order, and the regularity of the people.[39] In addition, on 5 June 2014, Phnom Penh City hall banned the Cambodian Youth Network from holding a gathering of the World Environment Day in front of the Ministry of Agriculture, Forestry and Fisheries. The responding letter according to the PAA s11 did not provide any reason for this decision.[40]

Nevertheless, if anyone challenges the authorities under the Cambodian PAA, he/she will have to face another problem with how the judiciary interprets the concept of "threat to public order".[41] Judges and prosecutors in Cambodia do not have adequate training in human rights and on interpreting domestic law under the light of international obligations.[42] For example, Tep Vanny, a land right activist, was arrested during a peaceful demonstration on 15 August 2016. Vanny and members of Boeung Kak community were conducting a traditional cursing ceremony as a form of peaceful protest before a group of para-police broke the meeting.[43] They arrested only Vanny and Bo Sophea, another prominent land activist. Sophea received a six-

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[37] Amnesty International, *Taking to the Streets Freedom of Peaceful Assembly in Cambodia* (n 15) 33.
[38] ibid.
[39] ibid 34-35.
[40] ibid 36.
[41] Surya Subedi, 'Report of the Special Rapporteur on the situation of human rights in Cambodia' 16 September 2010) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/161/45/PDF/G1016145.pdf?OpenElement> accessed 9 August 2019, para 99.
[42] ibid para 100.
[43] LICADHO, 'Free Tep Vanny: Two Year Too Long' 14 August 2018) <https://www.licadho-cambodia.org/articles/20180814/150/index.html> accessed 3 January 2018.

day sentence while Vanny faced another lawsuit for allegedly inciting violence during a protest in 2013 (which she committed three years prior to this case).[44] Vanny was accused of 'intentional violence with aggravated circumstances' under s218 of the Criminal Code. On 23 February 2017, the Phom Penh Municipal Court sentenced her to two years and six months.[45] To this case, the World Organisation Against Tourture (OMCT), an NGO based in Geneva, reported: '[d]uring the trial, no credible evidence was presented to either justify the charges brought against Ms. Tep Vanny or to prove that any violence had been committed against the para-police.'[46] Later, the Court of Appeal and the Supreme Court upheld the conviction.[47] Vanny spent 735 days in prison for her dissent protests before she was granted a royal pardon on 20 August 2018. Vanny's cases illustrate the absence of effective judicial review in Cambodia. Her arbitrary detention and prosecution were clearly aimed to silence her and to send warning message to other human rights activists in Cambodia.[48]

The Malaysian PAA is silent on the judicial review process. There is not any provision mentioning the imperative of a speedy procedure to expendite an appeal. The judiciary may not provide an enforceable remedy after reviewing an appeal involving the PAA. The provision of remedies for an enforcement of fundamental rights is provided under Paragraph I of the Schedule of the Court of Judicature Act 1964.[49] Although the law was enacted in 1964, the Court initiated it for the first time in 1997.[50] It was because many judges did not notice its existence. They rather applied English common law, which was a narrower approach than the provision under the Court of Judicature Act.[51] Because the Act is an ordinary law, the method of interpretation is bound by the restrictive rules under English common law tradition. This shows that the Court was reluctant to exercise its power to protect the fundamental rights, which were guaranteed by the Constitution. For example, during the running up period to the Bersih 4.0 protest on 29-30 August 2015, police warned that the gathering was illegal because the organisers failed to obtain permissions from premises owners according to the PAA s9. The

[44] Phnom Penh Municipal Court decision on 22 August 2016, Ms. Tep Vanny and Ms. Bov Sophea.
[45] Phnom Penh Municipal Court decision on 23 February 2017, Ms. Tep Vanny.
[46] World Organization Against Torture, 'Cambodia: Release of land rights defender Ms. Tep Vanny following 735 days of detention' (*OMCT*, 22 August 2018) <http://www.omct.org/human-rights-defenders/urgent-interventions/cambodia/2018/08/d25000/> accessed 24 July 2019.
[47] The Appeal Court decision on 8 August 2017, Ms. Tep Vanny; The Supreme Court of Cambodia decision on 7 February 2018, Ms. Tep Vanny.
[48] World Organization Against Torture (n 46).
[49] The Schedule of the Court of Judicature Act 1964 (Malaysia).
[50] *R Ramachandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145.
[51] Gan Chee Keong, 'The Remedies for Enforcement of Fundamental Rights in Malaysia and India' (2018) 3 Saudi Journal of Humanities and Social Sciences 335, 336.

Kuala Lumpur City Hall rejected the organisers' request to use Merdeka Square for the rally.[52] It suggested the organisers to use city's stadiums instead. The police also warned the public that any participant to this rally could face legal action under the PAA.[53] Two days before the event, the Malaysian Communications and Multimedia Commission blocked websites promoting Bersih 4.0 on the ground that the rally was illegal and warned the public not to share any information relating to the event on the internet.[54] The organisers continued their plan on the streets around the Merdeka Square. The events went on peacefully with a police blockade preventing protesters from entering the square. According to this event, the organisers did not have any effective legal procedure to seek remedies. In addition, around two months later, the organisers were charged under the PAA for organising a rally without giving a notification to the police.[55] This clearly demonstrates that the Malaysian PAA has been used as a deterrence law rather than facilitating a public assembly.

The Thai PAA is different from the Cambodian PAA and the Malaysian PAA because it provides both an internal appeal procedure and a judicial review process. For instance, under the PAA s11, organisers can appeal a banning order to the superintendent of police who has to give a respond within 24 hours. The superintendent of police also has the power to approve a late notification request.[56] The Thai PAA demands that the police must obtain an order from the Civil Court before they can disperse an illegal assembly.[57] The police may use necessary force to contain the assembly while waiting for the dispersal order.[58] Upon the court order, police, without a warrant, may arrest anyone who remains in the dispersal zone. They can impose any restriction to end the assembly. Organisers or participants who disagree with the order can appeal to the Civil Court within 30 days. The Appeal Court has the power to give a

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[52] The Straitstimes, 'Malaysian police say Bersih 4 rally is illegal' 26 August 2015) <https://www.straitstimes.com/asia/se-asia/malaysian-police-say-bersih-4-rally-is-illegal> accessed 5 January 2019.

[53] The Straitstimes, 'What you need to know about Malaysia's Bersih movement' 27 August 2015) <https://www.straitstimes.com/asia/se-asia/what-you-need-to-know-about-malaysias-bersih-movement> accessed 5 January 2019.

[54] The Straitstimes, 'Malaysia blocks Bersih rally websites' 28 August 2015) <https://www.straitstimes.com/asia/se-asia/malaysia-blocks-bersih-rally-websites> accessed 5 January 2019.

[55] Mayuri Mei Lin, 'Court of Appeal strikes out Bersih chief's illegal assembly charge' (*Malaymail*, 7 September 2016) <https://www.malaymail.com/s/1200813/court-of-appeal-strikes-out-bersih-chiefs-illegal-assembly-charge> accessed 5 January 2019.

[56] Thailand PAA s12.

[57] ibid s21 para 2.

[58] ibid s21 para 3.

decisive decision.[59] This provision on judicial review makes the Thai PAA different from PAAs in neighbouring countries.

Nevertheless, the Thai PAA does not explicitly mention the necessary in a democratic society criteria. There is not any provision reflecting a democratic value apart from the annotation (a remark follows the end of the law demonstrating a particular reason for enacting the law). This presents two problems in the interpretation of this law. First, the Thai legal system does not weight the contents in the annotation and in the preamble as much as the contents under each section. Second, where Thai Courts follow dualism, international law does not automatically applicable until it is incorporated by domestic legislation. Thus, one could doubt whether the Civil Court would consider the necessary in a democratic society when reviewing cases under the PAA. For example, Anon Numpa was sentenced to a THB 1,000 fine for failing to notify his event.[60] On 27 April 2016, Anon invited the public on his Facebook page to attend his stand-still activity to protest the military Junta. Five peoples stood for a few minutes before a group of riot police took them to a police station. They were released two hours later without any charge. A week later, the police charged them under the PAA. Dusit Municipal Court ruled that Anon was an organiser because he had posted an invitation online stating the date, time, and place for a public assembly. The Court found that the manner in which they stood still was as an expression in which the public could join.[61] Therefore, Anon had a duty to notify the police.

Anon appealed the fine to the Court of Appeal arguing that the PAA was unfairly enforced because his stand-still activity was peaceful and his protest was protected by ICCPR under the right to freedom of expression.[62] He argued that his arrest was unlawful because the intention of the PAA was to facilitate public assemblies. The police did not facilitate but rather restricted his freedoms. The police did not request the Civil Court for a dispersal order before arresting him. The Court of Appeal ruled that Anon's arrest was lawful because the police made the arrest according to the Criminal Procedure Code. The Court saw that failing to notify a public assembly is a flagrant offence which the police can make an arrest. There was no law prohibit the police from making an arrest without a dispersal order. In relation to the issue of constitutionality, the Court of Appeal ruled that the PAA was lawfully enacted. If the appellant

[59] ibid s25 para 2.
[60] Dusit Municipal Court Red No. Aor.317/2560 on 10 February 2017.
[61] ibid 6.
[62] Thai Lawyers For Human Rights, 'ศาลอุทธรณ์พิพากษาตามศาลชั้นต้นปรับทนายอานนท์พันบาท คดี ยืนเฉยๆ' (*TLHR*, 7 November 2017) <https://www.tlhr2014.com/?p=5634> accessed 5 January 2019.

believed that the PAA was unconstitutional, he could file a case before the Constitutional Court. The Appeal Court approved that the fine was appropriate.[63] Later, the Supreme Court agreed with the Appeal Court to fine Anon. The Supreme Court refused to review the issue on unlawful arresting and stated that the issue needed to file in a separated lawsuit.[64] Noticeably, it was clear that the Municipal Court, the Court of Appeal, and the Supreme Court failed to assess the proportionality of the notification requirements and failed to review the police's obligation to facilitate public assemblies.

Again in 2018, the Court of Appeal, in Appeal Court Red No.14177/2561, refused to review the authorities' operation according to ICCPR.[65] After a year under the National Council for Peace and Order (NCPO), thirteen activists peacefully assembled in front of the Bangkok Art and Culture Centre to protest the military government by standing still watching items that can tell the time such as clocks and watches silently. However, they were forcefully dispersed and arrested under the NCPO Order 3/2558. They argued that their gathering was protected under the Constitution and ICCPR. The NCPO Order 3/2558 prohibiting political gathering was unconstitutional. Also, they argued that the NCPO Order was implicitly revoked by the enactment of the PAA. The Court of Appeal ruled that the NCPO Order was constitutional because it had not been explicitly revoked. The Court saw that the Order was nether ambiguous nor causing uncertainty. Regarding the issue relating to ICCPR, the Court explained that there was no domestic legislation dictating that a domestic law would be unenforceable if it did not comply with Thailand's international obligations.[66] The Appeal Court reaffirmed the judgment of the lower court that the authorities' operation was legitimate. This judgment demonstrates that domestic courts limited judicial review to the available domestic legal framework without considering the obligation under IHRL. Secondly, the court refused to review any Junta's order because they were all made constitutional by default.[67] Last, all NCPO Orders are enforceable until they are explicitly revoked.

In short, we can conclude that Cambodia, Malaysia, and Thailand have legal frameworks governing public assemblies that share two similar characteristics. First, their legal frameworks provide expansive grounds for imposing restrictions and conditions without providing the strict

[63] ibid.
[64] Supreme Court Black No. Aor.1107/2559 on 27 August 2019.
[65] Appeal Court Red No.14177/2561 on 17 October 2018.
[66] ibid 22.
[67] Thailand Interim Constitution B.E. 2557 s48 directs that persons acting upon NCPO's orders are exempted from any legal liability.

test of necessary and proportionality. As a result, police are entrusted with almost unlimited discretion to perform their duties. In other words, the legal frameworks provide opportunities to the authorities to enforce the law discriminately. The second characteristic is that their legal frameworks do not provide any effective judicial review procedure. Their PAAs carry a defect that there is not much effective judicial review which can deliver enforceable remedies.

In chapter 3, I have argued that social movement scholars, including Robertson, overlooked legal factors in their studies. Then, in this heading, I have identified the two main characteristics of the legal frameworks governing public assemblies in hybrid regimes. Here, I argue that these two characteristics in their legal frameworks provide opportunities for the authorities to enforce the law discriminately. Thus, the following headings discuss how legal frameworks are being manipulated in details. They attempt to illustrate that the legal frameworks governing public assemblies directly affect political contention in hybrid regimes. The restrictions found in the three hybrid regimes are evidence showing that the three regimes curtail their legal frameworks to control Robertson's state mobilisation strategies similar to the legal framework in Russia (discussed in 3.5.2).

4.2 Curtailing the scope of freedom of assembly through legal frameworks

According to international standards on public assemblies, states are required to provide the necessary conditions for the enjoyment of freedom of assembly.[68] In chapter 2, we have identified that international standards use the three-prong test to justify any restriction to the freedom. In circumstances (as in hybrid regimes) where this test is absent from the domestic legal framework, law enforcement officials and the courts tend to enforce the restrictions according to the domestic legal frameworks without also considering their obligations under IHRL. Hybrid regime incumbents use this condition to create street proof mechanisms protecting themselves from street protests. The following part argues that hybrid regimes use content-based restrictions, blanket bans, and onerous notification requirements to shape how people exercise freedom of assembly.

4.2.1 Content-based restrictions

International standards direct that content-based restrictions should be avoided because they prevent the public to consider the content themselves. Any content-based restrictions must be

[68] United Nations, Report of the Human Rights Council, 'The promotion and protection of human rights in the context of peaceful protests' (6 July 2018) UN Doc. A/73/53/, 206.

subjected to a high level of scrutiny.[69] However, hybrid regimes impose content-based restrictions to prohibit public assemblies advocating some sensitive issues affecting the regimes' political stability. For instance, The Malaysian PAA allows a police officer to issue an order to disperse if there is 'any person at the assembly does any act or makes any statement which has a tendency to promote feelings of ill-will or hostility amongst the public or does anything which will disturb public tranquillity'.[70] This provision can be enforced arbitrarily upon the police's opinion. There is not any requirement for the police to consider the necessity and proportionality. The PAA s8 simply states that 'a police officer may take such measure as he deems necessary to ensure the orderly conduct of an assembly in accordance with this Act and any other written law.'

In addition, one should be aware that the reasonableness standard can be very subjective and often prejudice towards a particular preference.[71] When the law empowers the authorities to use reasonableness, the police could be trapped in the reasonableness that reflects only the majority's judgement on a particular value or style.[72] Baker pointed out that 'it is wrong if reasonableness involves some balancing of the interests of those who want to assemble against the interests of those who find the assembly annoying or offensive…'[73] As such, there is a need to consider international standard and IHRL when considering content-based restrictions in public assemblies.

PAAs in Cambodia and Thailand are silent on content-based restrictions. However, all three hybrid regimes impose content-based restriction by enforcing PAAs alongside other laws which are unrelated to freedom of assembly. PAAs in all three countries have a provision stating that individuals who exercise freedom of assembly have a duty to comply with other laws.[74] This study found at least three areas of law being applied alongside PAAs to impose content-based restrictions: defamation laws, military orders, and contempt of court proceedings.

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[69] For example, *Alekseev v The Russian Federation* (2 December 2013) Communication no 1873/2009 CCPR/C/109D/1873/2009, para 9.6; *Primov and Others v Russia* App no 17391/06 (ECtHR, 12 June 2014), para 135.

[70] Malaysia PAA s21(1) (c).

[71] Edwin Baker, 'Unreasoned Resonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations' (1983-1984) 78 Northwestern University Law Review 937, 948.

[72] ibid.

[73] ibid 948-949.

[74] Cambodia PAA s9, Malaysia PAA s6 (1) and s7 (a)(iv), Thailand PAA s6.

4.2.1.1 Defamation and lèse-majesté provisions

Defamation and lèse-majesté laws can be used against organisers of public assemblies and political activists as a technique to nullify potential threats from the street. These laws can be considered as another type of content-based restrictions on freedom of assembly. In a democratic society, people should be able to criticise their political leaders on public issues. However, Cambodia, Malaysia, and Thailand impose harsh penalties on defamation offenders, especially when the contents involve criticism of the head of the state.

Cambodia and Thailand enforce lèse-majesté offences arbitrarily to silence political activists and organisers of anti-government protests.[75] On this issue, David Kaye, UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, expressed the view that 'lèse-majesté provisions have no place in a democratic country. [76] He has urged Thailand to repeal lèse-majesté law. Despite its obligations under IHRL, the Cambodian government amended the Criminal Code in February 2018 to insert a lèse-majesté charge.[77] It carries a penalty of one to five years imprisonment and/or a fine from 2 to 10 million Riel.[78] The law does not give clear details of what constitutes an insult to the king. It can be interpreted widely to include almost any criticism on the monarch. This crime is a very effective tool to harass and restrict the opposition. For example, around two months before the general election in July 2018, Ban Somphy, a CNRP district deputy party leader, was arrested and sentenced to 7 months imprison because he shared text and an image on Facebook deemed insulting the King.[79] Although he did not write the text, he was considered to be liable equally to the person who wrote it.[80]

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[75] Charlie Campbell, 'The Draconian Legal Weapon Being Used to Silence Thai Dissent' (*Time*, 31 December 2014) <http://new.time.com/3650981/thailand-lese-majeste-article-112/> accessed 12 Jaunary 2019.

[76] OHCHR, 'Thailand: UN rights expert concerned by the continued use of lèse-majesté prosecutions' (*OHCHR*, 7 February 2017) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21149&LangID=E> accessed 13 January 2019.

[77] Cambodia Criminal Code s437.

[78] International Commission of Jurists, 'Cambodia: end efforts to introduce lèse-majesté law' (*ICJ*, 2 February 2018) <https://www.icj.org/cambodia-end-efforts-to-introduce-lese-majeste-law/> accessed 13 January 2019.

[79] LICADHO, 'Prisoners of Interest' <http://www.licadho-cambodia.org/court_watch/#poi> accessed 13 January 2019.

[80] International Commission of Jurists, 'Submission of the International Commission of Jurists to the Universal Periodic Review of Cambodia' (*ICJ*, 12 July 2018) <https://www.icj.org/wp-content/uploads/2018/07/Cambodia-UPR-Advocacy-Non-legal-submission-July-2018-ENG.pdf> accessed 13 January 2019, footnote 28.

In Thailand, the legal framework on lèse-majesté is even harsher. Those who found guilty can face a prison term up to 15 years. After the 2014 coup, many protest leaders have been arrested arbitrarily on this ground. For example, Jatupat Boonpattararaksa (Pai Dao Din), a student activist who consistently organised protests against the Junta government, was arrested and sentenced for two and a half years imprisonment because he shared a BBC Thai's Facebook post which critiqued the new king in 2017. Similar to Ban Somphy's case, Jatupat did not write the content. Out of around 2,600 Facebook users who had shared the same content, he was the only one who has been prosecuted. Even the administrator of the BBC Thai account and the author of the article was not charged from posting the news. It was clear to me that his prosecution had the political motive to create a chilling effect among those who protested against the Military government. Within four years under the NCPO government, there were at least 94 people charged under lèse-majesté law and 91 charged with Sedition[81]

Malaysia Sedition Act 1948 defines a "seditions tendency" very widely providing the authorities with an opportunity to silence critics of the government or its officials.[82] For example, a "seditions tendency" means to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government, to raise discontent of disaffection amongst the subjects of the king or any state's ruler, to question any privilege of the Malay majority protected by the Constitution or to question the special status of the indigenous people in Sabah and Sarawak.[83] Under this Act, any police officer from the rank of Inspector can make an arrest without a warrant when he/she reasonably suspects someone for committing, abetting or possessing the material breaching this law.[84]

Malaysia government has been using the Sedition Act to repress social movements against the government. For example, leaders of the Hindu Rights Action Force (HINDRAF) were arrested and charged under this law after they organised protests against the alleged marginalisation of ethnic Indians in 2007.[85] In addition, Adam Adli Bin Abdul Halim, a student activist, has been

[81] ilaw, 'Latest Statistic' (*ilaw*, 22 May 2018) <https://freedom.ilaw.or.th/en/content/latest-statistic> accessed 16 January 2019.
[82] OHCHR, 'Malaysia Sedition Act threatens freedom of expression by criminalising dissent' (*OHCHR*, 8 October 2014) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15144> accessed 13 January 2019.
[83] Sedition Act 1948 (Malaysia) s3(1).
[84] ibid s11.
[85] Human Rights Council, *Report of the Working Group on Arbitrary Detention* (8 February 2011), para 36.

arrested six times for calling others to join his peaceful protests.[86] In 2014, he was sentenced to a year in jail of sedition due to his speech in the 2013 general election protest. While he was on bail pending appeal, the government placed a new charge on participating in an unlawful street protest. Later, he was expelled from his college due to his role in organising the protest. Chua Tian Chang, the vice-president of an opposition party (PRK), was charged with sedition for his speech and for wearing a banned Bersih yellow t-shirt.[87] He has also been charged many times on the ground of participating in unlawful assemblies. Human Rights Watch reported that the authorities used PAA and the penal code to criminalise participants to unlawful assemblies while Sedition Act was initiated to silence organisers, including those who invited or called others to attend peaceful rallies.[88]

The Barisan Nasional government used Sedition Act to arrest and prosecute its critics for many decades. During the campaign leading to the general election in 2013, PM Najib Razak announced that he would repeal the law. However, after Najib won the election, his government resumed the use of the law aggressively to the oppositions who organised public rallies against the election's result.[89] After Barisan Nasional lost the election in May 2018, the new government led by PM Mahathir Mohamad continued to use the Act to repress political dissenters.[90] Although repealing the Act was on the agenda before the 2018 election, there was no exact timeline when the law would be repealed.[91]

4.2.1.2 Military junta orders

ICCPR directs that when a state suspends freedom of assembly, it must be able to justify all their measures derogating from the ICCPR.[92] The principle of strict necessity and proportionality must be applied to all derogation measures.[93] In Thailand, where we had identified earlier that these principles are missing from its legal frameworks and judicial review.

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[86] Human Rights Watch, *Creating a Culture of Fear The Criminalization of Peaceful Expression in Malaysia* (Human Rights Watch October 2015), 2.
[87] ibid 3.
[88] ibid 4.
[89] ibid 5.
[90] The Star, 'Sedition Act will continue to be applied for now, says Dr M' (*The Star*, 9 October 2018) <https://www.thestar.com.my/news/nation/2018/10/09/pm-no-timeline-to-repeal-law-sedition-act-will-continue-to-be-applied-for-now-says-dr-m/> accessed 14 January 2019.
[91] ibid.
[92] UN Human Rights Committee, *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency* CCPR/C/21/Rev.1/Add.11, para 5; UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (1985) U.N. Doc. E/CN.4/1985/4, Annex (1985).
[93] ibid para 54.

Under this condition, content-based restrictions were imposed through Revolutionary Order during the NCPO rule. In 2015, the Junta imposed NCPO Order No.3/2558 prohibiting any political gathering of more than 5 participants. The NCPO Order imposes content-based restrictions on political assemblies alongside the PAA. The dual existence of these two laws provides the authorities with vast discretion which law would be applied to a particular event – they had to decide what contents constitute a political assembly. It was common to find that a gathering to support the prime minister and ministers (the Junta's leaders), especially when they visited a province, was not considered to be a political gathering while an assembly condemning a corruption scandal in the government was seen as a political gathering.

For example, on 7 December 2015, 11 student activists were stopped on the train to Rajabhakti Park. They accused the government of the corruption on the park building project and called for a protest at the Park. They were prosecuted under the NCPO Order 3/2558. Later, Thanes Anantawong, one of the protesters, was arrested on the ground that he had shared a Facebook post explaining Rajabhakti Park's allegations.[94] He was prosecuted under the s116 of the Penal Code (Sedition) and s14(3) of the Computer Crime Act 2007.[95] On 16 December 2018, 14 activists attempted to protest at Rajabhakti Park on the same allegations. Despite the NCPO Order 3/2558 had been lifted, they still could not assemble at the park. They were stopped and searched on the way to the park several times. The trip to the park should take around 2.5 hours. After seven hours on the road, the organisers were forced to abandon the plan.

On 20 January 2018, People Go Network organised We Walk Rally. Organisers' plan was to walk 450 km. from Thammasat University Rangsit Campus to Khonkaen to raise awareness on the human rights situation in Thailand. Around 100 participants were blocked by the police at the university's gate for 7 hours. The local police commander stated that the demonstrators had violated NCPO Order No.3/2558 because the organisers sold t-shirts, which contain messages inviting the public to sign their petition abolishing NCPO Orders.[96] He saw that these messages had political meanings. Therefore, the rally was a prohibited political assembly according to the NCPO Order 3/2558.[97] As a result, the organisers decided to change their manner from

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[94] ilaw, 'นั่งรถไฟไปอุทยานราชภักดิ์' (*ilaw*, 6 November 2018) <https://freedom.ilaw.or.th/case/704#progress_of_case> accessed 12 January 2019

[95] Thai Lawyers For Human Rights, 'ศาลทหารให้ประกันธเนตร ข้อหา 116' (*TLHR*, 18 December 2015) <https://tlhr2014.wordpress.com/2015/12/18/thanate-116-military-court/> accessed 12 January 2019.

[96] Supreme Administrative Court Order No. Kor Ror 33/2561, 15 February 2018, 10.

[97] Administrative Court Red No. 2058/2561, 28 September 2018, 11.

walking together as a united group to walking separately in many four-people groups to avoid breaching the NCPO Order.[98].

In addition, laws governing special events can also be used to impose content-based restrictions. During a running up period to a constitution referendum, on 23 June 2016, 13 activists from the New Democracy Movement (NDM) were arrested after they distributed leaflets advocating negative effects in a draft constitution. It was the period before a referendum.[99] They were prosecuted under s61(1) of Constitution Referendum Act 2016 (causing disturbance to the referendum). The law imposes imprisonment up to 10 years to anyone who disseminates texts, pictures, or sounds that are inconsistent with the truth to persuade voters to vote or to refuse to vote.[100] In this case, the authorities imposed restrictions to the contents in the leaflets which perusing the public to vote no in the coming referendum.[101] At the same time, the authorities did not prevent any leafletting advocating people to vote accept to the draft constitution. The Constitution Referendum Act was a mechanism to mobilise regime supporter to vote for the Draft Constitution. It contains a provision prohibiting anyone except the government to provide free transportation to voters on the referendum date.[102] It prohibits anyone from publishing polling results on the referendum seven days before the election days. As a result, PAA and the Referendum Act have proven to be effective content-based measures to suppress the dissenters' campaigns.

4.2.1.3 Contempt of court proceedings

Contempt of court under Thai Civil Procedure Code s31 was used to impose content-based restrictions around courts' premises. On 10 February 2017, a group of student activists protested a court's verdict by erecting an unbalanced scale, which had a military boot on one side and an empty basket on the other side. They placed the scale on the footpath in front of the court's main sign and read out a statement, sang songs, and read poems contributing to Pai Dow Din who had been sentenced to jail for sharing a BBC post. Later, Khonkaen Provincial Court ruled that they commit a contempt of court.[103] The students argued that it was their freedom

[98] ibid 16.

[99] ilaw, 'ขู่-ห้าม-จับ พ.ร.บ.ประชามติฯ กกต.ใช้จำกัดการรณรงค์อย่างไรบ้าง' (*ilaw*, 29 June 2016) <https://ilaw.or.th/node/4168> accessed 12 January 2019.

[100] Constitution Referendum Act 2016 s61, para 2.

[101] Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association* (n 21), para 390.

[102] Constitution Referendum Act 2016 (Thailand) s62.

[103] Khonkaen Provincial Court Red No. Lor Mor.1/2560, 2 November 2017.

under ICCPR Article 19. The Appeal Court ruled that their scale was an expression within a court premises convincing the public that the court of justice had a prejudice against Pai Dow Din and was interfered by the military.[104] In this case, the Court interpreted 'the Court's precincts' to include the area in front of the Court's footpath. It is worth noting that the Supreme Court does not have exact meaning for this term. In the past two decades, the term 'the Court's precincts' has been interpreted both narrowly and widely by the Supreme Court. [105] In my opinion, the unbalance scale case is clearly contradict to the comment of the ECtHR in *Skałka v Poland* which states: 'the court, as with all other public institutions, are not immune from criticism and scrutiny. … A clear distinction must, however, be made between criticism and insult.'[106]

4.2.2 Blanket bans

According to Mead, the term 'blanket bans' refers to restrictions that are not tailored towards any threat but are applied in a uniform fashion.[107] They can be useful if they meet a pressing social need. However, since the previous section has pointed out that PAAs in the three countries are silent on the three-prong test. Blanket bans can greatly limit the scope of the freedom of assembly. When the PAAs impose broad restrictions, authorities can easily make an excuse to arrest, to prosecute or to order dispersal, even there is no serious disturbance.[108] International standards have reaffirmed the sight and sound principle: public assemblies should be facilitated within "sight and sound" of their target audience. Organisers of a public assembly have the right to choose time, place, and manner to express their opinion.[109] Nevertheless, this sight and sound principle does not have much traction in hybrid regimes. Blanket bans have been used extensively to limit the scope of freedom of assembly.

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[104] Thai Lawyers for Human Rights, 'ศาลอุทธรณ์ภาค 4 ยืนตามศาลชั้นต้นคดี 7 นศ.ละเมิดอำนาจศาล' (*TLHR*, 14 January 2019) <https://www.tlhr2014.com/?p=10427> accessed 15 Jaunary 2019.

[105] interpreted narrowly in Supreme Court Cases 4102/2549, 12413/2547, 4498/2546, and 3227/2542; interpreted widely in Supreme Court Cases 635/2559, 7920/2554, 5801/2550, 7-8/2543, and 5462/2539.

[106] *Skałka v Poland* App no 43425/98 (ECtHR, 27 May 2003), para 34.

[107] David Mead, *The New Law of Peaceful Protest. Rights and Regulation in the Human Rights Act Era* (Hart 2010) 101.

[108] Baker (n 71), 986.

[109] Daniel Simons, 'Protest as you like it: time, place & manner restrictions under scrutiny in *Lashmankin v. Russia*' (20 February 2017) <https://strasbourgobservers.com/2017/02/20/protest-as-you-like-it-time-place-manner-restrictions-under-scrutiny-in-lashmankin-v-russia/> accessed 24 April 2017.

4.2.2.1 Restricting who can assemble and how to assemble

The right to enjoy freedom of assembly, according to international standards, belongs to everyone. Therefore, everyone can be an organiser or a participant to a public assembly. The laws governing public assemblies must not discriminate against any individual or any group.[110] In practice, the three hybrid regimes impose blanket bans on the ground of citizenship, minimum age, and unregistered or banned organisations.

Citizenship

Citizenship becomes a restriction for enjoying the freedom of assembly in Cambodia, Malaysia, and Thailand. The least restrictive is the Thai PAA. It does not contain any provision explicitly discriminating on the ground of citizenship. However, the notification form under the PAA s10 requires an organiser's national identification number.[111] Foreigners are allowed to participate in any public assembly. However, when the Thai Government declared an emergency decree to control a protest, police can arrest any foreigner violating the decree and deport him/her. During the PCAD anti-government rally in 2015, the police issued a deportation notice to Satit Segal, an India national who was a core leader of the protest.[112] Segal had been living and working in Thailand for decades. It was clear that the deportation notice was issued because he led a protest against the government.

The Cambodian PAA assures the right to peaceful assembly to only Khmer citizens in accordant to the Cambodian Constitution Article 41, which grains the right to only Khmer citizens.[113] The Implementation Guide to the Law on Peaceful Demonstration released by the Cambodian Government mentions the principle of discrimination: '[t]he law must be applied to all people equally an in a way that abolishes discrimination. The right to peacefully assemble is a right that should be enjoyed by all citizens, regardless of ethnicity, gender, political opinion or other.'[114] The PAA and its guidelines are silent on non-nationals, although the law does explicitly define that organisers need to be citizens. The law assumes that persons in any group of individuals who wishes to organise a peaceful assembly can be considered as the organisers of an assembly who have the responsibility to notify the authorities.[115] One of the requirements

[110] Organisation for Security and Co-operation in Europe (n 4), guideline 2.5.
[111] Thailand Royal Gazette Book 132 Special Section 239 Ngo (3 November 2015) 4-5.
[112] Khaosod English, 'Satit seeks royal intervention to fight deport notice' (*Khaosod*, 6 March 2014) <http://www.khaosodenglish.com/politics/2014/03/06/1394084750/> accessed 9 Januray 2019.
[113] Cambodia PAA s2.
[114] Royal Government of Cambodia Ministry of Interior, *Implementation Guide to the Law on Peaceful Demonstration* , i.
[115] Cambodia PAA s5 and s14.

to accompany a notification letter is the organisers' Khmer national identification cards. Therefore, it can be implied that only Khmer nationals can organise a public assembly. Because the law is silent on foreign nationals, non-Khmer can participate in any public assembly at their own risk.

In addition, the Cambodian police can enforce the law arbitrarily against foreign nationals. For example, James Ricketson, an Australian filmmaker, was arrested on 3 June 2017 on the ground of espionage after he flew an unauthorised drone filming an anti-government rally, which was organised by the main opposition party.[116] He was arrested a day after the event. The authorities saw his journalism damaged the country's reputation. The Phnom Penh Municipal Court sentenced him to six years in prison on the ground of espionage and collecting information that is harmful to the nation. Jonathan Head, BBC correspondent, commented, in September 2018, that a case like this was common before a general election and Ricketson would be released before the full term. Head pointed out that PM Hun Sen became intolerant of criticism, especially before the general election. His critics would be released when they posed no threat to his regime.[117] Head's prediction was correct. Less than a month later, Ricketson was granted a royal pardon.[118] It was after Hun Sen's party won a landslide election in July 2018.[119] Ricketson's case sent a strong message to foreign nationals, including the international media reporting the opposition's rallies. Ricketson's prosecution certainly created a chilling effect because any foreign national filming or reporting the opposition rallies could be arrested on the same ground.

The most explicit blanket ban on the ground of citizenship is the restriction under the Malaysian PAA. It denies outright the right of non-citizens to organise an assembly or participate in an assembly peaceably.[120] Any non-citizen who organises or participates in a public assembly is liable to a fine up to RM 10,000.[121] For example, on 30 August 2017, more than a thousand of Rohingya (a stateless ethnic group from Myanmar) gathered in front of a building in Kuala

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[116] BBC, 'Cambodia jails Australian filmmaker found guilty of espionage' (31 August 2018) <https://www.bbc.co.uk/news/world-asia-45364695> accessed 8 January 2018.

[117] ibid.

[118] The Guardian, 'Cambodia to deport Australian film-maker James Ricketson after royal pardon' (*The Guardian*, 22 September 2018) <https://www.theguardian.com/australia-news/2018/sep/21/cambodia-pardons-australian-filmmaker-james-ricketson> accessed 8 January 2019.

[119] Hannah Ellis-Petersen, 'Camobodia: Hun Sen re-elected in landslide victory after brutal crackdown' (*The Guardian*, 29 July 2018) <https://www.theguardian.com/world/2018/jul/29/cambodia-hun-sen-re-elected-in-landslide-victory-after-brutal-crackdown> accessed 9 January 2019.

[120] Malaysia PAA s4(1) (a).

[121] ibid s4(3).

Lumpur. They planned to march to the Myanmar embassy to hand over a petition regarding the ethnic cleansing in Myanmar. The police announced it was an illegal protest and arrested 44 of the protesters.[122]

Minimum age

According to international standards, children can enjoy the right to freedom of peaceful assembly. However, the Malaysian PAA imposes a blanket ban on the age of the organiser and participant. The PAA prohibits children below the age of fifteen from participating in any public assembly.[123] Anyone below the age of twenty-one years old is not allowed to be an organiser. The law prohibits any person from bringing a child or allows a child to attend an assembly unless the assembly meets the criteria that under the PAA such as religious assemblies, funeral processions, assemblies related to custom, and assemblies approved by the Minister.[124] This may show that the PAA portrays public assemblies as dangerous and violent activities which children should not be involved. The PAA allows any police to arrest any organiser or participant who violates the provision without any warrant.[125] For example, after an opposition parties' rally, *Himpunan Kebangkitan Rakyat* (people uprising rally) on 12 January 2013, police were looking for 14 participants who allegedly brought children to the rally.[126] Pictures of these participants and their children were uploaded on the official City police Facebook page and the police urged them to step up to facilitate investigations.[127] The crime under this provision does not limit to the parents who bring children to an assembly. It includes the organisers who bring or recruit a child to their public assembly. Needless to seek a warrant, this provision offers an opportunity to arrest organisers and participants to an assembly swiftly to end a public assembly. For instance, on 1 August 2015, three activists from Gabbungan Anak Muda Demi Malaysia ("The Coalition of Youth for Malaysia") were arrested for organising a peaceful protest in Kuala Lumpur. It was a peaceful protest in response to a corruption scandal. The majority of arrests occurred after protesters began calling for Prime Minister Najib's

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[122] United States Department of State, 'Country Reports on Human Rights Practices for 2017' (21 April 2018) <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2017&dlid=277095> accessed 9 January 2019.
[123] Malaysia PAA s4(2)(e).
[124] ibid s4(2)(f), Second Schedule.
[125] ibid s20 (1)(c).
[126] Joint urgent appeal, 14 February 2013, Case no. MYS1/2013.
[127] Nation, 'Cops seek 14 for taking kids to Jan 12 rally' (*The Star*, 30 January 2013) <https://www.thestar.com.my/news/nation/2013/01/30/cops-seek-14-for-taking-kids-to-jan-12-rally_1/> accessed 9 January 2019.

resignation. There were 29 protesters arrested including a 14-year old child. They were accused of organising unlawful assemblies.[128] There was a sharp contrast after Najib lost power in 2018, the Pakatan Harapan government allowed the anti-ICERD (International Convention on the Elimination of All Forms of Racial Discrimination) leading by UMNO and its alliance to assemble on the Merdeka square advocating the Malay's racial and religious supremacy. The police allowed anti-ICER demonstration to gathering peacefully on the Merdeka square even there were many children participating the event.[129] This example shows that the police could apply double standards in regulating public assemblies upon government's signal.

Unregistered or banned organisations

It is worth reminding that chapter 3 pointed out that hybrid regimes use NGOs law to shape the organisational ecology. An NGO will lose the capacity to organise or participate in any public assembly when its registration is revoked under the NGOs law. In Malaysia, only registered organisations under the Societies Act 1966 may legally function as societies. The Societies Act provides the Minister responsible for the registration of societies with absolute discretion to declare any societies unlawful on the ground of 'incompatible with the interest of the security of Malaysia or any part thereof, public order or morality.'[130] An unregistered organisation who breach the mandatory registration is liable to a fined up to RM 5,000 and a fine not exceeding RM500 for every day after the first day during which the breach continues.[131]

Malaysia restricts student movements through the Universities and University Colleges Act 1971 (UUCA). Politicised youth movements, especially movements of the educated middle class, have been one of the main forces demanding political change.[132] Unlike Thailand where students were able to spark uprisings against their authoritarian rulers, Malaysia has been able to suppress student movements effectively. The UUCA imposed a blanket ban on students from joining political parties or take part in political campaigns or protests.[133] It criminalised any student who express, or do anything which may reasonably be construed as expressing support

[128] Joint allegation letter, 18 August 2015, Case no. MYS 3/2015.
[129] Emmanuel Santa Maria Chin and Azril Annuar, 'Parents who brought kids to anti-ICERD rally wanted to teach patriotism' (*Malaymail*, 8 December 2018) <https://www.malaymail.com/news/malaysia/2018/12/08/parents-who-brought-kids-to-anti-icerd-rally-wanted-to-teach-patriotism-vid/1701395> accessed 10 July 2019.
[130] Societies Act 1966 (Malaysia) s5(1).
[131] ibid s6(3).
[132] Thyen and Gerschewski, 'Legitimacy and protest under authoritarianism: explaining student mobilization in Egypt and Morocco during the Arab uprisings' 1.
[133] A. Munro-Kua, *Authoritarian Populism in Malaysia* (Palgrave Macmillan UK 1996) 83.

for, or sympathy with, or opposition to any unlawful society or any society which the Board of Directors of the University determined to be unsuitable.[134] Students who violate this law could face disciplinary action, be fined, or even be expelled from their universities.

In 2009, an amendment was made to allow a vice chancellor to grant permission for students to join a political party. However, roughly a year later, there was no report showing any permission had been granted and university students were still being detained by the police on the ground of 'campaigning for a political party'. [135] In April 2010, a group of students were charged on the ground of campaigning for a political party during a by-election in Hulu Selangor. Afterwards, they filed a lawsuit against their university.[136] The Kuala Lumpur High Court had previously upheld that the ban was constitutional. The Court of Appeal judges, on 31 October 2011, ruled that the UUCA s15(5)(a) was unconstitutional. The provision reads: '"No student of the University shall express or do anything which may reasonably be construed as expressing support for or sympathy with or opposition to any political party, whether in or outside Malaysia." Two of the three judges in this case agreed that the banning impeded the 'healthy development of a critical mind and original thoughts, an objective that higher institutions should strive to achieve.'[137] However, the UUCA was not repealed by the Court. An amendment was made to s15 in 2012 to allow students to join political parties and campaign as candidates in election on a condition that they are not engaging in political activities on campus.[138]

The UUCA and the PAA are the legal measures suppressing the oppositions' political activists on campus. The PAA restrict any person below the age of twenty-one years old from the right to organise a public assembly while the UUCA continues to be a useful tool to selectively exclude university students from participating in national political activities or scrutinising the government. For example, in 2016, numbers of students were suspended and fined after participating in peaceful rallies, the #TangkapM01 rallies. The rallies were organised by students calling for the arrest of the person named 'M01' who corrupted the state fund 1MDB. Asheeq Ali Sethi Alivi, a law student at Universiti Kebangsaan Malaysia (UKM) became an

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[134] Universities and University Colleges Act 1971 (Malaysia) s15(3).

[135] Liz Gooch, 'Malaysian Student Want Voices Heard' (*The New York Times*, 3 December 2010) <http://www.nytimes.com/2010/12/04/world/asia/04iht-malay.html> accessed 20 April 2017.

[136] Yojana Sharma and Honey Singh Virdee, 'MALAYSIA: Landmark court ruling on campus freedom' (*University World News*, 1 November 2011)accessed 20 April 2017.

[137] ibid.

[138] International Center for Not-for-Profit Law (ICNL), 'Civi Freedom Monitor: Malaysia' 29 August 2016) <http://www.icnl.org/research/monitor/malaysia.html#_ftn9> accessed 20 April 2017.

offender under the UUCA. He later filed a lawsuit challenging the constitutionality of the UUCA Section 15(3)(b).[139] Similarly, in 2017, four university of Malaya students (the UMANY4) were disciplined for holding placards protesting the 1MDB fund scandal in a university event.[140] They claimed that the university the disciplinary action was unconstitutional as it violated their freedom of assembly. On 27 February 2018, High Court Judge Azizah found that the University's Disciplinary Committee did not comply with a rule requiring the committee to allow students to present their evidence to defend themselves before determining a disciplinary action.[141] Nonetheless, the judge did not rule on the constitutionality issue.[142] Undeniably, these two legislations continue to give a chilling effect to university students and channelling them away from national politics.

A similar tactic to exclude or ban some organisations can be found in the Law on Political Parties and Election Law shaping organisational ecology of the political parties in both Thailand and Cambodia. When a political party is dissolved by the court, it cannot organise an assembly. In Thailand, 36 political parties have been dissolved by the Constitutional Court since 2005. This includes the ruling parties, Thai Rak Thai. In 2007, around a hundred Thai Rak Thai party's executive members were banned from engaging in any political activity for five years.[143] In Cambodia, in March 2017, the Law on Political Parties was enacted to prohibit anyone convicted to an unsuspended prison term from holding political office. Sam Rainsy was forced to step down from the leader of CNRP party due to his conviction for defamation. In July, the law was amended again to prevent any political party from using voice message, documents or activities of a person convicted of any crime. An offender may receive a ban from political activities, including organising or participating in public assemblies, for up to five years, or dissolution of the party concern.[144] Two months later, Kem Sokha, one of the leaders of the CNRP was arrested on the ground of seeking to overthrow the Government with foreign support. In November, CNRP was dissolved by the Supreme Court in which the Presiding Judge

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[139] Ho Kit Yen, 'Court dismisses UKM bid to get RM50,000 from student before suit' 19 April 2017) <http://www.freemalaysiatoday.com/category/nation/2017/04/19/court-dismiss-ukm-bid-to-get-rm50000-from-student-before-suit/> accessed 20 April 2017.

[140] Fortify Rights, 'No Politics on Campus' (*Fortify Rights,* 28 June 2018) <https://www.fortifyrights.org/downloads/No_Politics_on_Campus_Fortify_Rights_Report_June_28_2018.pdf> accessed 10 July 2019, 30-38.

[141] ibid 35.

[142] ibid.

[143] Hannah Beech, 'A Political Party Banned in Thailand' (*Time,* 31 May 2007) <http://content.time.com/time/world/article/0,8599,1626711,00.html> accessed 9 January 2019.

[144] Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Cambodia* (7 September 2018) A/HRC/39/73/Add.1, para 15.

was a member of the ruling party's Standing Committee.[145] 118 of CNPR's senior officials were banned from any political activity for five years.[146] As such, these oppositions are banned from organising or participating in any public protest.

4.2.2.2 Restricting when and where an assembly can take place

This thesis has established (in 2.2.4) that people have the right to assemble within sight and sound of their target audience because it is the key element to the freedom of assembly.[147] There is little use of being able to assemble in the middle of nowhere and shouting to themselves. In contrast, legal frameworks in hybrid regimes impose blanket bans on some sensitive places or have mechanisms that allow the authorities to impose blanket bans on time and place. This is because restricting when and where people can protest is a means of channelling. Crocker points out that the location where peoples speak is often just as important as the content of their messages.[148] A political protest becomes meaningless if it cannot convey its dissent message to the targeted government official or to the public.[149] This thesis has argued earlier that hybrid regimes are likely to open some public spaces for citizens to assemble but they unduly impose restrictions to create chilling effects. Hence, this section explores legal mechanisms in Cambodia, Malaysia, and Thailand that impose blanket bans on time and place.

The Cambodian PAA does not explicitly list out any prohibited place. The PAA imposes a blanket ban on time and manner when a public assembly is held at the freedom parks or on private property.[150] The law prohibits from holding any assembly in these places from six p.m. to six a.m.[151] Also, the maximum number to participants to an assembly in these places must not exceed two hundred persons. In other places, the law prohibits assembling on the national holidays and religious festivals namely the King's birthday, Coronation Day, water festival, the National Independence Day, Khmer New Year day and Pchum Ben Day.[152]

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[145] ibid para 20.
[146] Ben Sokhean, Mech Dara and Ananth Baliga, ''Death of democracy': CNRP dissolved by Supreme Court ruling' (*The Phnom Penh Post,* 17 November 2017) <https://www.phnompenhpost.com/national-post-depth-politics/death-democracy-cnrp-dissolved-supreme-court-ruling> accessed 9 January 2019.
[147] *Sáska v Hungary* App no 58050/8 (ECtHR, 27 November 2012), para 21; *Koreshkov v Belarus* (9 November 2017) Communication No 2168/2012 CCPR/C/121/D/2168/2012, para 8.5.
[148] T P Crocker, *Displacing dissent: The role of "place" in First Amendment jurisprudence* , 2587.
[149] ibid 2588.
[150] Cambodia PAA s14.
[151] ibid para 3.
[152] ibid

The PAA grants the authorities the power to impose any blanket ban on time, place, and manner when there is clear information indicating that the demonstration may cause danger or may seriously jeopardise security, safety and public order.[153] Under this provision, the authorities commonly reject notifications and use roadblocks to prevent peaceful assemblies.[154] For example, on 31 October 2017, Kem Sokha, a leader of the major opposition party, was put on trial. The authorities banned all assemblies and protests on that day. Security forces blocked all roads around the Supreme Court.[155] On 27 March 2018, when Kem Sokha attended a hearing at the Appeal Court, security forces barricaded nearby streets to prevent any demonstration. CNRP supporters were blocked at these barricades. One of them protested by drawing symbols with chalk on the street, he was slapped by a security officer. Then the peaceful assembly at the barricade was dispersed by force.[156] Prior to the general election in July 2018, the Cambodian authorities impose blanket bans on assembling or marching in front of the National Assembly complex to keep security, safety, and public order.[157] In addition, the authorities also place blanket bans on international commemorative events such as International Labour Day, the International Day of the World's Indigenous People, Human Rights Day, and International Women's Day.[158] For example, on International Labour Day March in 2017, the police blocked around two-thousand demonstrators from marching towards the National Assembly to hand in a petition.[159] In 2018, Phnom Penh City Hall rejected the notification of the Labour Day march on the ground of traffic and public safety concerns.[160] The City Hall ban any assembly in front of the National Assembly and suggested that the new Freedom Park, which located in the suburb of the city, should be used instead.[161] In 2019, the authorities denied the request to march 3 km. from Wat Phnom to the National Assembly on the Labour Day. The Labour Day march

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153 ibid.

154 Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Cambodia* (n 144) para 48.

155 ibid para 49.

156 ibid para 50.

157 Aun Chhengpor, 'Phnom Penh 'Bans Protests' Outside Parliament Ahead of Election' (*VOA Khmer*, 3 May 2018) <https://www.voacambodia.com/a/phnom-penh-bans-protests-outside-parlaiment-ahead-of-election/4374596.html> accessed 10 January 2019.

158 Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Cambodia* (27 July 2017) A/HRC/36/61, para 46;

159 Ben Sokhean and Zombor Peter, 'Riot Police, Guards Block Labor day Marchers' (*The Cambodia Daily*, 2 May 2017) <https://www.cambodiadaily.com/news/riot-police-guards-block-labor-day-marchers-128959/> accessed 10 January 2019.

160 Daphne Chen and Yon Sineat, 'Phnom Penh bans Labour Day march once again' (*The Phnom Penh Post*, 27 April 2018) <https://www.phnompenhpost.com/national/phnom-penh-bans-labour-day-march-once-again> accessed 10 January 2019

161 ibid.

was relocated to two Freedom Parks away from the National Assembly and the route was limited to 1 km around a city block.[162]

It is worth noting that Freedom Parks under the PAA are usually situated in remote areas, and often do not provide any shelter from the sun.[163] Moreover, they are too small to accommodate a sizeable crowd.[164] The PAA limits the maximum number to only 200 participants. Authorities use these parks as an excuse to ban or to relocate assemblies elsewhere.[165] The Freedom Park in Phom Penh city was closed down on 4 January 2014 as a response to anti-government protests led by CNRP between July 2013 and July 2014. It was reopened in July 2014 with a blanket ban on large protests.[166] In December 2016, Hun Sen announced a plan to cancel the Freedom Park in Phnom Penh city centre and designate a new site in an industrial area in the north of the city. He argued that 'the park was causing "anarchy" and the central location was a mistake…'[167] The order to relocate designated site can be seen as an attempt to silence political dissenters as the Freedom Park in Phnom Penh city had been symbolically used by the opposition as the major political struggle site, especially between late 2013 and early 2014. [168]

The Malaysian PAA defines "prohibited places" as (1) prohibited places declared under the Protected Areas and Protected Places Act 1959 and (2) places specified in the First Schedule. Apart from these two types of prohibited places, police can impose any blanket ban on time, place, and manner.[169] The Protected Areas and Protected Places Act allows the authorities to declare an area protected such as airport, police and military buildings. Only authorised persons are allowed to enter. This law has been invoked to arrest a participant to a public assembly.

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[162] The Straitstimes, 'Hundreds march in Cambodia's capital to mark Labour Day after ban lifted' 1 May 2019) <https://www.straitstimes.com/asia/se-asia/hundreds-march-in-cambodias-capital-to-mark-labour-day-after-ban-lifted> accessed 18 May 2019.

[163] Anstis (n 20) 321.

[164] Suy Se, 'Cambodia's 'Freedom Park' worries rights groups' (*Agence France Press),* (30 September 2010) <http://khmerization.blogspot.co.uk/2010/09/cambodias-freedom-park-worries-rights.html> accessed 30 April 2017.

[165] Amnesty International, *Taking to the Streets Freedom of Peaceful Assembly in Cambodia* (n 15) 31.

[166] Sun Narin, 'As Gov't Prepares to Shutter Freedom Park for Good, Residents Express Mixed Views on Its Legacy' (*VOA Khmer,* 18 February 2017) <https://www.voacambodia.com/a/as-government-prepares-to-shutter-freedom-park-for-good-residents-express-mixed-views-on-its-legacy/3729236.html> accessed 10 Januray 2019.

[167] Phan Soumy, 'Workers Break Ground on New Freedom Park' (*The Cambodian Daily),* <https://www.cambodiadaily.com/news/workers-break-ground-on-new-freedom-park-124769/> accessed 30 April 2017.

[168] Ben Sokhean, 'City Hall Confirms Relocation Of Freedom Park to Outskirts' (*The Cambodia Daily),* (18 January 2017) <https://www.cambodiadaily.com/morenews/city-hall-confirms-relocation-of-freedom-park-to-outskirts-123604/> accessed 30 April 2017.

[169] Malaysia PAA s15 (2).

MP Chua Tian Chang was arrested with 512 participants to the Bersih 3.0 rally in April 2012. They were taken to a police facility. After he was released, he remained on the site to help facilitate the release of the other participants. The police charged him again under the law for allegedly disobeyed police order to leave the police building. The Session Court convicted him in 2014.[170] On the other hand, the places specified in the First Schedule are utility facilities such as dams, water treatment plants, petrol stations, electricity generating stations, hospitals, transportation terminals, fire stations, ports, docks, canals, places of worship, kindergartens, and schools.[171] The PAA place blanket bans on any assembly to be held at or within fifty metres from the limit of the prohibited places.[172] However, the law also includes places of worship, kindergarten and schools as prohibited places. It is worth noting that while the law exempts religious assemblies from the notification requirement, it prohibits public assemblies on the places of worship. If one maps out all the prohibit places and their fifty meters radius, many public areas for gathering are banned, especially in small towns. For example, on 22 June 2013, four former student activists were charged for participating in an assembly held within the 50-meter radius from Masjid Ar-Rahman and Universiti Malaya.[173] Under this charge, each of them could be fined up to RM 10,000. The university main entrance is next to the Masjid. To enter the Masjid, one must go through the university's gate. If the Masjid goers can tolerance the traffic causing from the university, there is less reason why they cannot tolerate a public assembly. When it is a blanket ban, there is no question of proportionality or necessity.

The Thai PAA imposes blanket bans on time and places. The PAA bans any demonstration between 6.00 p.m. and 6.00 a.m. unless it is authorised by authorities.[174] This blanket ban has been proven to be effective in harassing anti-government demonstrations that start in the afternoon and continue after 6.00 a.m. The authorities have the discretion whether to allow a march to continue or seek a dispersal order from the Court of Justice. For instance, on 24 March 2018, a pro-democracy group organised a march demanding a general election. They rallied

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[170] Amnesty International, 'Malaysia: Imprisoned opposition lawmaker must be immediately released' (*Amnesty International* 2 October 2017) <https://www.amnesty.org/download/Documents/ASA2872102017ENGLISH.pdf> accessed 10 January 2019.

[171] Malaysia PAA 1st Schedule.

[172] ibid s4 (1)(b) and s4 (2)(b).

[173] Persatuan Kebangsaan Hak Asasi Manusia (Natoinal Human Rights Society), 'Activists lose constitutional challenge to assembly charge' (20 January 2017) <http://hakam.org.my/wp/index.php/2017/01/20/activists-lose-constitutional-challenge-to-assembly-charge/#more-12613> accessed 30 April 2017.

[174] Thailand PAA s16 (8).

around 2 kilometres from Thammasat University to the Army Headquarter. The march continued peacefully from 5.00 p.m. to 8.40 p.m. However, five days later, the police summoned the 57 organisers and participants (from around 350 participants).[175] One of the charges was rallying after 6 p.m. It should be noted that the PAA does not provide any criteria to guide the police when deciding whether a rally should be authorised under s16(8). Despite being a peaceful rally, the police can request a dispersal order, arrest, and prosecute the organisers/participant to the rally after 6 p.m. The provision offers opportunities to treat anti-government rallies discriminately.

The blanket bans on places in the PAA are also problematic. A public assembly must be held away at least 150 meters from the royal palaces and the royal residences, including the residences of the heir to the Throne, princes or princesses, his/ her majesty representatives and guests.[176] The law bans public assemblies in the National Assembly, the Government House and the Courts. In addition, the police have discretion to ban any public assembly within a radius of 50 meters from the boundary of these places.[177] These blanket bans are very effective in locations where some of the royal palaces and residences are clustered. They create strategic zones where protesters are banned. For example, the Royal Field (*Sanamlung*), where people had traditionally assembled to rise an issue to the government, is surrounded by the Royal Palace and the Supreme Court. Hence, a large part of the Field became illegal to assemble. The plaza in front of the Bangkok Art and Cultural Centre is another popular place for anti-government protesters. The local police commander (Patumwan District) declared that the plaza and its surrounding areas are banned from any public assembly because that they are in the prohibited radius from Sapratum Palace.[178] For example, pro-democracy protesters (known as MBK39) were prosecuted for protesting on a walkway next to the plaza on 27 January 2018.[179] In contrast, on 5 March 2019, Palang Pracharath Party, a pro-military party, was able to assemble to promote their candidates on the plaza.[180]

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[175] Thai Lawyers For Human Rights, 'ศาลยกคำร้องฝ่ากขัง 5 แกนนำ คดีคนอยากเลือกตั้ง ARMY57' (*TLHR*, 9 April 2018) <https://www.tlhr2014.com/?p=6813> accessed 13 August 2019.

[176] Thailand PAA s7, para 1.

[177] ibid s7, para 2-4.

[178] Patumwan District Police Station Order on 'Prohibited Public Assembly Site' (4 September 2015).

[179] Amnesty International, 'Amnesty calls for end of all criminal proceedings against "MBK39" protesters' (*Amnesty International*, 19 February 2018) <https://www.amnesty.or.th/en/latest/news/105/> accessed 13 August 2019.

[180] Spring News, 'ประมวลภาพ พลังประชารัฐเปิดตัว 30 ส.ส. กทม.พร้อมชูนโยบาย Bangkok OK' (5 March 2019) < https://www.springnews.co.th/photo/455070> accessed 19 May 2019.

The Palace is situated in the middle of a business area and next to a mega shopping mall where noise from busy traffic and the Skytrain system is common and bearable. The nuisance from several hundred protesters on the Bangkok Art's Plaza would be relatively small when compared to nuisance from the thousands of customers in the shopping mall next to the palace or from the busy traffic surrounding the palace. In addition, prohibited zones also create problems for rallies organisers. They have to avoid passing through these prohibited areas. For example, a rally in front of the Parliament cannot be allowed because the parliament is surrounded by royal palaces. On 30 March 2017, six organisers were arrested after they led a hundred of the People's Alliance for Energy Reform protesters rallying from the Parliament to the Government House in order to hand a petition to the Prime Minister demanding the government to withdraw the amended petroleum bill.[181] Police arrested them on the street in front of the parliament on the ground of organising a demonstration within the 150-meter radius of Chitrada Palace.[182] Without the key organisers, the demonstration ended on the same day.[183] According to international standards, restrictions on this ground should be considered on case by case basis. Banning on the ground of vicinity to palaces does not meet international standards because the restriction fails to provide a chance to consider 'the necessary in a democratic society' principle. The ECtHR, in *Alekseyev v Russia*[184], did not focus on the lawfulness of a restriction on public assembly but it looked whether the aim and the domestic lawfulness of the ban 'fell short of being necessary in a democratic society'.[185] Under this approach, the existence of domestic law, i.e. prescribed law, designed to curtail the right to peaceful assemblies do not automatically provide a justification for imposing restrictions.[186] Hence, imposing blanket bans on time and locations may fall short of being necessary for a democratic society. In addition, the Thai PAA s19 grants the authorities to impose any restriction, including blanket bans, in order to facilitate and protect public assemblies and affected parties. The law is silent on the strict test of proportionality and necessary to control this ability. For example, on 24 June 2019,

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[181] คมชัดลึก, '๖แกนนำคปพ.ถูกรวบไม่ยอมเซ็นรับผิด พ.ร.บ.ชุมนุมสาธารณะ' (30 March 2017) < http://www.komchadluek.net/news/crime/268639> accessed 29 April 2017.

[182] The Nation, 'Anti-petroleum amendment bill protesters disperse' (31 March 2017) <http://www.nationmultimedia.com/news/breakingnews/30310896> accessed 29 April 2017.

[183] Bangkok Post, 'Court drops anti-protest petition ' (*Bangkok Post*, 4 April 2017) <http://www.bangkokpost.com/news/general/1226408/court-drops-anti-protest-petition> accessed 29 April 2017.

[184] *Alekseyave v Russia* App Nos 4916/07, 25924/08 and 14599/09, Merits, 21 October 2010, para 69.

[185] Paul Johnson, 'Homosexuality, Freedom of Assembly and the Margin of Appreciation Doctrine of the European Court of Human Rights: Alekseyev v Russia' (2011) 11 Human Rights Law Review 578, 583.

[186] ibid 584.

the police ban a demonstration organised by ilaw (to advocate the abolishment of junta's orders) on the ground that the proposed route could cause traffic problems and the route would pass in front of a kindergarten during the school hours. The organisers claimed that the ban was unreasonable because they planned to march on the footpath which was wide enough to march on without disturbing any traffic lane.[187] However, the police did not let the organisers amend their plan to reduce the effects from their demonstration. Instead, the police recommended the organisers to send some representatives to submit their proposal to the relevant authority instead of organising a demonstration. In contrast, on 27 November 2018, the police facilitated a group of disable people to organise a demonstration demanding their better access to the mass transit system in front of the Administrative Court. The police closed a traffic lane for the march and allowed them to assemble on the Court's carpark.[188] These two cases show that the police applied double standards. ilaw's rally was seen as a anti-government gathering while the disable people's rally was facilitated well because it did not threaten the government's stability.

Although organisers and participants who are affected by the police's restrictions under the PAA may seek an injunction from the Administrative Court, it would take several days before they complete the process.[189] The procedure to obtain an injunction is unclear and time-consuming. The Administrative Court has ruled that organisers have to exhaust the internal appeal process before bringing the case to the Administrative Court. Organisers need to appeal restrictions to the superintendence of the police and wait for a response for at least 24 hours before filing the case to Court.[190] Moreover, the Court has established that only the organiser whose name is on the notification of an assembly can appeal police's restrictions to the Court.[191] Courts' office hours is another limitation in the appealing process. A request for an injunction must be made between the Courts' office hours 8.30 a.m. to 4.30 p.m. (Monday to Friday). Therefore, it is not possible to seek an injunction from the Courts during weekends or in the evening when public assemblies are most likely to be held.[192]

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[187] ilaw, 'มาตรา 19(5) พ.ร.บ. ชุมนุมฯ มาตรการสยบการชุมนุมโดยสงบ' (*ilaw*, 25 June 2019) <https://ilaw.or.th/node/5303?fbclid=IwAR1sa2-pgMPTMgseFQiM30Yjtc-DsVDFfCI9v8mxpYM4KbR7r5QVz0UMf18> accessed 26 June 2019.

[188] MGR Onine, 'คนพิการฟ้องเอาผิด รฟม.ละเลยจัดสิ่งอำนวยความสะดวกคนพิการบนสายสีม่วง' (*MGR Online*, 27 November 2018) <https://mgronline.com/politics/detail/9610000118319> accessed 1 August 2019

[189] Administrative Court's injunction Black No.154/2561 on 26 January 2017.

[190] Administrative Court Red No.925/2561 on 21 May 2018.

[191] ibid.

[192] For example, We Walk's organisers went to a Provincial Court on Saturday 20 January 2018 to seek an injunction to prevent the police blocking their rally. They were refused and were asked to submit the request on Monday (the next working day).

4.2.2.3 Restriction on manner

Restrictions on manner refer to any restriction on how organisers and participants to a public assembly assemble and deliver their messages. International standards direct that organisers have not only the freedom to choose when and where to assemble but also the freedom to choose how to assemble. PAAs in Cambodia, Malaysia, and Thailand grant power to the authorities to impose blanket bans on manner without having to consider the proportionality and the necessary in a democratic society.

Simultaneous assemblies are treated differently in the three regimes. The Cambodian PAA states that if there are more than one notification to assemble at the same time and place, the priority will go to the group that first submits its notification letter.[193] The Thai PAA are silent on the counter assemblies and simultaneous assembly. However, the police may allow and facilitate counter assemblies. For example, on 18 January 2019, a pro-democracy submitted a notification to organise assembly demanding a general election to. Two hours later, a counter-assembly notification was submitted by a pro-regime group. The police did not prioritise the first group. Both of them were allowed to use the same area. Later, the confrontation on the social media forced the pro-democracy group to change the venue because the organisers were afraid that the stand off would lead to violence causing by agent provocateurs.[194] On the contrary, the Malaysian PAA explicitly gives discretion to the police to impose restrictions on time, place, and manner to any notified simultaneous assembly. The police must give the priority to the organiser who first submitted the notification unless the place of assembly is traditionally or contractually to be used for other assemblies.[195] If there are more than one notification arrived at the same time, the PAA direct that the police will make a draw from all the notifications.[196] The Malaysian PAA states that the police can ban a notified counter-protest if there is evidence that the organisation of the counter assembly will cause conflict between the participants of the assemblies.[197] To this, the law does not mention to what degree the conflict must be. To me, it is rather unreasonable to expect no conflicts between the organiser if there is a counter assembly. The purpose of holding any counter assembly is to express

[193] Cambodia PAA s14, para 2.

[194] Thairath, 'เลี่ยงมือบชนมือบ กลุ่มอยากเลือกตั้งย้ายวิกชุมนุม' (*Thairath*, 19 Januray 2019) <https://www.thairath.co.th/news/politic/1473276> accessed 2 August 2019.

[195] Malaysia PAA s17(2)(a).

[196] ibid s17(2)(b).

[197] ibid s18.

disagreement to the people who advocate it. According to international standards, it is the police's positive duty to facilitate and protect all sides from violence.

In addition, the Malaysian PAA imposed a blanket ban on street protests until 4 July 2019. 'Street protest' were referred as 'an open air assembly which begins with a meeting at a specified place and consists of walking in a mass march or rally for the purpose of objecting to or advancing a particular cause or causes'.[198] Therefore, marches and rallies were banned. This provided a legal basis for the police to make an arrest.[199] The UN Special Rapporteur, Maina Kiai, commented that providing access to public space and protecting the participants are the crucial factors for facilitating peaceful assemblies.[200] In *Christians against Racism and Fascism v United Kingdom,* the Commission stated that 'the freedom of peaceful assembly covers not only static meeting, but also public processions.'[201]Individuals should have access to public space, including public streets, roads and squares, to conduct peaceful assemblies. It is normal that freedom of assembly and freedom of movement conflict with each other when there is a peaceful assembly. Disruptions to the normal routine of daily life can be expected. To create some disruptions in order to express an opinion is a part of the mechanism of a pluralistic society.[202] A democratic society needs to uphold pluralism, tolerance, and broadmindedness.[203] After the UMNO's regime lost the 2018 general election, the new government amended the PAA to decriminalise street protest and to shorten the notification period from 10 days to seven days.[204] The new leading collation parties, which had benefited from Bersih movements hoped to see an increase in peaceful public assemblies.[205]

The Thai PAA imposes a blanket ban on using amplifiers louder than 115 dB(A) or louder than 70 dB(A) on 24-hour average.[206] These maximum limits meet with the Sound Standard given

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[198] ibid s3.
[199] Human Rights Watch, 'Joint Statement 'Malaysia: Drop Charges and Release Bersih Organizers and Supporters" 21 November 2016) <https://www.hrw.org/sites/default/files/supporting_resources/joint_statement_bersih_5_21_november_2016.pdf> accessed 28 April 2017.
[200] Maina Kiai, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association A/HRC/23/39* (2013), paras 65-67.
[201] *Christians against Racism and Fascism* (n 12) 148.
[202] Kiai (n 200), para 65.
[203] *Barankevich v Russia* App no 10519/03 (ECtHR, 26 July 2007), para 30.
[204] Syed Umar Ariff and Arfa Yunus, 'Parliament decriminalises street protests'.
[205] ibid.
[206] Notification of Royal Thai Police on limitation of amplifiers in public assemblies B.E.2558, 23 September 2015, Art 2.

by the National Environment Board.[207] In practice, the police enforce Advertisement by Amplifier Act 1950 arbitrarily. This legislation is already outdated and unnecessary. It requires an organiser to request a permit to use loudspeaker from the local authority while the PAA notification is made at the local police station. Advertisement by Amplifier Act grants police and local authorities to order any loudspeaker user to reduce the volume or stop using the amplifier if it causes public nuisances.[208] The law also requires that speech going through loudspeakers must be in Thai. Such restriction reduces the opportunities for non-Thais to protest even though the PAA is silent on this issue. When this legislation is applied, it means that police have the power to stop organisers from using any amplifier. Every public assembly creates noise, which can be considered as public nuisances. Advertisement by Amplifier Act has many restrictions and procedure that do not conform to international standards on freedom of assembly. Nevertheless, the police have been applying this law to impose bans on loudspeakers and harass organisers.[209]

4.2.3 Onerous notification requirements

Notification requirements in PAAs play an important role in shaping the scope of freedom of assembly. Unlike authoritarian regimes where they prohibit public assemblies almost completely, hybrid regimes impose onerous notification procedures to control the level of protest on the street. Notification requirements affect Robertson's state mobilisation strategies because the authorities can impose them to filter who, what, when, where, and how a public assembly can be organised. The international standards on public assemblies recommend that governments should have the presumption in favour of holding assemblies.[210] We have established in chapter 2 that the true purpose of having a notification requirement is to enable the authorities to facilitate and protect peaceful assemblies.[211] It must not be operated against

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[207] Notification of National Environmental Board No.15 (1997) on 12 March 1997.

[208] Advertisement by Amplifier Act 1950 (Thailand) s6.

[209] Royal Thai Police Letter No. 0016.5(12)542 on 19 January 2018 to Lerdsak Kamkongsak, organiser of We Walk rally, requesting him to obtain a permit under Advertisement by Amplifier Act before commencing his rally; Matichon, 'ตร.แจ้งเอาผิด ชุมนุมร้องเลือกตั้งเสียงดังเกิน 115เดซิเบล แกนนำโชว์ใช้เครื่องวัดดูตลอด' (*Matichon*, 13 January 2019) <https://www.matichon.co.th/politics/news_1316678> accessed 17 January 2019.

[210] Human Rights Council, *First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, (21 May 2012) UN Doc A/HRC/20/27, para 27; Organisation for Security and Co-operation in Europe (n 4), guideline 2.1, 15.

[211] ibid para 28.

the object and purpose allowed by IHRL.[212] Notification requirements should not be automatically imposed on all assemblies.[213] Nevertheless, hybrid regimes utilise notification requirements not as a means to manage, or even to facilitate protests, especially where there may be conflict or counter-protests, but instead both to as a tool to screen out undesired assemblies and, having been forewarned, as a means to ensure that pro-regime supporters are able to mobilise.

The PAAs in Cambodia, Malaysia, and Thailand are silent on the right to hold a spontaneous assembly. Therefore, organisers must notify the authorities according to the timeframe requires by the PAAs. The notification procedures in these regimes are strictly enforced. The Thai PAA requires a 24-hour prior notification while the authorities can issue restriction orders or ban the assembly within 24 hours after receiving the notification.[214] The Cambodian PAA requires a 5-working-day prior notification.[215] The Malaysian PAA requires a 10-day-notification.[216] Here, the length of the notification period is worth considering. If the notification period is too short, like in the Thai PAA, the argument that the notification process allows authorities to prepare themselves to facilitate becomes less reasonable because the authorities have little time to prepare. On the contrary, when the notification period is too long, we still need to see how the authorities prepare to facilitate the assembly during that period. If they do too little or do nothing to facilitate, then, the notification process becomes not necessary. In the case of Cambodia, the PAA requires only 5 working days in advance. However, the PAA does not explicitly state that the authorities have a duty to facilitate. The PAA states that the organisers can request for assistance from the authorities and the authorities shall respond with full attention towards appropriate request in accordance with the law to ensure the exercise of the right to freedom of peaceful assembly.[217] In practice, Rhona Smith, Special Rapporteur on the situation of human rights in Cambodia, reported that the PAA was not being applied consistently to all people.[218]

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[212] *Bazarov v Belarus* (29 August 2014) Communication No.1934/2010 CCPR/C/111/D/1934/2010, para 7.4.
[213] *Lashmankin and Others* (n 36), para 456.
[214] Thailand PAA s11.
[215] Cambodia PAA s7
[216] Malaysia PAA s9(1).
[217] Cambodia PAA s 18.
[218] Rhona Smith, 'End of Mission Statement' (*OHCHR*, 31 March 2016) <https://spinternet.ohchr.org/SP/CountryVisits/Shared%20Documents/KHM/INT_CV_ESF_KHM_6107_Final_E.pdf> accessed 2 August 2019, 4-5.

PAAs in Cambodia, Malaysia, and Thailand consider unnotified assemblies to be illegal assemblies, the effect of which is that the authorities can issue a dispersal order and then arrest the organiser without having to consider the peacefulness of the assembly. Here, I argue that there are two special features in their notification systems. First, their PAAs impose assumed organisers. This feature provides the authorities with an opportunity to harass political dissenters by assuming them as organisers. This technique aims to apply limited public coercion to targeted activists and harass them with less visible coercion after their events had ended.[219] Second, the notification systems in the three regimes acting as de facto authorisation channelling people away from protest. Their PAAs provide the authorities with vast power to ban or to modify notified plans. Hence, the notification systems in these hybrid regimes enable the authorities to apply coercive and channelling techniques.

4.2.3.1 Assumed organiser

Empowering a state to deem any one individual as the organiser of a protest, without having to demonstrate that they are, allows the authorities to choose anyone as being responsible for a public assembly, and then to impose sanctions on them for failing to abide by the duties of an organiser. In differing ways, this is true in each of the three countries in our study, as we shall see. PAAs in Cambodia, Malaysia, and Thailand impose responsibilities that organisers need to follow.[220] Failing to fulfil their responsibilities, they are liable to criminal penalties, including imprisonment. One of the responsibilities is to notify the authorities of their public events according to the PAAs. Here, the ability to assume someone as an organiser allows the authorities to pick and choose a leader out of a crowd and prosecute him/her for failing to notify the authorities.

The Cambodian PAA does not define either "an organiser" or "demonstration leaders". However, it requires any group of individuals who wish to organise a peaceful assembly must notify the authorities in writing.[221] Although the PAA s6 states that the notification letter shall indicate three leaders, the authorities can assume more than three organisers when making an arrest.[222] For example, on 20 July 2015, around 50 activists marched in front of a market

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[219] Graeme B Robertson, *The politics of protest in hybrid regimes. managing dissent in post-communist russia* (New York : Cambridge University Press, 2011) 178-179.
[220] Cambodia PAA s16, Malaysia PAA s6, Thailand PAA s15.
[221] Cambodia PAA s5.
[222] Mech Dara, 'Six Arrested, Released Over NGO Law Protest' (*The Cambodia Daily,* 27 July 2015) <https://www.cambodiadaily.com/news/six-arrested-released-over-ngo-law-protest-89467/> accessed 14 January 2018.

handing out leaflet the NGOs law. Only five well-known activists were arrested for failing to notify the authorities of their event.[223] Again, on 27 July 2015, six activists dressed in prison uniforms and chained together to protest against the NGOs law in front of the parliament. The police arrested them all for failing to notify their event. In these two events, the police detained them at the local police stations for several hours before releasing them without further prosecution. In my opinion, the coercion tactic was completed because the police had removed some key protesters from their protest sites.

The Malaysian PAA s19 allows the authorities to assume 'any person who initiates, leads, promotes, sponsors, holds or supervises the assembly, or invites or recruits participants or speakers for the assembly, shall be deemed to be the organiser of the assembly.'[224] The reason behind is that the law imposes burdensome responsibilities to the organisers. The organiser has the responsibility to ensure that an assembly complies with the Act and any other written law. The ambiguous responsibilities include the duty to 'ensure that he or any other person at the assembly does not do any act or make any statement which has a tendency to promote feeling or ill-will or hostility among the public at large or do anything which will disturb public tranquillity.[225] The organiser also has the duty 'to ensure that the assembly will not cause any significant inconvenience to the public at large'.[226] With these burdens, the authorities have vast legal grounds to prosecute targeted political dissenters. For example, On 8 November 2014, a group of students arrange an academic freedom talk inside the International Islamic University (UIA). The university closed off the university gates denying three speakers access to prevent the event taking place inside the university. Then, the students organised the event by gathering outside the campus gates. Around 18 months later, Abdul Aziz Bari, Safwan Anang, and Fahmi Zainol, the three speakers, were summoned by the police. They were investigated for their part in the rally.[227]

The Thai PAA defines an organiser as 'a person who organises a public assembly, including any person who desires to organise a public assembly and any person who actively encourages

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[223] Ben Sokhean, 'Five Arrested Over Anti-NGO Law Leaflets' (*Cambodia Daily*, 20 July 2015) <https://www.cambodiadaily.com/news/five-arrested-over-anti-ngo-law-leaflets-88882/> accessed 2 August 2019.

[224] Malaysia PAA S19.

[225] ibid s6(2) (b).

[226] ibid s6 (2) (h).

[227] Human Rights Watch, 'Deepening the Culture of Fear' (*HRW*, 12 October 2016) <https://www.hrw.org/report/2016/10/12/deepening-culture-fear/criminalization-peaceful-expression-malaysia> accessed 2 August 2019.

or begs others to attend public assembly or behave in any manner to convince other that he/she is an organiser of such assembly.[228] In other words, the PAA imposes assumed organiser status to anyone who acts as if he/she is an organiser. In addition, UN Special Rapporteurs commented that "organiser" in the Thai PAA was defined too widely.[229] The law demands that the organisers must fulfil several responsibilities such as cooperating with the authorities, controlling the participants, and organise the public assembly peacefully and without arms according to the constitutional rights.[230] Police may use this as an opportunity to harass protesters. For instance, on 30 March 2017, Panthep Puapongpan was accused of failing to notify the authority of an assembly. Panthep was filmed using a speaker talking to the participants of a rally. He argued that he was asked by the police to ask the participants to disperse and he broke away from the assembly. Dusit Municipal Court dismiss this case on the ground that he there was lacking evidence showing that Panthep had acted as an organiser by inviting others to join the rally.[231]

On 4 March 2018, Sirawit organised a public assembly demanding a general election in Pataya. He failed to notify the local police of his event. After the event, the police accused 12 protesters (including Sirawit) for organising an unnotified public assembly. The Pattaya Municipal Court, on 31 July 2019, ruled that only three of them could be considered as organisers. The other protesters who helped taking photos and holding banners were not acting as the organisers.[232] This case shows that the police assumed all of the participants as the organisers instead of prosecuting only Sirawit who actually made a call to the local police station and inform the police verbally (the PAA requires a written notification).

4.2.3.2 De facto authorisation

Both notification requirements and authorisation requirements provide three benefits namely allowing better traffic planning, reducing scheduling conflicts, and easing the police to provide protection and facilitation.[233] However, Baker has argued that, historically, the primary function

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[228] Thailand PAA s4.

[229] Joint Allegation Letter, Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders, 27 May 2016, Case no. THA 4/2016, 4.

[230] Thailand PAA s15.

[231] Dusit Municipal Court, Red No.2772/2560, 28 December 2017, 6.

[232] Thai Lawyers For Human Rights, 'ปรับจ่านิวและเพื่อนคนละ 4000 บาท ฐานไม่แจ้งการชุมนุมคนอยากเลือกตั้งพัทยา' (*TLHR*, 31 July 2019) <https://www.tlhr2014.com/?p=13131> accessed 2 August 2019.

[233] Baker (n 71) 1008.

of authorisation requirements was to harass, control, and suppress unpopular groups.[234] It provides the authorities with an opportunity to reject the application or amend the proposed plan. Obviously, the authorities have the upper hand when bargaining with organisers. On the contrary, notification requirements can maintain all three benefits without giving up the opportunity to the authorities. However, the notification systems in Cambodia, Malaysia, and Thailand are de facto authorisation.

In chapter 2 (2.2.3), this study has identified that international standards and IHRL prefer notification over authorisation. They agree that it is not necessary to require notification from some types of assemblies and failing to comply with the notification requirements does not justify a dispersal of a peaceful public assembly. According to the OSCE Panel of Expert, 'prior notification…should only be required where its purpose is to enable the state to put in place necessary arrangements to facilitate freedom of assembly and to protect public order, public safety and the rights and freedoms of others.'[235] In some jurisdictions like Moldova and Poland, an assembly of a small number of participants is not required to notify the authority.[236] The reason for that is clear: a small group of, say, three or four does not need policing and so any rationale for requiring notification simply falls away. In contrast, hybrid regimes notification processes can be disguised as de facto authorisation.

Although authorisation requirements can be found in some consolidated democracies, the application of de facto authorisation in hybrid regimes has a greater extent in hybrid regimes. This thesis (in 3.4.3) has argued that hybrid regimes have the incentive to prevent serious threats from the oppositions' protests and still be able to mobilise pro-regime supporters to show their dominance. Thus, I see that authorisation requirements, as a channelling technique, allow small and insignificant assemblies to obtain public visibility while enabling regimes to mobilise their own supporters to show their domination. Here we can see that the PAAs in the three regimes provide vast discretion to the authorities to achieve this outcome.

In Cambodia, the notification procedure is a de facto authorisation procedure.[237] The Cambodian PAA s9 directs that 'the authorities receiving a notification letter shall respond positively in writing toward the notification letter except if…' This procedure shows an ambiguity because a notification should not be subject to any decision of the authorities

[234] ibid 1007.
[235] Organisation for Security and Co-operation in Europe (n 4) 17-18.
[236] ibid 63.
[237] Amnesty International, *Taking to the Streets Freedom of Peaceful Assembly in Cambodia* (n 15) 30.

involved.[238] The local authorities may call for a meeting if they have clear information indicating that the demonstrations may cause danger or would seriously jeopardise security, safety and public order.[239] If they fail to meet an agreement, the decision of the authorities shall be reviewed by the Minister of Interior.[240] However, the law does not require the Minister to give his decision in writing. Neither does it provide any procedure to appeal the Minister's decision to the court of law. Therefore, this lengthy dispute resolution process is ineffective and makes the notification become permission de facto.[241]

The Cambodian PAA provides the authorities with broad power to approve or ban almost any peaceful protest.[242] Notification of a peaceful assembly can be rejected simply because the local authorities 'have clear information indicating that the demonstration may cause danger or would seriously jeopardize security, safety and public order.'[243] When the law is silent on the strict test of proportionality and necessity, the authorities are prone to have the presumption that any public assembly is a threat to public order and public safety.[244]

Under the Cambodian PAA, the authorities issue demonstration permits at their discretion. It has been reported that lower-level government officials, especially in the capital, routinely denied requests unless the national government specifically authorised the gatherings.[245] Although stability and public security are the common grounds for denying assembly permits, the authorities systematically rejected notifications without justification.[246] When the PAA is applied together with NGOs law, the authorities can target anti-regime organisation and prevent them from organising any meeting or gathering, even on private property.[247] On the contrary, they pro-government demonstrators are allowed to mobilise. For example, on 1 May 2019, the Cambodian Labour Confederation organised the Labour Day march calling the government to lift the 2013 ban which prohibit workers from gathering in public spaces. Their plan was to march around the National Assembly to hand in their petition. The Phnom Penh City Hall did

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[238] ibid 33.
[239] Cambodia PAA s11.
[240] ibid s12.
[241] Amnesty International, *Taking to the Streets Freedom of Peaceful Assembly in Cambodia* (n 15).
[242] Anstis (n 20) 319.
[243] Cambodia PAA s11.
[244] Cf. Kiai, 'Report of the Special Rapporteur…' (n 200), para 50.
[245] United States Department of State, 'Cambodia 2017 Human Rights Report' (Bureau of Democracy, Human Rights and Labor, 2017) <https://www.state.gov/documents/organization/277315.pdf> accessed 14 January 2019, 16.
[246] Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Cambodia* (27 July 2017) (n 158), para 46.
[247] United States Department of State (n 245) 16.

not approve the plan and amended the plan to march around Wat Phhom instead. On the same day, PM Hun Sen celebrated labour day in a gathering of around 3,700 factory workers in Kandal province.[248]

The notification requirement in the Malaysian PAA is used and an excuse to harass the organisers including arresting and prosecuting them after their events. The law provides two exemptions from the notification requirement: assemblies held at the designated places and assemblies specified in the Third Schedule of the PAA.[249] The law is silent on spontaneous assemblies. [250] It empowers police to call a meeting with the organiser and advise the organiser on the assembly. The police may impose restrictions and conditions on an assembly.[251] These restrictions can be on the time, place and manner, including the payment of clean-up costs, the environment and cultural factors, or any measure that the authorities see fit.[252] Failing to notify is liable to a fine not exceeding RM 10,000. In 2013, alleged organisers of the Black 505 rallies, nationwide election fraud protests, were arrested for failing the notification requirement.[253] The government prosecuted activists and opposition figures who had participated in the post-election protests by assuming them as organisers.[254] These protests produced two contrasting Appeal Court's rulings on this matter: *Nik Nazmi bin Nik Ahmad v Public Prosecutor*[255] and *Yuneswaran v Public Prosecutor*.[256]

Nik Nazmi bin Nik Ahmad, an opposition MP, organised a Black 505 rally to protest an election result in a stadium. He was fined RM 1,500 for failing to notify the police. [257] He later argued that the PAA violated his constitutional rights and bring this matter to the Court. The High Court ruled that the 10-day notice period under the legislation was not unconstitutional.[258] He

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[248] Mom Kunthear, 'Union submits petition to mark labour day' (*Khmer Times*, 2 May 2019) <https://www.khmertimeskh.com/50599804/union-submits-petition-to-mark-labour-day/> accessed 3 July 2019.
[249] Malaysia PAA s9
[250] Malaysia PAA s9(1).
[251] ibid s15.
[252] ibid s15 (2)
[253] Human Rights Watch, Creating a Culture of Fear (n 86), 89-90.
[254] Human Rights Watch, 'Malaysia: Drop Charges Against 'Black 505'' (*Human Rights Watch*, 4 June 2013) <https://www.hrw.org/news/2013/06/04/malaysia-drop-charges-against-black-505> accessed 17 January 2019.
[255] *Nik Nazmi bin Nik Ahmad v Public Prosecutor* [2014] 4 MLJ 157.
[256] *Yuneswaran v Public Prosecutor* [2014] 6 MLRH 607.
[257] Allison Lai, Allison Lai, 'Nik Nazmi fined over PAA Charge' 9 December 2016) <http://www.thestar.com.my/news/nation/2016/12/09/nik-nazmi-fined-over-paa-charge/> accessed 18 March 2017.
[258] ibid.

appealed to the Appeal Court arguing that section 9(5) of the PAA are unconstitutional. The Court, on 25 April 2014, held that section 9(5), which imposed a fine on the organiser, 'failed the reasonableness test as well as the proportionality test as it has no nexus to public order, national security or a non-peaceful assembly.'[259]

Datuk Dr Hj Hamid Sultan Bin Abu Backer, the judge in this case, explained. First, the article 10 of the Federal Constitution allowed restrictions, but it did not criminalise the breach of the restriction.[260] The constitutional framers left this task to the existing penal laws to check law and order. He referred to section 144 of the Criminal Procedure Code of India, which was applied to any breach relating to assembly.[261] Secondly, he saw that PAA section 9(5) failed the reasonable test and the proportionality tests because criminalising someone for not giving notice had no connection with keeping public order unless the assembly was not a peaceful one.[262] The judge took the principle of proportionality, which laid down by the Court of Justice of the European Union[263], into consideration and reaffirmed that this principle had been accepted in civilised jurisdiction where democratic values were norms.[264] He further explained that it was the organiser's social responsibility to comply with the ten-day prior notification in order to enable police to provide security and to facilitate effectively. If the organiser failed the notification requirement, there was no prohibition for the law enforcement agencies to take action under the Penal law or the Criminal Procedure Code.[265]

Niz Nazmi's case was a significant milestone in which the principle of proportionality under international standards was taken into consideration. In this case, the Appeal Court explicitly declared that it is the court duty to ensure than the constitutional guaranteed freedom is not violated by any retrogressive law without meaningful grounds consistent with the Constitution.[266] However, this precedent was short lived. On 2 October 2015, The Appeal Court overturned the precedent and reaffirmed the constitutionality of Section 9 (5) in *Yuneswaran v Public Prosecutor*.[267] Both cases were originated from the same movement to protest 2013

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[259] Yvonne Tew, 'On the uneven journey to constitutional redemption: the Malaysian judiciary and constitutional politics' (2016) Washington International Law Journal 673.
[260] *Nik Nazmi bin Nik Ahmad* (n 255), para 24(d)
[261] ibid.
[262] ibid para 27.
[263] Baker J used the term 'the Court of Justice of the European Community'.
[264] ibid para 31.
[265] ibid para 38
[266] Tew, 'On the uneven journey to constitutional redemption: the Malaysian judiciary and constitutional politics' (2016) *Washington International Law Journal* 673, 686.
[267] *Yuneswaran* (n 256).

general election. However, they were prosecuted in different states. Under the Malaysian legal system, only cases which originate in the High Court can go to the Federal Court. Cases involving the PAA are usually filed to Sessions Court. This means that the Court of Appeal is the final appeal court.

Yuneswaran was the organiser of the Black 505 assembly in Jahor Bahru. He failed to notify the police according to the PAA. The Session Court sentenced him to a fine of RM 6,000 and a three-month jail. He appealed to the High Court. The High Court Judge in *Yuneswaran* held that he was bound by the decision in *Nik Nazmi bin Nik Ahmad v Public Prosecutor* and ordered the fine to be refunded. Next day, the Public Prosecutor filed an appeal to the Court of Appeal. The Appeal Court ruled that the requirement to give notice was not a restriction of a right to assembly because it did not stop a citizen from exercising his/her right to assemble peacefully. The notification procedure was necessary because the police would not be able to perform their role as facilitators and regulator effectively. Therefore, failing to notify according to the law would affect the police's ability to provide safety for the assembly participants.[268] The notification requirement was 'crucial and reasonable to enable the police to make the "necessary plan and preparation" to satisfy their legal obligation under the PAA…'[269] The Court saw that the requirement met international standard by comparing it to Article 11 of the ECHR and the notification requirements in Portugal, France, Italy and The United Kingdom .[270] The Court then overruled the decision set out by *Nik Nazmi bin Nik Ahmad v Public Prosecutor* and declared that the provision under PAA section 9(5) was constitutional.[271] In my opinion, the Court has overlooked that the ECHR and those PAAs (in Portugal, France, Italy and The United Kingdom) demand the strict test of necessity and proportionality, in which the Malaysian PAA lack of. However, *Yuneswaran* becomes stare decisis in two later cases: *Maria Chin Abdullah v Pendakwa Raya* and *Mohd Rafizi Ramli & Anor v PP & Other Appeals*.[272] Judges in these two cases held that there is no issue on the validity of the PAA s9(5).[273]

On this issue, Tew argued that after the Barisan National lost its two-thirds majority in the parliament, both 2008 and 2013 general elections, the judiciary appeared to be more rights-

[268] ibid para 37.
[269] ibid para 42.
[270] ibid para 40.
[271] ibid para 85-86.
[272] *Maria Chin Abdullah v Pendakwa Raya* [2016] 9 MLJ 601, *Mohd Rafizi Ramli & Anor v PP & Other Appeals* [2016] 7 CLJ 246.
[273] Sharizal Bin Razali, 'A Study on The Noncompliance of Peaceful Assembly Under The Peaceful Assembly Act 2012' (Master of Enforcement Law, Universiti Teknologi Mara 2017) 33.

oriented and showed more willingness to check on legislative and executive actions. [274] However, the Appeal Court has faded away from this approach in *Yuneswaran*. Tew suspected that Malaysian constitutional politics have played a role, as the powerful political branches were attempting to regain their superior status.[275] Therefore, I see that the provision under PAA section 9(5), a fine for failing to notify an assembly, is a key part of the mechanism to control the level of state mobilisation that worth protecting. This could explain why the public prosecutor in *Yuneswaran* quickly appealed to the Appeal Court in less than a day after the case was dismissed by the High Court.

The police in Thailand impose a de facto authorisation procedure in relation to public assemblies. The Thai PAA requires 24 hours prior notification. Upon a notification, police must inform the organisers to change venue if they propose to assemble in a prohibited area under the PAA.[276] If they do not change, then police ban the assembly. Failing to comply with the notification requirements makes an assembly illegal which police can issue dispersal order.[277] If the organisers or participants do not comply with the order, the police need to request a dispersal order from the Civil Court. Although the PAA allows an organiser to request for an exemption to assemble without notification, the permission depends on the local Police Commander's discretion.[278] He has 24 hours to respond to the request. In other words, the PAA impose a blanket ban on spontaneous assemblies while the Police Commanders have the discretion to allow spontaneous assembly. This procedure allows them to choose who can organise counter assemblies and who cannot.

Under the Thai PAA, a single-person protest is subjected to a notification. On 7 January 2019, Akaraj Udomamnoui was detained and brought to a police station, after he attempted to protest the Government for postponing the general election date by shaving his head at Victory Monument. He notified the police of his event but the police replied that he could not protest legally before his notification reached 24 hours after submitting.[279] In this case, the police denied that Akaraj was arrested. No charge was pressed. He was just brought to the local police station twice on that day. It is worth noting that this technique is commonly used to end small

[274] Tew (n 266) 693.
[275] ibid.
[276] Thailand PAA s11.
[277] ibid s14.
[278] ibid s12.
[279] BBC, 'เลือกตั้ง 2562 : กลุ่มคนอยากเลือกตั้งชุมนุม 6 จ. พร้อมกัน ย้ำจุดยืนต้องเลือกตั้ง 24 ก.พ.' (*BBC Thai*, 8 January 2019) <https://www.bbc.com/thai/thailand-46773222> accessed 16 January 2019.

protests. Police forcefully invite protesters to the nearest police station and detain them for several hours. For example, the police captured and detained Anon Nampa and his friends because they failed to notify their "Stand Still" protest on 27 April 2016 (discussed at 4.1.2).[280] To end an assembly, The PAA s21 paragraph 2 requires that the authorities need to obtain a dispersal order from the Civil Court before making an arrest on the ground of organising a non-notified assembly. Since there were a few participants, the police avoided making any arrest but forcefully brought organisers to the nearest police station. Later, they were released without charge. With this tactic, police avoid obtaining a dispersal order under the PAA. The capturing of all participants, including a single person protest, produces the same result as to end an assembly.

In addition, pressing charges after a public event is one of the preferred police tactics to create a chilling effect.[281] On 16 May 2019, Sirawit and Thanawat organised a public event to collect signatures in a petition letter demanding that all the senators refuse to vote for General Prayuth Chan-O-cha (the NCPO's leader) as the Prime Minister. The event was organised and carried out peacefully in front of a monument in Chiang Rai province. It was the third event after they collected signatures in Bangkok and Chiang Mai. Almost a month later, on 11 June 2019, the police pressed charges against Sirawit and Thanawat on the ground that they failed to notify the event in Chiang Rai according to the PAA.[282] Chiang Rai police also charged five participants who joined the list. It was clear to me that these charges were driven by a political motive to silence anti-government movements.

In another case, on 2 February 2019, two university students, Parit Chiwarak and Tanawat Wongchai, posted an invitation on their Facebook accounts inviting the public to join their traditional cursing ceremony at the government house. There was no participant joining their event because the police denied access to the protest site. The two cancelled the gathering and walked to another government house's entrance to conduct a cursing ceremony. It consisted of only two of them and the press. Shortly after, the two were arrested and charged on the ground

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[280] Dusit Municipal Court judgment Red No. Aor.317/2560 on 10 February 2017.

[281] ilaw, 'พ.ร.บ.ชุมนุมสาธารณะฯ ไม่แจ้ง-ไม่เชื่อฟัง เตรียมโดนข้อหา' (*ilaw*, 1 February 2018) <https://ilaw.or.th/node/4733> accessed 16 January 2019.

[282] Thai Lawyers For Human Rights, 'ตร.ออกหมายเรียก "จ่านิว-บอล- 5 ปชช. เชียงราย" ไม่แจ้งชุมนุม หลังตั้งโต๊ะล่าชื่อปิดสวิตซ์ ส.ว.' (*TLHR*, 14 June 2019) <https://www.tlhr2014.com/?p=12813&fbclid=IwAR11_NbSIXS2vU7hNB4yFPgI-D8H2MLthkQxg6pqc9jRqBlQauNfY3DlTi4> accessed 21 June 2019.

of no prior-notification.[283] On 21 August 2019, Dusit Municipal Court fined them on the ground that they organised an unnotified public assembly.[284] The two argued that their cursing ceremony was not an assembly. The Court decided that it was an assembly under the PAA because the two organisers distributed leaflets to the press and did not prevent the public from joining their event. Noticeably, the Court did not consider the necessity and proportionality of the restriction. In my opinion, the advertised event was cancelled because the police denied the access to the protest site. Such tactic forced the two organisers to find a new spot where they could perform their ceremony. This case shows that the authorities may harass political dissenters by charging them on the ground of organising a non-notified public assembly. The police enforce the notification requirements without considering necessity and proportionality.

Restrictions on freedom of assembly presented in this chapter lead us to conclude that hybrid regime incumbents rely heavily upon the applicable legal framework to curtail the ability of the people to organise a public assembly. This part has illustrated that content-based restrictions, blanket-bans, and onerous notification requirements (which do not comply with international standards) significantly reduce the protective scope of freedom of assembly in hybrid regimes. These restrictions clearly affect how protesters choose their strategies or what means they will use to make their voices heard. It stands to reason, therefore, as chapter 3 suggested and this chapter has evidenced, that a thorough analysis of the operation of domestic legal frameworks governing public assemblies must be central to any consideration and analysis of contentious politics in hybrid regimes.

4.3 Conclusion

This chapter has demonstrated that the incumbents in Cambodia, Malaysia and Thailand curtailed the scope of freedom of assembly through the respective legal frameworks governing public assemblies. These regimes do not totally ban public assemblies but rather significantly limit the abilities of anti-regime protesters to organise. In chapter 3 (heading 3.3.2), this thesis discussed Robertson's observation that the Putin administration in Russia used a combination of coercion and channelling techniques to increase the capacity of the regime to both repress opposition protesters and to mobilise pro-government activists.[285] We can see in this chapter that the three Southeast Asia regimes have pursued a similar approach through the legal

[283] Thai Lawyers For Human Rights, 'สืบพยานคดี "เพนกวิน-บอล" ใช้พริกเกลือไล่พลเอกประยุทธ์เสร็จสิ้น ศาลนัดฟังคำพิพากษา 21 ส.ค. 62' (*TLHR*, 13 June 2019) <https://www.tlhr2014.com/?p=12802> accessed 21 July 2019.
[284] Dusit Municipal Court Black No. 370/2562 on 21 August 2019.
[285] ibid 169-170.

frameworks governing public assemblies. Both coercion and channelling are embedded characteristics of these domestic legal frameworks. As such, restrictions in these three hybrid regimes, similar to those in Russia, serve a different purpose than that established by IHRL (and as outlined in chapter 2).

Evidence presented in this chapter shows that the legal frameworks in Cambodia, Malaysia, and Thailand share two similar characteristics: (1) providing overly broad legal grounds for the authorities to restrict freedom of assembly without requiring them to consider the strict test of necessity and proportionality, and (2) lacking adequate mechanisms of judicial review. The legal frameworks in these regimes provide opportunities for the police to exercise their discretion in a highly discriminatory manner. The incumbents are in turn able to rely on this feature to gain significant political advantage.

I have argued in Chapter 3 that Robertson overlooked the role of legislation and actors governing public protests. This chapter shows that the legal framework governing public assembly is part of the strategy to defeat-proof the street – an aspect which Robertson had largely overlooked.[286] Moreover, by examining the legal framework from Robertson's perspective, we can see that these have been systematically crafted as a tool to control the level of mobilisation in hybrid regimes. This chapter has demonstrated that the three Southeast Asian hybrid regimes curtail opposition mobilisation through content-based restrictions, blanket bans, and notification requirements. When the grounds for restriction are broad, the authorities can easily impose restrictions to intimidate anti-regime protests.

Content-based restrictions, blanket bans, and notification requirements greatly reduce the protection afforded by the right of peaceful assembly. These forms of restriction enable the authorities to apply highly coercive tactics. Content-based restrictions are tools to repel or channel anti-regime protesters away from sensitive issues. Blanket bans on time, place and manner provide legal grounds to restrict the scope of freedom of assembly. Notification requirements act as filters screening out serious anti-regime protests, as well as channelling them away from sensitive zones. With the combination of these three, we can conclude that laws governing public assemblies play an important role in shaping the exercise of the right to freedom of peaceful assembly. The legal framework governing public assemblies determines how people mobilise and ought therefore to be a central factor in explaining a State's

[286] Robertson (n 219) 11.

mobilisation strategy. The following chapter continues this analysis by focusing on the nature of public order policing in the three Southeast Asian hybrid regimes.

Chapter 5 Public Order Policing in Hybrid Regimes

The previous chapter has demonstrated that while legal frameworks in hybrid regimes might appear to guarantee freedom of assembly to all citizens, these legal frameworks also enable the hybrid regime incumbents to abuse this freedom. Furthermore, chapter 3 highlighted how the restrictions imposed on freedom of assembly and the degree of force used against protesters in hybrid regimes often depends on the political opportunities that the regime stands to gain from either mobilising or demobilising opposition groups. In other words, the incumbents' political interest is the main factor determining whether public assemblies in hybrid regimes will be repressed or facilitated.

This chapter seeks to further explain how public order policing in hybrid regimes differs from that in both consolidated democracies and authoritarian regimes. It aims to fill a gap in the existing literature on public order policing (noting too that relatively little attention is paid in social movement literature to the institutional factors that determine the nature of public order policing such as legislation, standards of conduct, policing strategies, mechanisms of internal and external control and the judiciary). It illustrates the common characteristics of police and public order policing in hybrid regimes: the lack of insulation from political influence and the divergence between the police's cultural norms and international human rights norms. As a result, the police instead 'swing' between democratic approach and authoritarian approach upon the incumbents' signals.

The first part of this chapter distinguishes constitutional policing from colonial era policing on the basis that police in hybrid regimes generally retain a colonial mentality – they see themselves as protectors of the realm rather than protectors of the people, owing allegiance to the rulers not their citizens. This mentality contrasts with the avowedly democratic values expressed in their constitutions and laws governing public assemblies. It also runs counter to the discernible trend in policing from a control-oriented approach to a service-oriented approach.[1]

The second part of the chapter then discusses the different facets of the principle of 'democratic policing' – namely, the rule of law, legitimacy, transparency and accountability, and

[1] Organisation of Secruity and Co-operation in Europe, *Guidebook on Democratic Policing* (OSCE Secretariat 2008) 11.

subordination to civil authority. As in consolidated democracies, legal frameworks in hybrid regimes confer a certain level of discretion on the police. However, in the absence of a human rights culture and effective accountability mechanisms, this readily enables recourse to coercive force. As such, public order policing in hybrid regimes fails to align with the principle of 'democratic policing'. Indeed, the political leaders of hybrid regimes retain the capacity to manipulate the police to serve their political agendas and the option of police deployment to forcibly prevent or crackdown on public assemblies. Public order policing in hybrid regimes – where the principle of popular sovereignty has only been partly conceded – thus represents the last line of defence for the incumbent regime. Ultimately, this chapter argues that the principle of democratic policing is the key to creating and sustaining a democratic society, but that the police in Cambodia, Malaysia, and Thailand retain high levels of discretion without effective institutional mechanisms for controlling police activity, enabling them to implement the law in a way that benefits the incumbent regime.

5.1 Characteristics of the police in hybrid regimes

Drawing on the work of Robert Dahl,[2] Feyzi Karabekir Akkoyunlu argues that hybrid regimes are 'political systems built on two contesting sources of legitimacy – elitest and popular – and corresponding institutions of guardianship and democracy'.[3] On this understanding, democratic institutions in hybrid regimes are not the only source of legitimacy: There are also non-democratic institutions which provide a degree of legitimacy to political actors through their existence in history, tradition, religion or revolutionary ideology.[4] For instance, in Thailand, the monarchy has been providing an alternative source of legitimacy for every successful coup since the country abolished the absolute monarchy. The military always claims its legitimacy from the palace rather than the citizens. Hybrid regime rulers often paint themselves as the guardians of the people. Their authority derives from quasi-guardianship institutions as much as from democratic institutions (which co-exist in parallel).[5] This insight is also helpful for considering the source of police legitimacy.

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[2] Dahl defined 'guardians' as 'meritorious rulers …, quite likely a very small minority, … who are not subject to the democratic process' (52) and regarded guardianship as the 'most formidable rival' to democracy (57). See, Robert A Dahl, *Democracy and its critics* (New Haven ; London : Yale University Press 1989) 52, 57.

[3] Feyzi Karabekir Akkoyunlu, 'The Rise and Fall of the Hybrid Regime : Guardianship and Democracy in Iran and Turkey' (Ph.D. Thesis, London School of Economics and Political Science 2014) 19.

[4] ibid 35.

[5] ibid 40.

Della Porta and Reiter identify a number of factors that determine the nature of public order policing – namely, institutional variables, the configuration of political power, public opinion, the police occupational culture, the interaction with protesters, and police knowledge.[6] Within these variables, it has been argued in this thesis that legal frameworks can significantly contribute to how police behave.[7] Discussing the interaction between policing and political developments, Bayley emphasizes that we should not think of the police as merely passive agents shaped by their political environment.[8] Rather and reflexively, police officers are themselves important actors who shape their political environment.

As such, we can hypothesize that since a hybrid regime, as a system of government, is different from a democracy, police in a hybrid regime will also be organised and behave differently from police in a democracy. The police in hybrid regimes have the mixed characteristics of both democracy and authoritarianism. They behave democratically in one situation and can behave authoritatively in another similar situation. The police in consolidated democracies see their role as the protectors of human rights and democratic process because their institutional settings require them to perform such duty. They need to fulfill this obligation in order to thrive and become success in their career. In contrast, the police in hybrid regime need to be responsive to both the people and the incumbents. As hybrid regimes relies heavily upon the patronage relationships, the police bow to the incumbents to thrive.

5.1.1 The police lack insulation from political influence

The establishment of the modern police originated from the need to impose social order. The police had broad responsibility to oversee everything from economic and political conditions to civil life that might disturb the order of a community.[9] As such, the history of policing is often regarded as being synonymous with the history of state power – with greater or lesser degrees of sophistication (the art of seeking to conserve/retain while all the while pretending

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[6] Donatella Della Porta and Herbert Reiter (eds), *Policing protest. the control of mass demonstrations in Western democracies* (Social movements, protest, and contention: v 6, Minneapolis : University of Minnesota Press 1998) 9.

[7] Della Porta and Reiter give an example from Italy, noting that although fascist ideology crumbled after the end of the war, Italian police continued to use coercive intervention to obstruct any popular protest *because* their legal frameworks allowed them to do so. Indeed, the Italian police continued to employ coercive policing styles until the law on meetings and demonstrations was enacted in 1983; ibid at 11.

[8] David H. Bayley, *The police and political development in India* (Princeton University Press 1969) 12-13, 409.

[9] Mark Neocleous, *The fabrication of social order : a critical theory of police power* (Pluto Press 2000) 3.

not to).[10] Indeed, the police have been key players in preserving a hierarchical political order in many repressive authoritarian regimes.[11] Policing during the period of colonisation provides a good example.

The rulers of colonial territories had to decide whether to rule by coercion or by consent. Perhaps most obviously, we might contrast colonial and constitutional models of policing by observing the difference between the preparedness to use force. As law was a weapon to ensure the imperial rule, a compromised system of law was created to incorporate local practices while delegitimising others.[12] Brogden explains how colonial police were forces belonging to the people but insulated from them and not governed by them.[13] He observed that the form of control and their proximity to the military made colonial police officers more obedient to their rulers.[14] First, it was necessary for the Governor of a colony to possess direct control over the police force. For example, police in Hong Kong and in the Indian provinces were under the control of civil officials who reported directly to the Governor. Such subordination arrangements were different from the English police whose local commanders and civil authorities were separate. Second, colonial police were in close proximity to the military. While the British police bore the notion of 'the citizen-in-uniform', the colonial police were more akin to the military. They often lived in barracks separated from local communities. In cases of emergency, they could be quickly mobilised to restore public order in other provinces or even conscripted to fight in armed conflicts. Therefore, colonial police structures were more similar to the military than the police structure in England.

This colonial history of policing resonates with the geographic scope of this thesis. Colonial police became a common model of policing in Southeast Asia during the colonisation period – when most Southeast Asian countries were colonised by western powers. Malaysia was colonised by the British and Cambodia was annexed to the French Indochina. Although Thailand (Siam) was not colonised by any Western power, it was heavily influenced by European models.[15] Police forces, legal systems, and bureaucratic systems in colonies usually

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[10] ibid xi.

[11] In this regard, Neocleous notes Adam Smith's observation that laws and government generally existed for the defence of the rich against the poor. ibid 42.

[12] Mike Brogden, 'The emergence of the police—the colonial dimension' (1987) The British Journal of Criminology 4, 11.

[13] ibid, 10.

[14] ibid, 13.

[15] Siam avoided being colonised by reforming state organs and legal system after western powers, especially the British Empire on its western and southern front and the French Empire on its eastern front. In 1860,

focused on the defence and maintenance of the established rule rather than focusing on service-oriented policing.[16] As colonial ventures were profit-motivated, colonial police aimed to protect their masters' interests and to maintain colonial domination. This perception continued after colonies gained independence. Even though some colonial police went through reforms, they continued to have the same perspective over their role and their powers. Police report directly to the rulers without sufficient democratic scrutiny and their organisational culture reflects that of the military. Regime incumbents in Southeast Asia succeeded in taking over their police force from the western powers without substantial reforms. I argue that the conception of law as a weapon to ensure imperial rule has been inherited by hybrid regime incumbents. Similarly, the police, which suppose (in a democracy) to protect civil freedoms and liberties, remain as the coercive arm of the state. Although constitutions in these hybrid regimes guarantee civil rights, their citizens are not protected in practice.

By way of contrast, in democratic contexts, policing should be free from political pressures and accountable only to the law.[17] The police have 'positive obligations' to protect the democratic process such as providing security for election processes, voters, and ballot boxes. Aitchison and Blaustein suggest that police officers should not be used as political tools to undermine democratic institutions.[18] They note, however, that the dominant power may manipulate the police to create possibilities for external influence and intervention.[19]

Historically, the broad duties of the police were subjected to the principle of the rule of law when liberal thinkers began to oppose the rule of police in the 1860s.[20] In this regard, questions concerning the governance of policing have long been central to thinking about the role of legal constitutionalism in delimiting an appropriate balance between police powers and individual

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King Rama IV appointed a British, Sammoel Joseph Bird Ames, to modernise Siamese police after European police. At the beginning of the reform, police officers under Ames's command were hired from British India and British Malaya. Hence, Thai police reform received heavy influence from British colonial police.

[16] Mahesh K Nalla and Chae Mamayek, 'Democratic policing, police accountability, and citizen oversight in Asia: an exploratory study' (2013) 14 Police Practice & Research 117, 121.

[17] Andy Aitchison and Jarrett Blaustein, 'Policing for democracy or democratically responsive policing? Examining the limits of externally driven police reform' (2013) 10 European Journal of Criminology 496 499.

[18] ibid.

[19] ibid 502.

[20] Neocleous (n 9) 29-30, drawing on Kant's argument that the existence of diverse views about the good ultimately compelled the sovereign to guarantee equality before the law so that individuals could freely pursue their own vision of happiness. This, in turn, required that the police power should be limited under the rule of law.

freedoms. However, a constitutional paradox arises – one that lies at the heart of this chapter. Conferring operational discretion on the police is needed to insulate the police from political influence and to enable them to effectively protect constitutional rights, but too much discretionary power (in the absence of robust safeguards) can contribute instead to the erosion of those same constitutional rights. This paradox of constitutional democracy 'gives us reasons to reject some combinations of democracy and law while justifying others'.[21] In terms of the balance to be achieved in public order policing, it is suggested in the following part that there is an international trend demanding that police shift from a control-oriented approach to service-oriented approach.

5.1.2 The divergence between the cultural norms of the police and international human rights norms

The second significant distinguishing characteristic of the police in hybrid regimes is the more marked disjuncture between their cultural norms, on one hand, and, on the other, international human rights norms and standards and democratic principles, more widely. The attainment of democratic policing became a goal for the international community after the end of the Cold War. Nations agreed to reform the police according to international human rights standards and democratic principles. This global agenda was led by developed countries and multilateral organisations such as the UN, the OSCE, and the EU.[22] They introduced the notion of rights-based policing to developing countries aiming to promote human rights awareness. For instance, article 2 of the Code of Conduct for Law Enforcement Officials adopted by UN General Assembly on 17 December 1979 states that: 'in the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.' In other words, the protection of human rights became one of the core objectives of democratic policing.

Earlier in this thesis (at 2.4), we saw that there are international standards on public order policing that arise from international human rights law (IHRL). In general, police are tasked with the responsibility to protect and to facilitate public assemblies. The past decade has seen a proliferation of international standards on public order policing:

- The OSCE *Guidebook on Democratic Policing (*2nd edition) published in 2008.[23]

[21] Olson Kevin, 'Paradoxes of Constitutional Democracy' (2007) 51 American Journal of Political Science 330.
[22] David Bayley, 'Human rights in policing: a global assessment' (2015) 25 Policing and Society 540
[23] Organisation of Secruity and Co-operation in Europe, *Guidebook on Democratic Policing* (n 1).

- The OSCE *Guidelines on Freedom of Peaceful Assembly* (2nd edition) published in 2010, elaborating on both procedural issues and implementing freedom of peaceful assembly legislation.[24]
- The OSCE Office of Democratic Institutions and Human Rights (ODIHR) *Human Rights Handbook on Policing Assemblies* published in 2016 emphasising the police role in facilitating public assemblies and reaffirms the basic principles of democratic policing established by the 2008 *Guidebook*.[25] It holds that police must pursue objectives of democratic policing: 'maintain law and order, protect and respect fundamental rights and freedom, prevent and combat crime, and provide assistance and service to the public'.[26]
- The United Nations Office on Drugs and Crime (UNODC) and the Office of the United Nations High Commissioner for Human Rights (OHCHR) published *Resource Book on the Use of Force and Firearms in Law Enforcement* in 2017. This contains a chapter outlining the international human rights framework regarding the policing of public assemblies and protest[27], and suggests that the police can avoid violence and reduce the potential of disorder by getting support from participants through a 'negotiated management approach'— an approach premised on the idea that is more productive to work with crowds rather than against them.[28] This requires the police to accept some of the disruptive effects of protest in exchange for the continuity of the peaceful nature of the assembly.[29]

These international standards have served to guide police training and reform in consolidated democracies, urging a shift towards democratic policing (with a greater emphasis on human rights protection).

Police in Cambodia, Malaysia and Thailand lagged behind their peers in consolidated democracies, not keeping up with the newer public order policing standards and tactics, developments which, by the late 1990s, were argued as being no longer typified by a control-oriented approach but by a service-oriented approach'.[30] Most obviously this was denoted by a cultural shift. Police in consolidated democracies while responsive to the majority were duty-bound at the same time to protect the human rights of individuals and minority groups, to ensure

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[24] Organisation for Security and Co-operation in Europe, *Guidelines on Freedom of Peaceful Assembly*, (Second edn, ODIHR 2010) 17-21.
[25] Organisation of Secruity and Co-operation in Europe, *Human Rights Handbook on Policing Assemblies* (Poligrafus Jacek Adamiak 2016) 22.
[26] ibid 23.
[27] United Nations Office on Drugs and Crime and the Office of the United Nations High Commissioner for Human Rights, *Resource Book on the Use of Force and Firearms in Law Enforcement* (United Nations 2017) 106.
[28] ibid 114.
[29] ibid.
[30] Organisation of Security and Co-operation in Europe, *Guidebook on Democratic Policing* (n 1) 11; Della Porta D and Diani M, *Social movements: an introduction* (Oxford: Blackwell, 2006) 198.

that citizens can enjoy their freedom and liberty.[31] In contrast, while most of the constitutions in hybrid regimes commit to the protection of human rights, they do not produce much substantial change in society.

Fundamentally, law enforcement personnel in hybrid regimes do not see their role as the guarantor of human rights and democratic principles. Bayley has argued that police practices towards human rights protection in the developing world change too slowly because law enforcement personnel have not yet shown an acceptable level of commitment towards human rights.[32] He suggests that the success of human rights reform relies on effecting change in the mindset of the police—'that government is a public good not an opportunity for private advantage, that customary authority is not top-down rather than bottom-up and that national identity take precedence over subnational ones.'[33] Building on these political imperatives, Bayley points out that any police reform to enhance human rights protection must work around the local customs and the historical and cultural settings.[34] Therefore, the colonial policing mindset (that we discussed earlier) should be taken into consideration.

In short, this section has illustrated that there are two characteristics that the police in hybrid regimes have in common: that the police are not insulated from political influence and there remains a mismatch between policing norms and the norms of international human rights standards and democratic principles. The coalescence of these two risks a damaging mix. Police in hybrid regimes have not yet adopted a service-oriented approach because they claim their legitimacy from more than one source. They still possess a colonial mentality and prioritise their duty to protect the realm over the duty to protect the rights of their people. While there has been a global agenda to move towards democratic policing, this has not resulted in changes in protest policing in hybrid regimes. Here, the police fail to see themselves either as the guarantors of human rights or the protectors of democratic principles. In order to identify why and how police in hybrid regimes fail to protect freedom of assembly, the next section examines in greater detail the different elements that policing scholars have elaborated as underpinning the principle of 'democratic policing'.

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[31] Nathan Pino and Michael D Wiatrowski, *Democratic policing in transitional and developing countries* (Ashgate Pub. Co. 2006) 72.
[32] Bayley, 'Human rights in policing: a global assessment' (n 22) 543.
[33] ibid 545.
[34] ibid.

5.2 Curtailing the scope of freedom of assembly through public order policing

This chapter is premised on the observation that public order policing in hybrid regimes differs markedly from that in consolidated democracies. This is, in part, due to the non-democratic sources of police legitimacy (guardianship institutions, as discussed in 5.1) and the elite-driven nature of political contention. This thesis (in 3.4.2) has pointed out that while hybrid regime incumbents seek to keep political competition partly open, they also rely heavily upon restrictions on freedom of assembly to filter out significant threats emanating from the street. Hybrid regime incumbents are thus incentivised both to limit the ability of opponents to protest and to mobilise pro-regime supporters to display their dominance.[35] This section seeks to establish that hybrid regimes curtail the right to freedom of assembly through the manipulation of public order policing. More specifically, public order policing in hybrid regimes alternates (or 'swings') between democratic and authoritarian styles because the concept of 'democratic policing' is missing.

Let us unpack this concept a little further, Pino and Wiatrowski define 'democratic policing' as a policing concept that supports and is consistent with democratic values and human rights.[36] They explain that democratisation in emerging democracies was less successful because their police did not uphold the concept of democratic policing.[37] Neild points out that police reforms must dismantle authoritarian structures and move from "regime policing" to "democratic policing".[38] Authoritarian leaders often see police as a quick fix and a tool to use coercive force to quell public disorder. In contrast, democratic leaders rather focus on maintaining a policing ethos that reflects the principle of 'democratic policing'.[39] In this light, the following section examines the deficits of public order policing in hybrid regimes in greater details by expanding on the concept of 'democratic policing' and its constituent elements, namely: the rule of law, legitimacy, transparency and accountability, and subordination to civil authority.[40] It attempts

[35] Graeme B Robertson, *The politics of protest in hybrid regimes. managing dissent in post-communist russia* (New York : Cambridge University Press, 2011) 27.
[36] Pino and Wiatrowski (n 31) 73, 81.
[37] ibid 70.
[38] Rachel Neild, 'Confronting a Culture of Impunity' in Andrew Goldsmith and Colleen Lewis, *Civilian Oversight of Policing : Governance, Democracy, and Human Rights* (Bloomsbury Publishing Plc 2000) 225.
[39] Pino and Wiatrowski (n 31) 69.
[40] ibid 83-87.

to demonstrate that the incumbents in Cambodia, Malaysia, and Thailand subvert these principles to manipulate protest policing in their regimes.

5.2.1 The rule of law

According to Pino and Wiatrowski, the rule of law requires that laws and legal institutions are the products of the democratic process.[41] Police activities are then carried out with due process and within the scope of the laws. Police are law enforcers, not judges. They must not adjudicate or punish. The rule of law directs that suspects must be prosecuted under fair trials and the police must not align themselves with political parties or with particular individuals. They must be answerable only to the law rather than to particular members of society. On the basis of this account, it can be argued that Pino and Wiatrowski's conception of the principle of the rule of law conforms only to the formal conceptions of the rule of law (as elaborated further below).

The rule of law, as a legal principle, has many different definitions.[42] In particular, it can be classified as either 'formal' or 'substantive'.[43] Formal conceptions focus on the law-making procedure. They are not concerned with assessing the merits or defects of any particular law but, rather, merely with justifying the law by examining whether certain formal precepts of the legislative process have been met.[44] Raz, for example, observes that a non-democratic regime may meet the formal requirement of the rule of law without producing what might be termed "a good society".[45] In contrast, substantive conceptions of the rule of law take the view that good laws must go beyond these minimal characteristics espoused by the formalists. Laws must also comply with fundamental values such as justice, equality, and human rights.

Both formal conceptions and substantive conceptions are imperfect. On the one hand, formal conceptions leave space for oppressive regimes to claim compliance with the rule of law. This risk is heightened because, as Thomas Carothers notes, 'western policymakers and commentators have seized upon [the rule of law] as an elixir for countries in transition.'[46] On

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[41] ibid 83.

[42] Olufemi Taiwo, 'The rule of law: the new leviathan?' (1999) Canadian Journal of Law and Jurisprudence 151, 154.

[43] Keith Syrett, *The foundations of public law : principles and problems of power in the British constitution* (2nd edn, Palgrave 2014) 54.

[44] Paul Craig, 'Formal and substantive conceptions of the rule of law: an analytical framework' (1997) Public Law 467.

[45] Syrett (n 43) 55 citing J Raz, 'The Rule of Law and its Virtue' (1977) 93 Law Quarterly Review 195-196.

[46] Thomas Carothers, 'The Rule of Law Revival' (1998) 77 Foreign Affairs 95, 99. some scholars embraced the rule of law as the 'signal virtue of civilized societies'. See, Neil MacCormick, *Rhetoric and the rule of law : a theory of legal reasoning* (Law, state, and practical reason, Oxford : Oxford University Press

this basis, Rajagopal argues that governments prefer the term 'rule of law' over the term 'human rights' because the former 'is much more empty of content and capable of being interpreted in many diverse, sometimes contradictory, ways'.[47] Hence, formal conceptions of the rule of law could operate to camouflage mere 'rule by law'. On the other hand, substantive conceptions run the risk of falling into a broader question of what constitutes a good society. Craig argues that the substantive conceptions of the rule of law are meaningless because they simply reproduce the conclusions of the political theory to which it attaches.[48] For example, in many Western democracies, liberalism is commonly regarded as providing the ideological template for a good society.[49] Liberalism, in turn, yields its own substantive definitions of the rule of law (which might include the promulgation of laws that seek to achieve the accommodation of diversity within society).[50] In other places, where political philosophies are different, the rule of law is understood differently.

Hybrid regimes might be regarded as following the most formal conceptions of the rule of law. The rule of law in hybrid regimes appears, at least to the Western liberal democracies, as "rule by law"—where power is simply exercised via positive law.[51] It matters not whether the law – and its implementation through protest policing – can be said to promote certain civic values or human rights. Instead, the minimalist requirements of the rule of law can be satisfied as long as the police formally adhere to the duly enacted laws. Where these laws in turn reflect the long-term parliamentary dominance of the incumbent regime (rather than the popular will of the people), the rule of law then becomes a vehicle for tyranny, and Public Assembly Acts (PAAs) inevitably fail to protect the right to freedom of peaceful assembly.

The PAAs in Cambodia, Malaysia, and Thailand were enacted with very little public participation. The parliamentary representatives in these countries are politically subordinate to the executive branch and do not possess any real power – they act merely as a rubber-stamp.[52] Thailand's Public Assembly Bill went through the National Assembly, in which all its members

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2005) 12.

[47] Balakrishnan Rajagopal, 'Invoking the rule of law in post-conflict rebuilding: a critical examination' (2008) *William and Mary Law Review 1347*, 1359.

[48] Craig (n 44) 468.

[49] Syrett (n 43) 57.

[50] Duncan Ivison, 'Pluralism and the Hobbesian logic of negative constitutionalism' (1999) 47 Political Studies 83 89.

[51] Christopher May, *The rule of law : the common sense of global politics* (Edward Elgar 2014) 45.

[52] Rory Truex, 'The Returns to Office in a "Rubber Stamp" Parliament' (2014) 108 The American Political Science Review 235

were appointed by the military. Although the Thai PAA states that its enactment was to set out clear rules and regulations to enable the freedom of assembly under the ICCPR[53], there was no public participation in making this law. Seventeen out of twenty-two Sub-Legislative Committee Members in charge of reviewing the bill were either police officers or soldiers. During its hearing procedure, only the government agencies and the representative of the courts participated in the committee's inquiry.[54] The Thai PAA fulfils the formal conceptions version of the rule of law by limiting the freedom of assembly through a law which was enacted by the parliament. However, its legislative process lacked any democratic scrutiny. The PAA was enacted by unelected legislators and there was no public participation during the enacting process. Hence, it does not reflect the popular view of the people on the enjoyment of freedom of assembly.

Similarly, it took the Cambodian Parliament only three days to debate the law on peaceful demonstrations.[55] The law was passed quickly with affirmative votes of 76 out of 101. The bill lacked public participation, especially form the civil society actors. Cheam Yeap, an MP from the CCP (the main political party), made a comment (illustrating the finality of formal legal enactments): 'if the opposition is elected, they can make amendments [to the law]'.[56] The CCP has been one of the longest-ruling parties in the world. Yeap's comment reflects the most formal conception of the rule of law – the rule of law in Cambodia means the rule of law that is designed by the CCP. The opposition has no other option but to bow to the legal framework.[57]

In Malaysia, when the Bersih movement gained momentum in the 2010s, the government proposed the Peaceful Assembly Bill to contain challenges from the streets. Whiting emphasises that parliamentary scrutiny of legislation in Malaysia is inadequate because the opposition has a very short period to examine the bills in order to prepare questions or suggest

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[53] Public Assembly Act 2015 (Thailand PAA) annotation.

[54] National Assembly, 'Report of the Public Assembly Bill Committee' [รายงานของ คณะกรรมาธิการวิสามัญพิจารณาร่างพระราชบัญญัติการชุมนุมสาธารณะ พ.ศ....] <https://ilaw.or.th/sites/default/files/d050158-10.pdf> accessed 2 November 2017.

[55] Eang Mengleng, 'National Assembly Passes Demonstration Law Limiting Demonstrations' (*Cambodia Daily*, 22 October 2009) <https://www.cambodiadaily.com/news/national-assembly-passes-demonstration-law-limiting-demonstrations-93131/> accessed 28 February 2018.

[56] ibid.

[57] Astrid Norén-Nilsson, 'Cambodia democracy on the ropes' (*East Asia Forum*, 5 November 2017) <http://www.eastasiaforum.org/2017/11/05/cambodian-democracy-on-the-ropes/> accessed 1 March 2018.

any meaningful amendment.[58] The debate on the bill took only a few hours and it was passed into law without substantive scrutiny because the opposition protested the bill by a walkout.[59] Although one could argue that it is normal that the government, under the Westminster model, has the capacity to force its legislative agenda through the lower house with its majority, the Malaysian parliamentary committees do not operate thorough investigation and analysis. In practice, after the second reading, the whole house of the Dewan Rakyat is converted to a committee to review the bill. The process is rushed with little opportunity for substantial debates. Whiting notes that there was not any parliamentary standing committee whose duty was to effectively scrutinise bills in order to make sure that they aligned with the existing legislation and international law.[60]

When the substantive rule of law is absent from the legislative process (and the mechanism of enforcement), public order policing in these three hybrid regimes reflect a formalistic understanding of the letter of the law. Even strict adherence by the police to the rule of law in its formal conception is not without difficulties for protesters. Rigid enforcement of everyday, ordinary laws – or their use as a means to quash or dampen protests – is a mark of public order policing in hybrid regimes. That is not to say it does not occur elsewhere but its scale and preponderance (in combination with other characteristics identified in this chapter) mark the difference. Such ordinary laws offer the police greater latitude if used without any appreciation of the political context within which protest necessarily occurs. For example, Thai police apply the PAA in conjunction with other laws such as the Cleanliness and Tidiness of the Country Act, the Land Traffic Act, the Highway Act to arrest key organisers or harass participants, without considering *lex specialis* (special laws ought to take preference over general laws), to impose petty fines. Although these laws do not impose harsh penalties on the violators, it provides opportunities for the authorities to arrest key protesters and to discourage anyone from expressing their opinion. Consequently, the law creates a chilling effect among the protesters and hinders the freedom of assembly.[61] These tactics are effective in removing organisers and

[58] Amanda Whiting, 'Emerging from Emergency Rule? Malaysian Law 'Reform' 2011-2013' (2013) 14 Australian Journal of Asian Law 1 39.
[59] ibid.
[60] ibid.
[61] iLaw, '364 วันหลังรัฐประหาร: ประมวลสภานการณ์เสรีภาพในการแสดงออก' <http://freedom.ilaw.or.th/en/node/240> accessed 29 December 2015.

leading figures from protest sites.[62] Sirawit's Post-it protest (discussed below) clearly illustrates such tactics.

On 1 May 2016, Sirawit organised a public gathering on a walkway adjunct to a Skytrain station (BTS) calling the government to release a political prisoner. Around a hundred participants came to write their political messages on Post-its and stick them to the station's wall.[63] During the gathering, Sirawit was surrounded by policemen. Then, he threw Post-it papers to other participants and asked them to write their messages. He was arrested and sent to a nearby police station. After detaining him for several hours, the police fined him for littering. The police invoked only the Cleanliness and Tidiness of the Country Act. The Court of the First Instance found him guilty under the Cleanliness and Tidiness of the Country Act B.E. 2535 and ruled that he could have given out the post-its by hand rather than throwing them.[64] As such, the court ruled that Sirawit had the intention to litter since there was no expectation that the participants would collect the post-its left behind. Later, the Appeal Court reaffirmed the sentence. In this case, the police successfully stopped the gathering by detaining the organiser. The Court of Justice adhered to a purely formal conception of the rule of law by applying formulaic understandings of 'littering' (under the Cleanliness and Tidiness of the Country Act) without also giving any consideration to the question of whether substantive human rights (specifically, the right to freedom of peaceful assembly) were engaged, interfered with or violated. The Court in Sirawit's case failed to consider that Sirawit was intimidated by many police officers surrounding him. It was the police's interference that caused Sirawit to throw Post-it papers to others.

This rigid application of law is a hallmark of public order policing. It is not always the case – as we shall see – but that brings with it claims of inconsistency, arbitrariness and uncertainty, oftentimes as damaging to the exercise of the right to protest as draconian enforcement because of the unpredictability of the police response.

During the same event, Titari, a participant in Sirawit's gathering, was arrested and detained for five hours at the local police station and finally fined her under the same Act for

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[62] These tactics are also common even in consolidated democracies. However, the difference is that consolidated democracies have much better access to effective judicial review comparing to authoritarian regimes. Amory Starr, Luis A. Fernandez and Christian Scholl, *Shutting down the streets : political violence and social control in the global era* (New York University Press 2011) 86.

[63] Prachatai, 'อุทธรณ์ยืนสั่งปรับ 'จ่านิว' 1,000 กรณีแจกโพสต์อิทให้คนเขียนรณรงค์ ผิด พ.ร.บ.ความสะอาดฯ' (ประชาไท, 3 October 2017) <https://prachatai.com/journal/2017/10/73529> accessed 24 October 2017.

[64] Bangkok South Municipal Court No. 1619/2559.

unauthorised advertising by flyposting. However, the Court of the First Instance found Titari not guilty. The Court saw that her action was political expression rather than an illegal flyposting.[65] Despite being arrested at the same event by the same group of police officers, these two cases were decided by different reasoning. To me, both Titari's and Sirawit's actions were the same political expression. In my opinion, Sirawit's case was even more politically motivated because he had organised many anti-military protests while Titari was only a participant Sirawit's activity. These two cases demonstrate that the different conception of the rule of law leads to contradicting precedents.

The tactic of invoking the ordinary criminal laws to remove protest leaders has also been used in environmental protests. On 27 November 2017, a group of anti-coal protesters submitted a notification of their demonstration to the local police, but the police responded by stating that their demonstration was illegal because their notice did not meet the 24-hour requirement. However, the protesters continued with their plan. The march had been peaceful until they met a police cordon where police and soldiers used force to disperse the gathering. [66] Police arrested some protesters and detained them on charges of resisting arrest, injuring state officers, obstructing traffic, carrying weapons (flagpoles) in public areas.[67] At the time of their arrests, charges were made under the Highway Act, the Land Traffic Act, and the Penal Code without regarding the concept of *lex specialis*.[68] These protesters were brought to a police station and detained for a night.[69] In contrast, on the same day, the Regional Army sent an invitation to the press in Songkhla to report about a public assembly supporting Thepa coal power plant project in front of the district office. [70] It was clear that the authorities applied a double standard in this

[65] Bangkok South Municipal Court No. 1620/2559.

[66] Thai PBS, '16 coal-fired power plant protester prosecuted' (*Thai PBS*, 13 January 2018) <http://englishnews.thaipbs.or.th/16-coal-fired-power-plant-protesters-prosecuted/> accessed 5 March 2018.

[67] cf *Bukta and Others v Hungary*, *Kudrevičius and others v Lithuania*, and *Oya Ataman v Turkey* – the ECtHR has established that a failure to comply with the notification alone does not justify a dispersal as long as the assembly remained peaceful.

[68] Teeranai Charuvastra, 'Coal protesters face prison after police scuffle' (*Khaosod*, 28 November 2017) <http://www.khaosodenglish.com/politics/2017/11/28/coal-protesters-face-prison-police-scuffle-photos/> accessed 5 March 2018.

[69] Later, on 27 December 2018, Songkhla Provincial Court acquitted all the participants but fined two organisers for failing to notify the police under the PAA. See Songkhla Provincial Court Black No.115/2561, 12 January 2018.

[70] Khaosod, 'จี้หยุดเลือกปฏิบัติกลุ่มต้านโรงไฟฟ้าเทพา [Stop using double stadards agaist anti-Thepa Power Plant]' 27 November 2017) <https://www.khaosod.co.th/politics/news_648145> accessed 5 March 2018.

conflict. While the anti-coal power plant protesters were arrested, the local authorities explicitly mobilised and facilitated the power plant's supporters.

That illustrates very well the manipulation of the same law for different political ends. That lack of the understanding of the substantive rule of law is further betrayed when the police routinely apply double standards in enforcing the 24-hours prior notification requirement. While anti-military government protesters and environment protesters were arrested or dispersed on the ground of no-notification, the regime supporters, especially those who organised assemblies when the prime minister made his regional visits, have never been dispersed or arrested on the spot on the same ground – even when a public assembly clearly violated the notification requirement and assembled on the prohibited area. For example, on 1 February 2018, a group of pro-regime supporters organised a public assembly in front of the Defense Ministry to show their supports for the Deputy Prime Minister who was accused of corruption.[71] The police did not arrest them on the spot but rather detained and prosecuted the organisers four days later, after several anti-regime activists called it a double standard. The Dusit Municipality Court fined them for assembling on a prohibit area.[72] The public prosecutor did not even raise the issue relating to no-prior-notification. In my opinion, had the organisers submitted a notification, the police would have an opportunity to stop the picketing before it happened. Therefore, this is still another double standard in enforcing the prior-notification requirements.

Turning to Cambodia, the most formal conception of the rule of law is illustrated by the contrasting nature of the Cambodian PAA and Cambodian public order policing in practice. The PAA was enacted with an aim to assure freedom of expression of Khmer citizens through peaceful assembly.[73] The implementation guide to the Law on Peaceful Assembly makes a reference to the right of peaceful assembly under the ICCPR.[74] It states that the implementing authorities shall have the duty to adhere to the principles such as having a presumption in favour of holding peaceful demonstrations, having appropriate restrictions, non-discrimination, and

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[71] Asaree Thairakulpanich, 'Don't resigh, plead Prawit Wongsuwan Fans (VIDEO)' (*Khaosod*, 1 February 2018) <http://www.khaosodenglish.com/politics/2018/02/01/dont-resign-plead-prawit-wongsuwan-fans-video/> accessed 22 July 2019.

[72] Khaosod, 'ปรับ 3 พัน แท็กซี่ชูป้ายเชียร์ 'บิ๊กป้อม' หน้ากลาโหม' (*Khaosod*, 5 February 2018) <https://www.khaosod.co.th/politics/news_739307> accessed 22 July 2019.

[73] Law on Peaceful Assembly 2009 (Cambodia PAA) s2.

[74] Ministry of Interior, 'Implementation Guide to the Law on Peaceful Demonstration' <http://cambodia.ohchr.org/sites/default/files/Implementation_Guide-Rev_Eng.pdf> accessed 2 November 2017.

being flexible when dealing with demonstrations.[75] In contrast, the authorities routinely use excessive force to disperse public assemblies.[76]

The lack of the understanding of the substantive rule of law can be seen again when the government takes steps to repress grassroots protesters.[77] Those who joined protests or invited others to join demonstrations were charged on the ground of inciting people to unrest.[78]As a government offensive tactic, there were as many as 306 protesters arrested in 2010. Around half of them were released on bail after a period of detention.[79] Arrests and detentions were aimed to scare protesters and to suppress criticism.[80] Such tactic made land activists avoided using the term 'protest' to describe their social movements on the street.[81] In 2010, despite being a member of the parliament, Sam Rainsy was sentenced, in absentia, to two years imprisonment after he led a political protest in which border markers between Cambodia and Vietnam were uprooted.[82] He was accused of inciting villagers to uproot the marker along the border. It was clear that Rainsy's case was politically motivated in order to crack down on the opposition leader.[83]

Even assembling in a designated area like in the Freedom Park in Phnom Penh does not protect protesters from policing intervention. In July 2014, numbers of participants in anti-government demonstrations were arrested and charged with criminal offences at the Freedom Park.[84] The protests went peacefully until the park's security guards tried to remove a banner hung by the opposition party, the CNRP. Three CNRP leaders were arrested on the ground of involvement in the violence. Seven CNRP's lawmakers were arrested and detained for several days on the

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[75] ibid.

[76] LICADHO, *The Danger of Dissent: Attacks on Human Rights Defenders* (2017); Ministry of Interior, 'Implementation Guide to the Law on Peaceful Demonstration' 3-6-4.

[77] Steve Heder, 'Cambodia in 2010 Hun Sen's Further Consolidation' (2011) 51 Asian Survey 208, 211.

[78] Chi Mgbako and others, 'Forced Eviction and Resettlement in Cambodia: Case Studies from Phnom Penh' (2010) 9 Wash U Global Stud L Rev 39, 56.

[79] May Titthara, 'Over 300 land protesteors charged this year' (*Phom Penh Post*, 30 December 2010) <http://www.phnompenhpost.com/national/over-300-land-protestors-charged-year> accessed 25 September 2017.

[80] Mgbako and others (n 78) 43.

[81] Tim Frewer, 'Land and Conflict in Cambodia' (*New Mandala*, 6 January 2012) <http://www.newmandala.org/land-and-conflict-in-cambodia/> accessed 25 September 2017.

[82] Associated Press, 'Cambodia: Opposition Leader Convicted in Absentia' (*New York Times*, 23 September 2010) <http://www.nytimes.com/2010/09/24/world/asia/24briefs-Cambodia.html> accessed 25 September 2017.

[83] BBC, 'Cambodia issues Sam Rainsy arrest warrant' (*BBC*, 1 January 2010) <http://news.bbc.co.uk/1/hi/world/asia-pacific/8436851.stm> accessed 25 September 2017.

[84] Amnesty International, *Taking to the Streets Freedom of Peaceful Assembly in Cambodia* (Amnesty International Ltd 2015) 105.

ground of 'insurrection'. The CNRP later condemned the government of arrest and detention to intimidate and threaten the CNRP for political gain.[85] Amnesty International reported that cases related to politically motivated detainees such as human rights defenders and political opposition activists are 'routinely resolved through political negotiations between the CPP and CNRP'.[86] If successful, they would be released on bail, given suspended sentences or a Royal Pardon, or a combination of the three. These examples show that the Cambodian PAA, although has an objective to protect freedom of assembly, has failed to adequately guide public order policing.

In Malaysia, the most formal conception of the rule of law is reflected in the PAA. The Malaysian PAA, until 4 July 2019, explicitly banned any street protest – 'an open-air assembly which begins with a meeting at a specified place and consists of walking in a mass march or rally for the purpose of objecting to or advancing a particular cause or causes.'[87] The absence of substantive rule of law in public order policing is demonstrated when the police apply the domestic law without having to consider the international standards. In 2012, three Bersih movements leaders Anwar Ibrahim, Azmin Ali, and Badru Hisham Shahrin were charged on the ground of organising a street protest, assembling illegally, and disobeying an order duly promulgated by a police officer.[88] Later, the government and the KL City Hall launched civil lawsuits against these Bersih leaders to make them responsible for the clean-up cost and damages caused by the crowd.[89] This could be seen as a Strategic Lawsuit Against Public Participation (SLAPP) to bankrupt the Bersih organisers. Apart from the PAA, the Malaysian police can initiate several laws to arbitrarily arrest protesters and silence political dissenters (as discussed at 4.2.2): Sedition Act, The Printing Presses and Publication Act, the Official Secrets Act, the University and University Colleges Act, the Police Act, and the Society Act. Without considering the substantive rule of law, the police exercise their discretion to detain protest organisers and participants.[90]

The examples presented above illustrate that the inadequacy of the substantive rule of law in public order policing across Cambodia, Malaysia, and Thailand. The PAAs in these three

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[85] Radio Free Asia, 'Three Cambodian Opposition Leaders Held Over Freedom Park Protests' 2 August 2014) <http://www.rfa.org/english/news/cambodia/court-08022014213824.html> accessed 25 September 2017.

[86] Amnesty International, *Courts of Injustice Suppressing Activisim Through the Criminal Justice System in Cambodia* (Amnesty International Ltd. 2017) 10.

[87] Peaceful Assembly Act 2012 (Malaysia PAA).

[88] Whiting (n 58) 13.

[89] ibid 14.

[90] ibid 5.

regimes were enacted and enforced under the most formal conception of the rule of law. When the police in these regimes have adhere to their former colonial mentality and not culturally attuned to international human rights standards (as discussed above at 5.1), they perform their duties according to the rule by law rather than the rule of law –they all claim compliance with the rule of law (in the sense of the most formal conceptions) but fail to facilitate and protect freedom of assembly to everyone equally.

5.2.2 Legitimacy

Legitimacy might be seen as comprised within the rule of law or at least a function of and generated by adherence to it. Nevertheless, Pino and Wiatrowski's focus on the principle in the context of democratic policing is on 'the source of legitimacy'. This section follows that analysis, locating it within a discussion of the legitimacy of public order policing in hybrid regimes. It argues that authorities in hybrid regimes can switch between alternative source of legitimacy to empower them to use excessive force against protesters. Normally, they seek legitimacy from rational-legal authority like those in consolidated democracies. When they need more power, i.e. to employ excessive force, they seek legitimacy from the guardian institutions which possess traditional authority or charismatic authority, in the Weberian sense.

Legitimacy, according to Pino and Wiatrowski, is 'the perception that those exercising authority are doing so in accordance with the defined purpose of a social institution or law'.[91] Where such institutions are perceived as legitimate, people tend to comply willingly when they are directed to do so. As a result, the authority is less likely to use excessive force against the people. [92] On this issue, Weber has suggested earlier that legitimacy leads to obedience as a person believe that 'the person giving orders has the right to do so'.[93] He identified the three ideal types of legitimate authority: traditional, charismatic, and rational-legal.[94] First, the traditional authority, such as an absolute monarchy, is based on a belief in tradition and practices passed on from previous generations. Second, the charismatic authority is based on the special characteristics of an individual leader such as a religious prophet or a populist dictator.[95] The third, and last legal authority, is based on laws and regulations. Weber has argued

[91] Pino and Wiatrowski (n 31) 84.
[92] ibid.
[93] William Brett, Jason Xidias and Tom McClean, *An analysis of Max Weber's Politics as a vocation* (Routledge 2017) 40.
[94] M Weber and others, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press 1978) 215-216.
[95] Brett, Xidias, and McClean (n 93).

that the mix of charismatic and legal-rational authority is the key to becoming a great leader in a modern state. [96] Hybrid regime incumbents not only seek legitimacy from the mixed use of charisma, and rational-legal authority, but they also rely heavily on traditional forms of authority.

The argument being propounded here is that public order policing in hybrid regimes is not always easy to conceive of as legitimate for three reasons, taken cumulatively: claims are made to non-rational-legal authority; the police too easily resort to excessive force; and there is an over-reliance on executive emergency powers. Legitimacy in public order policing in hybrid regimes can come from all three types of authority. This thesis shows (above at 3.2.2.2) that democracies routinise collective actions through legal frameworks to ensure that public assemblies broadly support and enrich the democratic process. IHRL and international standards also attempts to standardise public order policing practices. Hence, in light of Weber's tripartite classification of authority, democracies claim legitimacy in public order policing primarily through rational-legal authority. In contrast, the authorities in hybrid regimes switch between the three grounds of authority. They switch to traditional or charismatic authority to claim the legitimacy beyond the limit of rational-legal authority (which has incorporated international standards on public assemblies). Authorities in consolidated democracies are bound by international standards and IHRL.[97] Both the judiciary and the parliament actively review government actions. In hybrid regimes, there are also the judiciary and the parliament to review the use of force to disperse public assemblies, but they are incapable of scrutinising the government. This lack of scrutiny reflects extended claims to legitimacy based in tradition and charisma.

In Thailand, when a protest becomes critical of the regime, the authorities seek legitimacy from the guardian institution to forcefully disperse the protest by initiating emergency laws –often without properly justifying all the requirements before derogating from the ICCPR (discussed at 2.4.5). However, it is common to see Thai authorities assign the military to assist the police, or even to take over public order policing tasks.[98] In doing so, the use of lethal firearms to

[96] ibid.

[97] The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials Adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Principle 12-14: using force or firearms shall be avoided or be used only to the minimum extent. The use of firearms in the case of dispersing violent assemblies shall be applied only when less dangerous means are not practicable.

[98] There is a sharp contrast between the police dispersal operation on 7 October 2008 in front of the Parliament where police did not use lethal weapons and the military dispersal operation on 18 May 2010

control the situation becomes somehow more 'legitimate'. The Police Handbook on the Public Assembly Act states that officers must attempt to negotiate to deescalate the situation before using reasonable force according to the principle of proportionality and necessity.[99] Officers must avoid using force, crowd control instruments, or weapon unless it is necessary; force must be used only to the minimum extent in light of the particular circumstances (similar conditions as described in principle 9 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Official). However, these duties and guidelines apply to the police only. There is not any specific guideline on public order policing by the military. The military has a different view on public order policing.

The military, as the guardian institution, has been a tool to disperse public assemblies with lethal force.[100] Despite many violent crackdowns, no senior military officer has ever been sentenced by the judiciary for using excessive force. The Red-shirt crackdown in 2010 clearly shows that the government transferred public order policing to the military and handed down a new rule of engagement allowing security forces to use lethal weapons.[101] The authority depicted protesters as armed terrorists.[102] The Internal Security Act 2008 (ISA) and Emergency Decree on Public Administration in Emergency Situation 2005 provide legitimate means to use the military to suppress political protests. Then, the military deployed sniper squads and armoured vehicles to disperse protesters causing deaths and injuries to many unarmed protesters.

Prior to the enactment of the Thai PAA, legitimacy in public order policing came from the Emergency Decree. The Decree allows the authorities to ban any political gathering regardless

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at Rajaprasong. In the later operation, the military was authorized to used life-rounds including light-tanks to disperse protesters. See Robert Horn, 'On Bangkok's Bloody Streets, a Crackdown Breaks Protests' (*Time,* 19 May 2010) <http://content.time.com/time/world/article/0,8599,1990184,00.html> accessed 22 July 2019.

[99] The Royal Thai Police, *Public Assembly Act B.E.2558 Handbook* (2015) 81.

[100] cf The United Nations Office on Drugs and Crime and the Office of the United Nations High Commissioner for Human Rights (n 27) 106.

[101] Human Rights Watch, 'Descent into Chaos Thailand's 2010 Red Shirt Protests and the Government Crackdown' 3 May 2011) <https://www.hrw.org/report/2011/05/03/descent-chaos/thailands-2010-red-shirt-protests-and-government-crackdown> accessed 24 August 2016.

[102] Later, the Court of Justice has ruled that the protesters in the 2010 crackdown were rioters not terrorists: Civil Court judgment Black No. ฝบ.4326/54 (1 March 2013); Supreme Court judgment Black No. 8132/2561 (30 April 2019).

of the degree of violence an assembly may pose.[103] Between 2009-2015, there were nine events that led the government to declare a "controlled zone" under the Internal Security Act (ISA) to restrict the freedom of assembly.[104] By invoking the ISA, the Prime Minister can set up an Internal Security Operation Command (ISOC) to oversee security issues and enforce curfews, direct traffic and prohibit the movement of people. The ISA offers a means to impose special security measures without having to declare a state of emergency. The main incentive for its invocation was 'to give the government heightened powers to deal with any unrest'.[105] During the Red-shirt protests between 29 August 2009 and 20 April 2010, the ISA was invoked 5 times.[106] Between November 2012 and April 2014, the Yingrak administration invoked the ISA three times to restrict Yellow-shirt protests. The Emergency Decree on Public Administration in Emergency Situations 2005 was seen, by both the Red-shirt government and Yellow-shirt government, as a common tool to contain public assemblies. Thupthong and Pankaew have pointed out that, if the insurgencies in the Southern most provinces of the country are excluded, political protests were the only reason that led to the declaration of an emergency situation under the Emergency Decree.[107]

The International Commission of Jurists commented when the Decree was declared that the Prime Minister and delegated officials can exercise the state power that 'go beyond the limited and proportionate response to a grave threat to the life of the nation, envisaged by Article 4,

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[103] Sarawut Thupthong, 'Thai State and the Extertion of Authority in Emergency Situation: A Case Study of the Declaration of Emergency Decree on Public Adminstration in Emergency Situation A.D. 2005 from 2009 - 2010' (Master of Political Science Thesis, Thammasat University 2015).

[104] Reuters, 'Thai protesters force Asia summit cancellation' (11 April 2009) <http://www.reuters.com/article/us-asean-summit/thai-protesters-force-asia-summit-cancellation-idUSTRE53A06H20090411> accessed 13 September 2017.

[105] Legacy Phuket Gazzette, 'ASEAN meeting: Internal Security Act to be imposed for 15 days' (1 July 2009) <https://www.phuketgazette.net/phuket-news/Asean-meeting-Internal-Security-Act-be-imposed-15-days> accessed 13 September 2017.

[106] iLaw, 'เก็บอาวุธทหาร: ยกเลิกกฎหมายความมั่นคง [confiscate soilders' weapons: withdraw security laws] ' (2012) <https://ilaw.or.th/node/273> accessed 13 September 2017.

[107] Sarawut Thupthong and Attasit Pankaew, 'ระบบกฎหมายความมั่นคง ข้อเสนอแนะสำหรับการปฏิรูปโครงสร้างและองค์กรในการใช้อำนาจตามหลักธรรมาภิบาลภาคความมั่นคง [Security Law System: Some Guidelines for the Reform of the Structures and Organisations that Exercise the Power in Accordance with Security Sector Governanace]' (2015) 34 Thammasart University Journal 79; Sarawut Thupthong, สถานการณ์ฉุกเฉินและความรุนแรง : ศึกษาความเหมาะสมสำหรับการควบคุมและจัดการการชุมนุมประท้วงของภาครัฐในช่วง พ.ศ. *2552-2553* ผ่านหลักนิติรัฐ [*The state of emergency and violence : a study on the appropriate measures for controlling and managing mass demonstrations in 2009-2010]* (Thammasat University 2014) 107.

ICCPR.'[108] The Commission expressed the view that there were at least three aspects of Thailand's emergency laws that weaken the rule of law in Thailand: [109] First, definitions and provisions under the laws are vaguely defined which offer opportunities for law enforcement officials to criminalise a wide range of behaviours (even if they do not pose any demonstrable security threat). Second, fundamental rights are at risk of being violated due to the historical fragility of Thailand's legal institutions and the frequent interventions of the military. Last, the emergency laws confer substantial discretion upon the security forces which undermines the principle of civilian authority.[110]

Between 2015-2018, the source of the legitimacy for public order policing was a mixed between the Junta's orders and the PAA. The National Council for Peace and Order (NCPO) released the Order No.3/2558 prohibiting any political gathering of five or more persons imposing a penalty up to six-month imprisonment. Under this Order, the military has the power to detain protesters up to seven days before transferring the detainee(s) to police. In 2015, it enacted the PAA aiming to set a standard for public order policing. However, the military government did not revoke the NCPO Order 3/2558. The NCPO continued to prosecute political protesters under both the PAA and the NCPO Order 3/2558. There were more protesters prosecuted under the NCPO Order during the first two years of the military rule. [111] For example, on 21 September 2017, organisers and participants of an academic seminar were charged under NCPO Order No.3/2558 because they affixed a poster in the conference room displaying: 'an academic stage is not a military camp'. Their arrests created a chilling effect among academics and represented a clear challenged the principle of academic freedom.[112]

It is worth noting that under the NCPO Order, arrested protesters were prosecuted in the Military Court, casting yet further doubt on claims to legitimacy. This means that the NCPO created a means to use the Military Court to selectively prosecute political dissenters. This procedure runs parallel to the normal procedures of the Court of Justice. Furthermore, the judiciary does not have the authority to review the NCPO Order because the Thai constitution

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[108] International Commission of Jurists, *The Implementation of Thailand's Emergency Decree, July 2017* (2010) ii, 7.

[109] International Commission of Jurists, *Thailand's Interal Security Act: Risking the Rule of Law?* (2010) ii.

[110] ibid.

[111] Prachatai, 'กลไกการควบคุมเสรีภาพในการแสดงออกภายใต้ระบอบ คสช. [the NCPO's Mechanism limiting freedom of expression] ' (*Prachatai*, 18 February 2018) <https://prachatai.com/journal/2018/02/75504> accessed 3 March 2018.

[112] On 25 December 2018, Chiang Mai Municipal Court acquitted these five academics because the NCPO Order 3/2558 was lifted.

contains an amnesty provision that makes all NCPO Orders legitimate.[113] The authorities benefit from this provision because it guarantees impunity for human rights violations committed by the military regime and provides bureaucratic-legitimacy for public order policing.

In Malaysia, the police are perceived as the traditional authority. They existed before Malaysia came into being as a national state and represented elite interests during the British colonial rule. In term of public order policing, the Malaysian PAA states: 'a police officer may take such measure as he deems necessary to ensure the orderly conduct of an assembly in accordance with this Act and any other written law.'[114] The law gives power to a police officer to issue an order to disperse in several circumstances: assembly in a prohibited place, the assembly has become a street protest, any person in the assembly disturb public tranquillity.[115] An officer may issue a dispersal order when the participants do not comply with the imposed restrictions or engage in unlawful violence towards person or property or commit any offence under any written law.[116] The PAA gives vast discretionary power to the police. For example, when police exercise the power to disperse an assembly, this law states that police may use all reasonable force.[117] On this issue, 'reasonable force' under PAA s21 (2) can be interpreted widely. The PAA s21 (2) does not state that the police must consider the strict test of necessity and proportionality. These two principles are stated in PAA s2 (b) which directs that the exercise of freedom of assembly 'is subject only to restrictions deemed necessary or expedient in a democratic society in the interest of the security of the Federation…'[118] In practices, when street protests were illegal, civil society and opposition demonstrations often met with police's water cannons, tear gas, and mass arrests.[119]

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[113] Thailand Constitution s279 para 1 states:

> All announcements, orders and acts of the National Council for Peace and Order or of the Head of the National Council for Peace and Order which are in force on the day prior to the date of promulgation of this Constitution or will be issued under section 265 paragraph two, irrespective of their constitutional, legislative, executive or judicial force, as well as the performance of acts in compliance therewith shall be considered constitutional, lawful and effective under this Constitution…

[114] Malaysia PAA s8.
[115] ibid s21 (1) (a)-(c).
[116] ibid s21 (1) (d)-(f),
[117] ibid s21 (2).
[118] Malaysia PAA S2(b).
[119] United States Department of State, 'Malaysia 2016 Human Rights Report' <https://www.state.gov/documents/organization/265562.pdf> accessed 2 November 2017, 13.

Similar to Thailand, Malaysian police, as the guardian institution, seek legitimacy from emergency laws when dealing with political protests. The Internal Security Act 1960 (ISA) equipped the police with a special power to arrest and detain without trial. This law was enacted to suppress the armed insurgents in 1960s. During the 1970s, it had become a means to silence political dissenters.[120]After the Nation Human Rights Commission (SUHAKAM) was established in 1999, it launched a report calling on the parliament to repeal the ISA.[121] The motivation for initiating arrests under the ISA could be varied. One of them was to prevent political unrest on the street. The Minister, under section 8 of this law, has the power to order detention or restriction of person.[122] During the detaining period, detainees were kept in small cells without access to legal counsel or to family. Mental and physical stress were usually applied during their interrogation.[123] When the two-year detention period nearly ended, the minister had the power to renew it endlessly.[124] Furthermore, the ISA denied judicial review and relied solely on unpromising internal review.[125] One of the examples was when the Mahathir administration used the ISA as a legitimate tool to restrict the Reformasi movement started by Anwar Ibrahim. The Reformasi movement was a major force in criticizing Mahathir's political structures in late 1998. To cripple the movement, the government arrested Anwar under the ISA and prosecuted him with a series of criminal charges.[126]

On 31 July 2012, Malaysia replaced the ISA with a newer version of its security law, the Security Offences (Special Measures) Act 2012 (SOSMA). SOSMA was seen as a rebranded ISA. The definition of 'security offences' under this law excludes political dissent or industrial action that is not intended to cause serious harm to the public. The law also states that 'no person shall be arrested and detained under this law solely for his political belief or political activity'.[127] The punitive sanction by detaining without trail was removed. The investigative

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[120] Nicole Fritz and Martin Flaherty, 'Unjust order: Malaysia's Internal Security Act' (2003) Fordham International Law Journal 1345, 1357.

[121] ibid 1352.

[122] Internal Security Act 1960 (Malaysia) s8(1) states:

> (1) If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as "a detention order") directing that that person be detained for any period not exceeding two years…

[123] Fritz and Flaherty (n 120) 1354.

[124] Internal Security Act 1960 (Malaysia) s8 (7).

[125] ibid s8B.

[126] Fritz and Flaherty (n 120) 1358.

[127] Security Offences (Special Measures) Act (SOSMA) 2012 (Malaysia) s4(3).

detention period was reduced from 60 days to 28 days. At the end of this period, all detainees must be bought to trial or released.[128] However, when the government faced challenges from a series of mass rallies organised by the opposition, SOSMA has proven to be an available option to generate legitimacy for the incumbents to harass dissenters.

On 18 November 2016, SOSMA was used to arrest and detain Maria Chin Abdullah, the chairperson of Bersih 2.0 movement, in order to stop her from leading the Bersih 5 rally.[129] She was detained for 28 days without judicial review in a secret detention centre, in solitary confinement with no windows.[130] At least 13 activists were being detained a night before the planned Bersih 5 rally on 19 November 2016.[131] As organisers were detained under SOSMA, such tactic sent a warning message to Bersih protesters and created the fear of government prosecution. As a result, the turnout of the Bersih 5 rally was lower than it was estimated.[132]

While Thailand and Malaysia authorities seek legitimacy from their traditional authorities (the Thai military and the Malaysian police), Cambodia authorities seek legitimacy in public order policing from charismatic authority. Hun Sen is generally perceived as Cambodia's strongman prime minister.[133] He has been in power since 1985, one of the longest-serving prime ministers in the world.[134] Hun Sen's legacy is credited with ending the brutal Khmer Rouge regime, in which around 2 million lives (a quarter of its population) were lost. Hun Sen was a commander in the Khmer Rouge Armed Force who fled to Vietnam on 20 June 1977.[135] Hun Sen has been praised by many Cambodian as a national hero after he fought alongside Vietnamese force to

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[128] ibid s4(5) and (9).

[129] Office of the High Commissioner for Human Rights, Communication ref. JAL MYS 4/2015 16 December 2015.

[130] ARTICLE 19, 'Free Maria Chin, Abolish SOSMA!' (24 November 2016) <https://www.article19.org/resources.php/resource/38569/en/free-maria-chin,-abolish-sosma!> accessed 3 May 2017.

[131] cf *Huseynli and Others v Azerbaijan* App 67360/11 67964/11 69379/11 (ECtHR, 10 February 2016), para 89 – The ECtHR saw that pre-emptive arrests aim at preventing individuals to participate in a planned demonstration violate freedom of assembly.

[132] Shannon Teoh, 'Bersih rally: Undeterred by arrests, thousands march against Malaysia PM Najib Razak in KL' (*The Straits Times*, 19 November 2016) <http://www.straitstimes.com/asia/se-asia/protesters-against-malaysia-pm-najib-razak-undeterred-by-arrests> accessed 25 September 2017.

[133] BBC, 'Hun Sen: Cambodia's strongman prime minister' (27 July 2018) <https://www.bbc.com/news/world-asia-23257699> accessed 22 May 2019.

[134] Casey Quackenbush, '40 Years After the Fall of the Khmer Rouge, Cambodia Still Grapples With Pol Pot's Brutal Legacy' (*Time*, 7 January 2019) <https://time.com/5486460/pol-pot-cambodia-1979/> accessed 24 July 2019.

[135] Human Rights Watch, '30 Years of Hun Sen Violence, Repression, and Corruption in Cambodia' (*Human Rights Watch*, January 2015) <https://www.hrw.org/sites/default/files/reports/cambodia0115_ForUpload.pdf> accessed 24 July 2019, fn 119.

end the Khmer Rouge brutal regime in 1979. However, it should be noted that the admiration of dictators and dictatorship is essential in any authoritarian regime. Especially during the Cold War, it was common to find communist leaders and fascist leaders created personality cults and bombarded their population with propaganda.[136] Moreover, historical facts, including the leaders' personalities, in these regimes are often distorted for the purpose of political agendas.[137] Hun Sen was depicted as one of the national rescuers. He was portrayed as a military and economic genius – by merging military control with economic dominance.[138] Such tactics contribute very much to his charismatic legitimacy.

In terms of public order policing, using excessive force has been one of Hun Sen's main strategies.[139] Drăghia claims that Hun Sen has mastered protest for his political aims by controlling the main branches of power, namely the administration, the police, and the army.[140] Earlier, this thesis has pointed out (at 4.2.3.2) that the notification procedure under the Cambodian PAA is a de facto authorisation procedure. Hun Sen has the legitimate power to outlaw any public assembly by withdrawing the authorisation. Then, the assembly will become illegal, providing a legitimate ground to disperse the public assembly, usually by force. For example, on 3 January 2014, workers' protests supported by the opposition Cambodia National Rescue Party (CNRP) clashed with the police. The protests were largely peaceful until the police and the military used excessive force, including the use of live-ammunition.[141] Four people were shot dead and 23 participants were arrested.[142] Later, the Phnom Penh Municipality withdrew permissions to hold a demonstration on the Freedom Park effective from 4 January 2014 until the security situation and social order return to normal.[143] This means that the

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[136] Paul Hollander, *From Benito Mussolini to Hugo Chavez: Intellectuals and a Century of Political Hero Worship* (Cambridge University Press 2017) 120.

[137] Niem Chheng and Erin Handley, 'Documentary recounting Hun Sen's role in Vietnamese invasion divides opinion' (*Phnom Penh Post*, 4 January 2018) <https://www.phnompenhpost.com/national-politics/documentary-recounting-hun-sens-role-vietnamese-invasion-divides-opinion> accessed 24 July 2019

[138] Heder (n 77) 209.

[139] Human Rights Watch, '30 Years of Hun Sen…' (n 135); cf the Cambodian PAA – the competent authorities shall take measures to protect peaceful demonstrations, ensuring security, safety and public order, and shall not interfere with the conduct of the peaceful assembly.

[140] Dan Drăghia, 'De-Democratization in a contentious space. Cambodia after the 1993 UN sponsored elections' (2015) 3 South-East European Journal of Policial Science 46-47.

[141] Radio Free Asia, 'Four shot dead as Cambodian Police open fire on workers' protests' (*Radio Free Asia*, 3 January 2014) <https://www.rfa.org/english/news/cambodia/shooting-01032014110118.html/> accessed 25 July 2019.

[142] Duncan McCargo, 'Cambodia in 2014 : Confrontation and Compromise' (2015) Asian Survey 207.

[143] Amnesty International, *Taking to the Streets Freedom of Peaceful Assembly in Cambodia* (n 84) 37; Ministry of Foreign Affairs and International Cooperation, *memorandum No. 014 MFA-IC/Pro*. (4 January 2014).

government temporarily suspended the right to freedom of peaceful assembly in Phnom Penh outright. The legitimacy in this operation was clearly derived from the Prime Minister Hun Sen.

In short, while Pino and Wiatrowski conceive legitimacy as concerning the 'source of authority', we can see that Cambodia, Malaysia, and Thailand seek the source of authority in public order policing from traditional authorities and charismatic authority rather than relying on the legitimacy from rational-legal authority alone. In previous heading, this thesis has demonstrated that the substantive rule of law in public order policing is inadequate in these regimes. Malaysia and Thailand revert to the imposition of vast military authority/police authority under emergency laws when they opt to use coercive force against protesters. Under the same light, Cambodian authorities revert to Hun Sen's charismatic authority when they use excessive force. In Weberian terms, one of the distinguishing features of public order policing in hybrid regimes is that they can switch between alternative sources of legitimacy. Their legal frameworks, which lack of the substantive rule of law, allow the authorities to seek legitimacy in public order policing from the guardian institutions, particularly when employing excessive force to disperse protesters.

5.2.3 Transparency and accountability

According to Pino and Wiatrowski, transparency means that 'government operations should be visible by the public' and accountability means 'establishing systems that ensure responsiveness with citizens, elected officials, and the news media'.[144] They explain that citizens in a democratic society have the right to view the internal operations of government agencies because the government is the creation of its citizens.[145] Thus, accountability in Pino and Wiatrowski's democratic policing means there must be a system that ensures the responsiveness of elected officials and state authorities to the citizens.[146] There is no democratic governance without transparency.[147] However, hybrid regimes can falsify transparency and accountability because the institutions which are tasked with monitoring role are weaken significantly.

Police operations should be subject to public scrutiny unless they will be compromised if disclosed to the public. Therefore, democracies need to have mechanisms allowing public

[144] Pino and Wiatrowski (n 31) 85.
[145] ibid.
[146] ibid.
[147] Barry Friedman and Maria Ponomarenko, 'Democratic policing' (2015) New York University Law Review 1827, 1835.

actors, such as the media, civil society organisations, external review boards, human rights monitors, to check the police.[148] Furthermore, O'Donnell explains that a system of accountability consists of horizontal accountability and vertical accountability.[149] The horizontal accountability is the effectiveness of institutional mechanisms such as courts, the disciplinary action in the police force, and the ability of, for example, a police commission to review the work of the police.[150] The vertical accountability is the control over the government through elections.[151] Horizontal accountability of the police in hybrid regimes is weak because the lack of effective impartial mechanism and the police are not insulated from political influence (discussed at 5.1.1). In contrast, police in democracies need to follow democratic principles because social demands and media scrutiny can lead public opinion which cause the incumbents to lose out in elections.[152] To this point, Della Porta and Reiter observe that public opinion is one of the factors shaping the public order policing style.[153] This thesis (at 3.3.2) has noted that the authorities in hybrid regimes manipulate mass media, impose a licensed civil society, and mobilise pro-regime supporters to win public opinion, manipulating the vertical accountability to render it of very limited value.

Here, I draw on Bonner's account of 'discursive accountability'. Bonner has argued that political leaders may shape public discourse to gain political benefits. On the one hand, they can frame an incident as if no wrongdoing has happened. Where there is no wrongdoing, there is no need to answer nor to punish anyone.[154] In consolidated democracies, there are NGOs and media who scrutinise the government and demand answers from the authorities.[155] These free actors exist in hybrid regimes but have limited ability to keep the authorities checked. The regimes also use state-controlled media and state agencies to frame an incident as if no wrongdoing has occurred by employing techniques such as comparing the incidents to historical events (repetition), explaining the consistency with current events, and using the credibility of the speakers.[156] If this strategy fails to convince the public, political leaders then identify and

[148] Pino and Wiatrowski (n 31) 86.
[149] A Schedler, L J Diamond and M F Plattner, *The Self-restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers 1999) 29.
[150] Michelle D Bonner, *Policing protest in Argentina and Chile* (First Forum Press 2014) 25.
[151] Schedler, Diamond and Plattner (n 149) 30.
[152] ibid.
[153] Della Porta and Reiter (n 7) 9.
[154] Bonner (n 150) 26.
[155] ibid 25.
[156] ibid 28-29.

prosecute wrongdoers through prejudice committees.[157] Cambodia, Malaysia, and Thailand have no effective civilian mechanism or other regulatory mechanisms for oversight, either internal or external, created specifically to deal with complaints against the police. Prateeppornnarong and Young point out that the lack of impartiality in the police complaints system, exacerbated by the patronage system and extremely authoritarian approach to law enforcement, leads the police to use underhand tactics to block complaints.[158] These tactics might include: deflecting attempts to register complaints, informal settlement, discrediting the complaints, fabrication of evidence and refraining from reporting the misbehaviour of their colleagues, and making the complaints fear of reprisals.[159]

Although oversight mechanisms such as human rights commissions, anti-corruption agencies, and ombudsmen do exist, they do not have a significant role in providing accountability involving public order policing, and thus for regulating police conduct.[160] I argue that these existing oversight bodies hinder the principle of democratic policing because instead of providing transparency and accountability, they act as rubber stamps. Rather than conducting investigations into governments' misbehaviours, they carry out politically motivated investigations of the critics and dissenters.[161] As a result, the hybrid regime incumbents have only the appearance of being accountable to the public through the crippled accountability mechanism but, and this is worse, they are ones that can be passed off as effective. For this reason, I argue that hybrid regime incumbents shape public discourse and create a cognitive environment in which coercive force is acceptable in public order policing. Also, this further reinforces the ability of such regimes to draw on the alternative forms of legitimacy identified in the previous section.

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[157] ibid 26.

[158] Dhiyathad Prateeppornnarong and Richard Young, 'A critique of the internal complaints system of the Thai police' (2019) 29 Policing and Society 18, 32.

[159] ibid 19-21.

[160] Nalla and Mamayek (n 16) 122; Human Rights Watch, '"No Answers, No Apology" Police Abuses and Accountability in Malaysia' (*Human Rights Watch*, 1 April 2014) <https://www.hrw.org/report/2014/04/01/no-answers-no-apology/police-abuses-and-accountability-malaysia> accessed 16 August 2019; Human Rights Watch, '"Tell Them That I want to Kill Them" Two Decades of Impunity in Hun Sen's Cambodia' (2012) <https://www.hrw.org/sites/default/files/reports/cambodia1112webwcover_1.pdf> accessed 18 September 2017; Human Rights Watch, 'Thailand:Supreme Court Enshires Impunity for 2010 Violence' 1 September 2017) <https://www.hrw.org/news/2017/09/01/thailand-supreme-court-enshrines-impunity-2010-violence> accessed 5 March 2018.

[161] Human Rights Watch, 'Cambodia Events of 2017' (*Human Rights Watch*, January 2018) <https://www.hrw.org/sites/default/files/cambodia_3.pdf> accessed 26 July 2019.

Discursive accountability affects public order policing style because police are more likely to change their strategies according to the environmental settings where the policing takes place rather than based on the law alone.[162] Therefore, when particular types of protests are framed as wrongdoing, the police understand that they need to be tough on the protesters. The media and ersatz social movement organisations may frame the public opinion to justifying repressive policing style.[163]

The 2010 Red-shirt crackdown in Thailand offers insights into the discursive accountability in public order policing. The authorities created the discursive accountability through controlled media and the Centre for the Resolution of the Emergency Situation (CRES). The crackdown was an excessive military operation causing 98 deaths and more than 2,000 injuries due to the enforcement of the 'live fire zones' covering the Red-shirts' protest site.[164] First, the CRES framed the protest as a threat to national security claiming that there were terrorists among the protesters.[165] When a sniper team was filmed shooting at unarmed protesters, the CRES simply explained that it was a normal tactic to keep soldiers safe from terrorists.[166] Despite this, there were many incidents that soldiers fired at unarmed civilians, soldiers' misconduct were not reported on the mainstream media.[167]

After the 2010 crackdown, the government established a truth-finding committee, the Truth for Reconciliation Commission of Thailand (TRCT), which released a final report two years later reaffirming that there were terrorists operating among the protesters.[168] The TRCT concluded that the Red Shirt protesters used firearms and grenades to harm officers and innocent civilians. The report reaffirmed that the CRES had a legitimate reason to employ excessive force against

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[162] J Chan, 'Changing police culture' (1996) 36 British Journal of Criminology 109, 130.

[163] Bonner (n 150) 31.

[164] cf UN Human Rights Council, *Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies*, UN Doc. A/HRC/31/66, para 60 –using legal firearms to disperse an assembly indiscriminately is always unlawful.

[165] National Broadcast on 18 May 2010 available at <https://www.youtube.com/watch?v=0SRspceSte4/> accessed on 5 March 2018; CRES Broadcast on 17 May 2010 [with English subtitle] available at https://www.youtube.com/watch?v=rdtlosTXI8E accessed on 5 March 2018.

[166] CRES Broadcast on 17 May 2010 <https://www.youtube.com/watch?v=ab_YZ2FT-xA> accessed on 5 March 2018.

[167] Nidhi Eoseewong, 'The culture of the Army' in , *Bangkok, May 2010: Perspectives on a Divided Thailand* (ISEAS–Yusof Ishak Institute 2012) 13-14.

[168] Truth for Reconciliation Commission of Thailand, 'รายงานฉบับสมบูรณ์คณะกรรมการอิสระตรวจสอบและค้นหาความจริงเพื่อการปรองดองแห่งชาติ [Full Report of Truth for Reconciliation Commission of Thailand] ' September 2012) <https://thaipublica.org/wp-content/uploads/2012/09/Final-Report-TRCT_17-9-12_2.pdf> accessed 5 March 2018 111

protesters.[169] On that point, Amsterdam argues that the TRCT was lack of independence and impartiality and its report was an attempt to acquit senior officials who were responsible for the violence.[170]

In addition, the National Human Rights Commission released a report on this crackdown stating that the Red Shirt's protest was not a peaceful assembly protected by the constitution.[171] However, this report contains a misleading logic – it states that it was impossible to identify the affiliation of the agent provocateur but concludes that the protesters were not peaceful because authorities stationed at the protest site were targeted and shot at. This reasoning goes against the international standards that the authorities have the positive obligation to protect public assemblies from violent parties (discussed above at 2.2.2 and 2.4.1.2).[172] If the authorities accepted that there were agent provocateurs among the protesters then it was the government's duty to separate the violent parties from the peaceful protesters. Another fallacy is that while the Commission concluded that the CRES's crackdown was legitimate and conformed with the laws governing public assembly, the Commission further suggested that the authorities needed to investigate whether there was any officer went beyond his/her legal power.[173] In my opinion, it is unreasonable to conclude that the operation was legitimate and conformed with the laws without first establishing that the authority did not act ultra vires.

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[169] Phiphop Udom'itthiphong, 'รายงานฉบับสมบูรณ์ของ คอป: ใบอนุญาตให้ฆ่า [The final report of Truth for Reconcilliation Commission of Thailand (TRCT): A licence to kill]' (*Prachatai*, 18 September 2012) <https://prachatai.com/journal/2012/09/42698> accessed 5 March 2018.

[170] Robert Amsterdam, '"A license to kll" making sense of the "Final Report" by the Truth for Reconcilliation Commission of Thailand (TRCT)' 24 September 2012) <https://www.scribd.com/document/106802487/TRCT-A-License-to-Kill-Paper-by-Amsterdam-Partners-LLP> accessed 5 March 2018, 4.

[171] National Human Rights Commission of Thailand, 'รายงานผลการตรวจสอบเพื่อมีข้อเสนอแนะเชิงนโยบายกรณีเหตุการณ์การชุมนุมของกลุ่มนปช.ระหว่างวันที่ ๑๒ มีนาคม ๒๕๕๓ ถึงวันที่ ๑๙ พฤษภาคม ๒๕๕๓ [Report and recommendation on the UDD protests between 12 March 2010 and 19 May 2010] ' 26 June 2013) <http://www.nhrc.or.th/> accessed 6 March 2018, 70.

[172] *Christians against Racism and Fascism* (n 12), 138, 151—the ECHR ruled that the violent threat from the counter-demonstration alone did not justify the authorities to interfere with any peaceful assembly; in *Ziliberberg v Moldova* App no 61821/00 (ECtHR, Admissibility decision of 4 May 2004) –the ECtHR ruled that participants to a public assembly do not cease to enjoy their right because someone else causes violence.

[173] National Human Rights Commission of Thailand (n 171) 70-71.

Although the operation caused many deaths and injuries, none of the high-level officers or policymakers in this operation have been charged. [174] In 2014, there was an attempt to bring Prime Minister Abhisit and his Deputy Prime Minister to justice on the ground of murder and attempting murder because they ordered CRES to employ lethal force. Later, the Supreme Court, on 31 August 2017, ruled that the Criminal Courts have no jurisdiction to hear the case.[175] In my opinion, the judges in this case should not have taken this long to find an answer on the legal issue relating to court jurisdiction. The culture of impunity, especially in the military, is yet another major problem that needs to be challenged. On the contrary, the organisers of the Red-shirt protest were charged on several grounds including inciting the public and committing an act of terrorism. After 9 years in the legal battle, the Criminal Court acquitted all of the organisers due to the lack of evidence.[176] The Court ruled that the Red-shirts protest was an exercise of constitutional rights which could not be considered as an act of terrorism.

In short, public order policing in hybrid regimes lacks transparency and accountability because there is no effective impartial mechanism to review police operations, civil actors are too weak, the media are heavily controlled by the regime, and judges ignore accusations that the authorities exceed their power. Hybrid regimes may create discursive accountability to guide the public opinion in justifying repressive policing style. The 2010 Red Shirt crackdown provides a good testimony. The mainstream media reported the facts established by two bias truth-finding commissions. The government has never officially apologised to those affected by the crackdown. Neither has it prosecuted any officer who were involved in the operation.[177] With discursive accountability, the authorities reinforce the culture of impunity. Yet, state-sponsored violence towards peaceful public assemblies continues and the responsiveness of elected officials and state authorities to citizens is based on the regime's monopolised narrative.

5.2.4 Subordination to Civil Authority

According to Pino and Wiatrowski, subordination to civil authority means that the military must always take orders from democratically elected officials. [178] This concept has traditionally been

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[174] Human Rights Watch, 'World Report 2017: Thailand Events of 2016' (2017) <https://www.hrw.org/world-report/2017/country-chapters/thailand> accessed 9 March 2018; Eoseewong (n 167) 14.

[175] Human Rights Watch, 'Thailand:Supreme Court Enshires Impunity for 2010 Violence'

[176] The Criminal Court Back No. Aor.2542/2553 on 14 August 2019.

[177] Human Rights Watch, 'Thailand: End 2010 Violence Cover-Up Prospect for Justice Bleak under Military Junta' 5 August 2015) <https://www.hrw.org/news/2015/08/05/thailand-end-2010-violence-cover> accessed 6 March 2018.

[178] Pino and Wiatrowski (n 31).

applied to the military rather than the police. Pino and Wiatrowski extend this principle to cover both military and police. This thesis earlier demonstrated that the military is an important factor in applying coercive means to crackdown on protesters. It is even more common to see military personnel performing policing duties in hybrid regimes than in consolidated democracies because the concept of civilian control of the military is weaker. Croissant and Kuehn explain that, in a democracy, civilians alone have the power to decide on national policies.[179] They point out that civilians may delegate some decision-making power to the military, but the military does not have autonomous decision-making power outside the specifically defined area given by the civilians.[180] Most importantly, the civilian authorities must have the power to effectively control the implementation of their decision.[181] Croissant and Kuehn further argue that freedom of assembly, among other fundamental rights, is in jeopardy if the concept of civilian control is ineffective.[182] The lack of civilian control leads the military to become lawless – the military can implement policies without being checked by actors who can be judicially or electorally held accountable.[183]

Thus, the lack of civilian control provides a loophole for the incumbent to use their armed forces to crackdown on protesters. Consolidated democracies limit the mission of the military to external defence and, on the domestic plane, they restrict the use of states of emergency or exception which deprives constitutional rights.[184] In contrast, incumbents in hybrid regime deploy military units or private militants to disperse public assemblies violently. These units are neither subordinate to civil authority nor accountable to legislative, community or legal processes. They respond to the incumbents who give them authority rather than to the public.

The use of the military in public order policing has further applications and purposes in authoritarian regimes than in consolidated democracies. As, Przeworski notes, a consolidated democracy needs democratic institutions to maintain its democratic environment.[185] In contrast, political actors in hybrid regimes do not limit themselves to democratic institutions. The

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[179] Aurel Croissant and David Kuehn, 'Civilian Control of the Military and Democracy: Conceptual and theoretical Perspectives' in Aurel Croissant and Paul Chambers (eds), *Democracy under stress : Civil-military relations in South and Southeast Asia* (Bangkok : Institute of Security and International Studies, Chulalongkorn University 2010) 27.

[180] ibid.

[181] ibid 27-28.

[182] ibid 34.

[183] ibid 35.

[184] Neild (n 38) 225.

[185] Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Studies in Rationality and Social Change, Cambridge University Press 1991) 26.

military see themselves as guardians of the realm preventing the regime change or enforcing a regime change – a revolution will hardly succeed if the military does not support the revolutionary force.[186] Equally, the ability to mobilise armed forces to control political protests in authoritarian regimes is a crucial tool to prevent a regime change. Authoritarian regimes use more brutal force than democracies because their soldiers and police are not subordinate to their civil authority. To this point, Costa and Thompson points that the ability of the security forces to act freely is a necessary condition of the prevailing structure of domination.[187] When there is no democratic control, they eventually become part of an institutional arrangement to strengthen the political elites.[188]

Taking Russia as his example, Robertson notes that 'coercion in Russia is overwhelmingly carries out by special units of the state apparatus'.[189] The Interior Ministry (MVD) and Federal Security Services (FSB) were restructured to secure the political power of its incumbent.[190] Any demand to transfer public order policing tasks from the federal to the regions were swiftly ignored by both the MVD and the presidency.[191] Moreover, the FSB is 'a self-contained and closed system' upon which there is no independent organ to check and no court to balance its power.[192] Alongside the FSB control over the security services, Putin also established the National Guard on top of the regular army. The creation of the National Guard was to prevent colour revolution.[193] Unlike the regular army, these special units are less reluctant to use force against protesters on the street.[194] Security forces in Cambodia, Malaysia, and Thailand were established on the similar pattern as Russia. They have pro-regime units that can be mobilised against any threat from the street regardless of the principle of subordination of civil authority.

Southeast Asian hybrid regimes utilise two technique to weaken the principle of subordination to civil authority. Firstly, they staff security forces with pro-regime agents to weaken

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[186] George Katsiaficas, *Asia's Unknow Uprisings*, vol 2 (PM Press 2013) 445.
[187] Arthur Trindade Maranhão Costa and Timothy Thompson, 'Police Brutality in Brazil: Authoritarian Legacy or Institutional Weakness?' (2011) 38 Latin American Perspectives 19, 31.
[188] ibid; Peter Joyce and Neil Wain, *Palgrave dictionary of public order policing, protest and political violence* (Palgrave Macmillan 2014) 25.
[189] Robertson (n 35) 174.
[190] ibid 152.
[191] Taylor, 'Historical Legacies and Law Enforcement in Russia' (PONARS Eurasia, 2011) <https://www2.gwu.edu/~ieresgwu/assets/docs/ponars/pepm_150.pdf> accessed 8 September 2017.
[192] Mette Skak, 'Russian strategic culture: the role of today's chekisty' (2016) 22 Contemporary Politics 324, 325.
[193] The Economist, 'Wheels within wheels How Mr Putin keeps the country under control' (22 October 2016) <https://www.economist.com/news/special-report/21708877-how-mr-putin-keeps-country-under-control-wheels-within-wheels> accessed 8 September 2017.
[194] ibid.

democratic control. Secondly, they derogate public order policing duties to other security units including the military, para-military, and private security.

5.2.4.1 Staffing security forces with pro-regime agents

Modifying police structure to lessen democratic control can be achieved by placing pro-regime agents into police decision-making bodies and police oversight bodies. Thai police and Malaysia police are not independent of the dominant political power. In Thailand, military dominance has shaped internal police organisation and management. In Malaysia, the police are dominated by UMNO under a strong patronage system. Cambodian police are not different. Hun Sen has managed to appoint his relatives to high-level positions in the security forces. All three countries present the same pattern that their police forces are dominated by pro-regime agents.

In Thailand, the National Council for Peace and Order (NCPO) leaders saw that having politicians as the highest commander enabled politicians to take advantages from the force through a patronage system.[195] They removed the external members from the Board of Royal Thai Police and replaced them with two members who are selected by the Senate. [196]Six specialist positions in the Police Commission Committee were also removed and replaced by two senior police officers who are selected by the Senate.[197] Despite the NCPO's intention to eliminate politician influence in the police's organisation, these were attempts to insert the military's influence over the police force because, under the 2017 Constitution, all of the senators in the first term will be appointed by the NCPO.[198] Therefore, the NCPO will have a substantial influence on selecting four persons in the Board of Royal Thai Police and in the Police Commission Committee. After the Senator's first term has ended, the second term senators will be elected by professional group members, whom the NCPO can influence during the selection process. As a result, the police are guided by the military rather than the elected representatives. Clearly, the representatives' proportion in the police board and the Police Commission Committee demonstrates that Thai police subordinate to the military elites rather

[195] Anusit Jongjeerangsub, 'Interference by Politicians in Police Operations : A Case Study of the Metropolitan Bureau, Royal Thai Police' (Master of Arts in Criminal Justice Admnistration Thesis, Thammasat University 2010) 79-80.
[196] NCPO order No.88/2557 2014 (Thailand) on 10 July 2014.
[197] ibid.
[198] Thailand Constitution B.E.2560 (2017) s 269.

than to the civil authority. [199] This organisational structural reflects the deficit of the principle of subordination to civil authority.

The dynamic and inconsistencies of the public order policing tactics employed during political protests in the past decade reflects the contention between the military, protest camps, and the civilian government over the police force. Sombutpoonsiri points out that the politicisation of the police was one of the crucial factors in Thai police applying mixed tactics to political protests, swinging between forceful dispersion and negotiation.[200] Thai police are trapped between the conflict between the elected government, the anti-government protesters, and the military. The conclusion to political conflicts in Thailand between 2005 to 2015 depended on the military's allegiance. When the military aligned itself with the government, the military employed excessive force against protesters. When the military aligned with the protesters, it led to a coup.

In Cambodia, Hun Sen consolidated his power by appointing the police chief. He made sure that the police chief would report directly to him.[201] In 2009, Hun Sen continued his power grab by appointing his long-time comrade to oversee the Armed Forces.[202] While his dominant political party kept tight control of every position in the bureaucracy, traditional coercive instruments such as police, armed forces, and intelligence agencies were used to stabilise his regime.[203] After major security positions were taken, Hun Sen personalised his regime by utilising the Cambodian neopatrimonial tradition to drive his nepotistic agenda.[204] He maintains his regime through the recurring appointment of his relatives to high-level posts.[205] This arrangement created a network of political elites that run Hun Sen's regime. With his sons and relatives holding important positions in both security services and ersatz social movement

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[199] It is worth noting that Thai police do not adhere to subordination to civil authority because the military is another political fraction which seeking an opportunity to stage a coup. Prateeppornnarong and Young explain that 'the police are bound into an authoritarian political structure repeatedly subject to military takeovers.' see Prateeppornnarong and Young (n 158) 18.

[200] Janjira Sombatpoonsiri, 'The Policing of Anti-government Protests: Thailand's 2013–2014 Demonstrations and a Crisis of Police Legitimacy' (2017) 4 Journal of Asian Security and International Affairs 95 96-97 – she argues that there are four factors determining the police mixed policing tactics: the police tactical improvement, a history of police politicisation, extreme characteristics of the protests, and the nature of conflict over governmental legitimacy contributing to public mistrust in the police.

[201] L Morgenbesser, 'Misclassification on the Mekong: the origins of Hun Sen's personalist dictatorship' (2018) 25 Democratization 191, 199.

[202] ibid 200

[203] Sorpong Peou, *Human security in East Asia. challenges for collaborative action* (Routledge 2008) 134.

[204] Morgenbesser (n 201).

[205] ibid 197.

organisations such as the CPP's Youth, Hun Sen has created a shield against protests on the street.[206]

In Malaysia, the police have more power and influence than the military. Compared to the military, it has more equipment, troop strength, and superior organisational structure.[207] Bertrand has argued that the stability and longevity of UMNO's regime were the effects of institutional manipulation and patronage.[208] Government organisations, laws, and constitution were amended to sustain UMNO's dominance and elite unity.[209] Under a highly politicised environment, the appointment of the Interior Ministry and of the Inspector General Police depended on the UMNO's patronage system. UMNO maintained its dominance through patrimonial ties.[210] Although it seems like the police follow the principle of civilian control because UMNO is a political party, the selective use of excessive force by the police to suppress political dissenters tells us otherwise.

Here, we can see a pattern that these three hybrid regimes have been able to exert domination over their police force by ensuring police organisations are staffed by pro-regime actors. Although it seems like the police in these regimes are controlled by political parties according to the requirement of the principle of subordination to civil authority, the police do not accountable to the people under democratic control. In the case of Thailand, the military can influence the Police Board and the Police Commission Committee through unelected senators. Malaysian Police perform their duties under the influence of UMNO's patronage system. Cambodia police are under the direct control of Hun Sen and his relatives. Police in these regimes do not respond to civil authority but rather to the incumbents.

5.2.4.2 Transferring public order policing duties to other security units

Empowering other security units to carry out public order policing duties rather than police units is another method to bypass the principle of subordination to civil authority. Given the constraints of law and regulations to keep the police checked, this allows incumbents to use coercive force against political dissenters. In general, the government should assign riot police

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[206] Morm Moniroth, 'Cambodia's Hun Sen Names Son Head of Military's Intelligence Department' (*Radio Free Asia*, 22 October 2015) <http://www.rfa.org/english/news/cambodia/appointment-10222015170944.html> accessed 5 November 2017.

[207] A Croissant and P Lorenz, *Comparative Politics of Southeast Asia: An Introduction to Governments and Political Regimes* (Springer International Publishing 2017) 165.

[208] Jacques Bertrand, *Political change in Southeast Asia* (Cambridge University Press 2013) 93.

[209] ibid.

[210] ibid 228.

to perform public order policing tasks rather than the military.[211] Riot police are usually equipped with protective clothing and with non-lethal weapons and are specialised in crowd control tactics.[212] However, maintaining riot police can be costly. Another option is to create a temporary fusion between the regular police and the military. This can create problems because the joined forces do not have to 'cultivate good relations with those they are policing' and opt to use aggressive tactics easily.[213] Furthermore, military or para-military personnel may not have adequate policing skills. Under intense pressure, they may use aggressive force and threaten demonstrators in the same way as their enemy.[214] The combined forces may prefer to use lethal weapons and military tactics, with which they are more familiar, to manage protesters. Therefore, there is more chance the troops will overreact when they are provoked. Moreover, soldiers have a different approach from the police when handling the rule of engagement. Soldiers mainly focus on securing a parameter by eliminating threats. In contrast, police follow the judicial process and fulfil any legal requirement such as getting warrants for gathering evidence and arresting suspects. Danlap further explains that 'military personnel tend to revert to the combat-oriented architecture that they understand and in which they are comfortable operating'.[215] Under the same circumstance, riot police personnel have to reach a much higher threshold before they apply self-defence. This kind of self-restraint is usually absent in military practice.[216] Nevertheless, Cambodia, Malaysia, and Thailand deploy combined forces between military, police, and paramilitary to perform public order policing tasks.

Apart from having an option to mobilise the military against protesters (discussed above at 5.2.2), the Thai incumbents can also assign the paramilitary to perform public order policing duties. Thailand's Volunteer Defence Corps (VDC) is a paramilitary corps working under the Ministry of Interior. It has duties to respond to natural disasters and to assist the military. VDC personnel are recruited from the local population. They can be assigned to perform policing task affixed to the police.[217] Compared to the standard police training course, both VDC and

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[211] UN Human Rights Council, *Joint report of the Special Rapporteur...* (n 165), para 66; Alan Wright, *Policing : an introduction to concepts and practice* (Cullompton : Willan 2002) 68.
[212] Joyce and Wain (n 188) 327.
[213] Peter Joyce, *The policing of protest, disorder and International terrorism in the UK since 1945* (Palgrave Macmillan 2016).
[214] ibid 31.
[215] Charles J Dunlap Jr, 'The thick green line: The growing involvement of military forces in domestic law enforcement' in Tim Newburn (ed), *Polcing key reading* (Polcing key reading, Willan Publishing 2005) 791.
[216] ibid 790-791.
[217] Volunteer Defence Corps Act 1954 (Thailand) s16 (2).

military personnel do not have adequate legal training on public order policing.[218] However, VDC and the military are often tasked with public policing duties. For example, in February 2016, an anti-potash-mining protest was interrupted by VDC who claimed that the protest did not conformed with the PAA.[219] On 7 April 2017, VDC and military personnel intimidated an anti-mining activist who led a series of protests opposing a potash-mining project in Sakon-Nakorn province.[220] These security units put the protest leader and participants on surveillance in order to make them feel insecure and give up their activities.[221]

In Malaysia, the People's Volunteer Corps (RELA) play the supporting role in public order policing. Malaysia Volunteers Corps Act gives that officers and members of RELA have a duty to assist any security force or authority established under written law upon request of the force or authority.[222]For example, in 2007, around 5,000 RELA personnel were deployed to assist the police during the first Bersih rally.[223] Their main task was to manage traffic around the event. Although RELA is a paramilitary corps under the ministry of home affairs, it has over three million members, out of 32 million population in Malaysia. RELA was accused of functioning as a political machine for BN and UMNO.[224] Its member expanded drastically since 2008. There were only around half a million members in 2008. In 2010, the membership expanded to 2.5 million in 2010, and over 3 million in 2018. In 2011, Prime Minister Najib Razak made a comment in an RELA conference that RELA could be mobilised against any mass demonstration. [225] In 2015, the government announced that it would deploy a thousand RELA

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[218] Public assembly law has been a compulsory subject in the Non-Commissioned Police Training Course B.E 2560 since 2017. The course consists of lectures (8 hours) and crowd control trainings (40 hours). Detail available at http://www.ptcr5.com/attachments/view/?attach_id=173947.

[219] Thai Lawyers For Human Rights, 'การจัดการทรัพยากรเหมืองแร่กับการละเมิดสิทธิมนุษยชนหลังรัฐประหาร (2) [Managing miniral resources and human rights violations after coup (2)]' 3 June 2016) <http://www.tlhr2014.com/th/?p=2020> accessed 26 March 2018.

[220] Thai Lawyers For Human Rights, 'ทหาร ตำรวจ เตือนชาวบ้านกลุ่มต้านเหมือนโปแตชสกลนครให้ยุติการเคลื่อนไหว [Soldiers Police warned anti-potast-mining protesters to stop their movement]' 8 April 2017) <http://www.tlhr2014.com/th/?p=3945> accessed 26 March 2018

[221] Pratch Rujivanarom, 'NHRC warns activists are being monitored' (*The Nation*, 29 July 2017) <http://www.nationmultimedia.com/detail/national/30322110> accessed 26 March 2018.

[222] Volunteers Corps Act 2010 (Malaysia) s5 (1) (a).

[223] Charles Ramendran, 'Rela not just a helping hand' (*The Sun Daily*, 7 January 2018) <http://www.thesundaily.my/news/2018/01/08/rela-not-just-helping-hand> accessed 26 March 2018.

[224]Sasagu Kudo, 'Securitization of Undocumented Migrants and the Politics of Insecurity in Malaysia' (2013) 17 Procedia Environmental Sciences 947, 953.

[225] ibid.

personnel to help policing the Bersih 4.0 rally.[226] It was obvious that RELA could be mobilised as an alternative security force and a social movement to sustain UMNO's dominant. In addition, the Malaysian Government has special security service similar to the Russian's FSB – the Malaysian Special Branch Department.[227] The Special Branch Department is in charge of intercepting subversive activities threatening the nation's stability.[228] Its personnel often target opposition party members and NGOs by putting them under surveillance discriminately.[229] This tactic has proven to be a significant deterrent to the opposition's supporters in Malaysia.[230] One can easily predict that the collaboration between the Special Branch Department and RELA will create a greater chilling effect on political dissenters.

In Cambodia, the government has an option to use coercive tactics against protesters through military, gendarmerie (military police), and para-police. Hun Sen has two military units which act as his private army: Brigade 70 and the Bodyguard Unit. In practice, the gendarmerie is deployed when civilian police are unable to provide effective crowd control.[231] Cambodian para-police are not professional police. Their duty is to assist police officers and non-police auxiliaries carry out legal and administrative measures. They often do not have sufficient technical security training.[232] These para-police are often assigned as shock troops against opposition gathering.[233] Moreover, in 2010, the Ministry of Interior initiated 'the people's defence movement' as an unarmed villager movement under local command.[234] The movement was designed as an auxiliary intervention force assisting local police, gendarmerie and other competent forces to suppress crimes. They can arrest individuals committing crimes and transferring them to the authorities or issue warnings to people to refrain from participating in illegal activities.[235] Although they are referred to as 'police agents', they neither have clear legal

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[226] The Sun, 'Bigger turnout expected at 'mother of all rallies'' (*The Sub (Malaysia)*, 28 Aug 2015) <https://www.pressreader.com/malaysia/the-sun-malaysia/20150828/282183649806292> accessed 26 March 2018

[227] Julian C H Lee, 'Barisan Nasional – Political Dominance and the General Elections of 2004 in Malaysia' (2007) 26 Südostasien aktuell : journal of current Southeast Asian affairs 38, 49.

[228] Inc. IBP, *Malaysia Justice System and National Police Handbook Volume 1 Strategic Information and Regulations* (International Business Publications USA 2007) 82.

[229] Lee (n 227) 43.

[230] ibid 50; cf *Catt v The United Kingdom* App no 43514/15 (ECtHR, 24 January 2019), para 123.

[231] United States Department of State, 'Country Reports on Human Rights Practices for 2011' <https://www.state.gov/documents/organization/186476.pdf> accessed 18 September 2017, 5.

[232] Amnesty International, *Taking to the Streets Freedom of Peaceful Assembly in Cambodia* (n 84) 58.

[233] Human Rights Watch, 'Cambodia: New Violence Against Opposition' (*Human Rights Watch*, 27 October 2015) <https://www.hrw.org/news/2015/10/27/cambodia-new-violence-against-opposition> accessed 29 March 2018.

[234] Amnesty International, *Taking to the Streets Freedom of Peaceful Assembly in Cambodia* (n 84).

[235] ibid.

authorisation nor legal background to disperse public assemblies.[236] These para-police are seen as agents provocateurs They are not recognised as police under the law but are assigned to govern public assemblies. The police can keep their hands clean by letting them do the dirty works. In addition, civilian control of the military and police in Cambodia is not an institutionalised form of control under law but rather a more personalised form of control under 'neo-sultanistic tendencies'—similar to Belarus and Azerbaijan.[237] Chambers points out that the Cambodian military is integrated into the regime by arranging the patronage relationship between security personnel and the dominated CPP.[238] As a result, the military has become the guardian institution which provides stability and sustains regime survival.[239]

In short, the principle of subordination to civil authority under the principle of democratic policing is neglected in Cambodia, Malaysia, and Thailand because the police structures in these regimes have been modified to respond to their incumbents' command rather than to respond the civil authority. Despite the fact that some of the positions in the police force reflect some degree of civilian control, pro-regime agents in the force can influence the force with less democratic control means. The police structures in these three regimes reveal that the incumbents gain control over public order policing by staffing police organisation with pro-regimes agents and having other standing security forces, rather than the police, to perform public order policing duty. Under these circumstances, the incumbents have opportunities to confer public order policing tasks on other security units which are more loyal to the regime and more willing to use coercive force upon their commands.

5.3 Conclusion

This chapter has demonstrated that public order policing in hybrid regimes is structured to facilitate swing between a democratic approach and an authoritarian approach because hybrid regime rulers benefit from having police that can change their policing styles. This chapter has identified that police in hybrid regimes share two characteristics: the lack of insulation from political influence and the divergence between the police's cultural norms and international human rights norms. The police in Cambodia, Malaysia, and Thailand have a colonial mentality perceiving their role as the protectors of the realms rather than the guarantors of people rights and freedoms. In chapter 3, we have seen that hybrid regime incumbents have an incentive to

[236] ibid 103.
[237] P W Chambers, "'Neo-Sultanistic Tendencies:' The Trajectory of Civil-Military Relations in Cambodia' (2015) 11 Asian Security 179, 180, 188.
[238] ibid 188.
[239] ibid 200.

restrict anti-regime protest while retain the ability to mobilise pro-regime supporters. In chapter 4, the thesis showed that hybrid regimes curtail freedom of assembly through legal frameworks. As the legal frameworks provide overly broad legal grounds for restricting freedom of assembly and inadequate judicial review, authorities in hybrid regimes abuse the discretion provided by the legal frameworks. Then this chapter demonstrates that the incumbents manipulate police and public order policing by diminishing the concept of 'democratic policing' namely the rule of law, legitimacy, transparency and accountability, and subordination to civil authority. The principle of democratic policing is twisted or neglected in order to present an opportunity to use a more aggressive public order policing style.

Regarding the rule of law, this study found that Cambodia, Malaysia, and Thailand implement this principle under the most formal conceptions. They restrict the freedom of assembly through laws which are enacted by the parliaments without much scrutiny and with very little, and usually no, public participation and substantive discussion. PAAs in Cambodia, Malaysia, and Thailand were enacted quickly with an aim to be a tool to quell political challenges on the street rather than to guide the authorities to govern public assemblies according to international standards. The police enforce their PAAs without considering the substantive conceptions of the rule of law.

Regarding the principle of legitimacy, we saw that the three hybrid regimes avoided the limits in rational-legal authority, which incorporated IHRL and the international standards on public assemblies, by seeking legitimacy from other sources. While consolidated democracies claim legitimacy mainly from rational-legal authority, these three hybrid regimes have options to claim their legitimacy from other two grounds of authorities: traditional authority in the case of Malaysia and Thailand, and charismatic authority in the case of Cambodia.

We then saw how hybrid regimes can falsify transparency and accountability because of the democratic deficit in institutional setting. The institutions, including the media and civil society actors, which are tasked with monitoring role are weakened significantly. The 2010 Red-shirt crackdown illustrated how the Thai incumbents applied discursive accountability by framing the incident as no wrongdoing had happened. Discursive accountability is effective in pursuing public opinion under three conditions: no strong civil actors to scrutiny the government, the media are heavily controlled by the state and no effective impartial mechanism to review complaints against the authorities. All these conditions are common across Southeast Asian hybrid regimes. The lack of transparency and accountability in public order policing is a part of a much bigger problem: 'the culture of impunity'. The authorities in these regimes will

continue to use excessive force against protesters because they know that they will not be held responsible for their misconducts.

Last, for the principle of subordination to civil authority, this study found that all three hybrid regimes have the means to deploy military, para-military, and/or para-police to perform public order policing. Cambodia and Thailand have their military as the regimes' guardian institutions while the police are the guardian institution in Malaysia. International standards give that it is not appropriate to deploy soldiers to perform public order policing. Soldiers are trained differently and have a different mindset about using force against civilians. They do not have much concern about IHRL or the democratic process. This study has demonstrated there are two techniques to weaken the principle of subordination to civil authorities: staffing security forces with pro-regime agents and transferring public order policing duties to other security units which are more loyal to the incumbents. Upon the incumbents' signals, public order policing tasks can be undertaken by these units to ensure that public assemblies will pose no threat to the regimes. From the evidence shown in this chapter, it can be concluded that hybrid regime incumbents have curtailed the scope of freedom of assembly through public order policing. The scope is significantly limited when the principle of democratic policing is manipulated. In my opinion, the application of the legal frameworks governing public assemblies depends heavily on police practice. Even when the legal framework governing public assembly is neutral on its face, the scope of freedom of assembly can still be limited significantly by police practices. This problem is also common in consolidated democracies. However, in hybrid regimes where the legal frameworks were designed to give the incumbents unfair political advantages, undemocratic public order policing magnifies the restrictions on freedom of assemblies.

Chapter 6 Conclusion

While international human rights standards on public assemblies seek to enable individuals to exercise freedom of assembly as a part of the democratic process, laws governing public assemblies and public order policing in hybrid regimes are used by incumbent leaders to curtail the exercise of freedom of assembly rather than to secure it for its citizens. The case law from CCPR and ECtHR presented in chapter 2 reaffirms that there is a substantial body of international standards on governing public assemblies – setting up a minimum level of protection for the freedom. However, it protects only peaceful assemblies which sustain the democratic process and comply with three democratic values: pluralism, tolerance, and open-mindedness. This democratic test is also expressly incorporated in the three-prong test relied upon by the CCPR and ECtHR to scrutinise any restriction on the freedom of assembly.[1] As such, conformity with democratic values forms an essential part in assessing the necessity and proportionality of restrictions. However, hybrid regimes, although they appear formally committed to (at least, core) international standards and IHRL, their true objective is to gain benefits from allowing freedom of assembly while minimising effects from anti-regime protests.

Hybrid regimes carefully curtail the scope of freedom of assembly with an aim to give the regime the upper hand in dealing with political contention on the street. Thus, the legal mechanisms governing public assemblies in hybrid regimes do not serve the purpose which is enshrined in the heart of international standards. These laws serve primarily as 'street-proofing' mechanisms enhancing the incumbents' political power. Closed authoritarian regimes ban almost all public assemblies and heavily restrict civil society because social movements can lead to a revolution or a regime change. Elites in closed authoritarian regimes refrain from mobilising because of the lack of genuine civil society to sustain social movements and there is no freedom of assembly. In contrast, in hybrid regimes, there are genuine civil society actors to drive social movements. The elites in hybrid regimes can use public assemblies as their political strategies to demand renegotiation or to overthrow the incumbents. Therefore, there is a need to have legal mechanisms that allow some freedom of assembly while significantly reducing threats from the street.

[1] They assess whether a restriction: (1) is prescribed in conformity with the law, (2) pursues a legitimate aim, and (3) is necessary in a democratic society (comply with a strict test of necessity and proportionality).

This thesis has shown (in chapter 3) that Robertson, as well as other leading social movement scholars, have overlooked the role of law and its institutions governing public assemblies in shaping the nature of contention in hybrid regimes. The domestic legal frameworks and the nature of public order policing impact upon Robertson's variables. The legal framework under the Putin administration is a good example to prove this claim. This study reveals that Russia controls what Robertson describes as "organisational ecology" precisely through legal frameworks governing NGOs. The Federal Law No.18-FZ, No.121-FZ, and No.129-FZ impose a licensing regime which expressly limits the role of civil society actors to organise a public assembly. Moreover, the Putin administration also controls Robertson's "state mobilisation strategies" through the Federal Law No. 54-FZ (Russian PAA). The law provides widely framed legal grounds for the authorities to restrict freedom of assembly. Evidence presented in chapter 3 reaffirms that Robertson paid little attention to these laws when he evaluated the nature of political contention in Russia. However, Robertson's framework allows us to establish that there is a strong relationship between his three variables and the characteristics of the law and the law enforcement governing public assemblies.

Additionally, the incentive of the incumbents in hybrid regimes to restrict freedom of assembly can affect the characteristics of the legal mechanisms governing public assemblies. To defeat-proof the street, the incumbents want legal mechanisms that enable them to impose restrictions limiting the ability of political dissenters to mount protests whilst also allowing them to mobilise ersatz social movements to display their dominance. These incentives shape the characteristics of legal frameworks governing public assemblies and public order policing in hybrid regimes. The legal mechanisms governing public assemblies in hybrid regimes have at least two main components. First, the legal frameworks provide overly broad legal grounds for the authorities to act arbitrarily in favour of the incumbents. Second, the incumbents need law enforcement agents that are willing to act arbitrarily to protect the regimes' dominance. To maintain these two configurations, the judiciary in hybrid regimes must refrain from advocating IHRL and the international standards on public assemblies. In other words, the legislation governing public assemblies, although it may appear neutral on its face, is being implemented among other laws in a highly discriminatory manner. The evidence supporting this claim is laid out in chapter 4 and chapter 5.

Chapter 4 demonstrated that the incumbents in hybrid regimes curtail the scope of freedom of assembly through legal frameworks governing public assemblies. It highlighted how the legal frameworks in all three Southeast Asian hybrid regimes provide overly broad legal ground without requiring authorities to consider the strict test of necessity and proportionality. Also,

they do not provide any adequate judicial review. All three regimes have been using content-based restrictions, blanket bans, and onerous notification requirements to shape how people exercise freedom of assembly. One of the clear examples in chapter 4 is the power to impose content-based restrictions in Malaysia. The Malaysian PAA empowers the police to issue an order to disperse if anyone in the assembly does any act or makes any statement which has a tendency to promote feelings of ill-will or hostility amongst the public or does anything which will disturb public tranquillity.[2] Such provision provides the authorities with an opportunity to act arbitrarily in favour of the incumbents. In Thailand, the military government discriminately enforces the Junta's order that prohibits any political gathering of more than five people. The order uses the term "political gathering" which can be interpreted subjectively by law enforcement agents. A gathering to support the prime minister (the Junta's leader) was not a political gathering while a gathering to advocate against a corruption scandal in the government was characterised as such.

The legal frameworks in the three hybrid regimes impose many blanket bans to uniformly limit the scope of freedom of assembly. These uniform restrictions dictate who can protest, and when, where and how a protest can be organised. When the judiciary refrains from applying IHRL and international law, these restrictions significantly limit the scope of freedom of assembly. Furthermore, this study found that the onerous notification requirements provided in the PAAs in these hybrid regimes play an important role in controlling the level of protest on the street. They act as filters screening out anti-regime protests and provide a legal ground for dispersing or harassing the organisers. Although these PAAs use the term 'notification', in practice they are de facto authorisation requirements because the PAAs provide the authorities with an opportunity to reject or amend the proposed plan. As the authorities always have the upper hand, they negotiate with a 'take it or leave it style'. Again, the core problem here is not only that the law provides broad legal grounds to restrict the freedom, but also the lack of any requirement to consider the necessity and proportionality of restrictions imposed. The law contains no internal constraints on the nature of its enforcement. This is the main reason why the PAAs in these regimes appear neutral on their face but providing the authorities with opportunities to enforce the law arbitrarily to favour the incumbents.

In consequence, this study has found that public order policing in hybrid regimes swings between a democratic approach and an authoritarian approach because the incumbents are able to manipulate the principle of democratic policing. As argued earlier, incumbents in hybrid

[2] Peaceful Assembly Act 2012 (Malaysia PAA) s21 (1) (c).

regimes need law enforcement agents that are willing to act arbitrarily to protect the incumbents' dominance. The examples presented in chapter 5 confirm this assumption. The police in all three hybrid regimes share two common characteristics: the lack of insulation from political influence, and the divergence between the cultural norms of the police and international human rights norms. The incumbents in these regimes curtail the scope of freedom of assembly by manipulating the structure of policing institutions and bending the principle of democratic policing in public order policing. When there is a transformation from an authoritarian political system to democracy, the police must be reformed to dismantle the authoritarian structure and introduce a new concept of policing which is compatible with human rights and democratic values.[3] However, the police in the three hybrid regimes have not yet dismantled the colonial mentality. They perceive their role as the protectors of the realm rather than as the guarantor of human rights and democratic principles.

This thesis uses the concept of democratic policing, proposed by Pino and Wiatrowski, to assess public order policing in the three hybrid regimes.[4] This principle consists of the rule of law, legitimacy, transparency and accountability, and subordination to civil authority. Although one can find some evidence of these principles in the three hybrid regimes, chapter 5 shows that these jurisdictions do not align with Pino and Wiatrowski's conceptualisation. First, under the rule of law, the police in the three regimes practice the 'rule by law' instead of the 'rule of law'. All PAAs in these regimes were enacted quickly without much debate or public participation as they were aimed to contain the rise of street protests. As a result, these laws do not reflect the values of human rights and democratic principles. The lack of understanding of the rule of law is clearly shown when the police enforce the PAAs together with other (non-subject specific) laws to limit public assemblies. This might be regarded as a departure from the concept of *lex specialis* (a maxim that implies that special laws ought to take preference over general laws). For instance, the Thai police invoke the Highway Act, the Land Traffic Act, the Penal Code, and the Cleanliness and Tidiness of the Country Act to remove protest leaders and technically end public assemblies without having to seek a court dispersal order according to the Thai PAA.

In terms of 'legitimacy' (the second of Pino and Wiatrowski's principles), consolidated democracies receive legitimacy solely from rational-legal authority, which has a strong link

[3] Rachel Neild, 'Confronting a Culture of Impunity' in Goldsmith and Lewis, *Civilian Oversight of Policing : Governance, Democracy, and Human Rights* 225.

[4] Nathan Pino and Michael D Wiatrowski, *Democratic policing in transitional and developing countries* (Ashgate Pub. Co. 2006) 83-87.

with democratic institutions governed through a democratic process. This study found that the authorities in the three hybrid regimes can switch their legitimacy source in performing public order policing from rational-legal authority to traditional authority or charismatic authority, especially when they need to use excessive force against protesters. When protests become a critical threat to the regime, the incumbents can 'legitimately' seek assistance from the guardian institution, such as the military in the case of Thailand, to crackdown on demonstrators.

For transparency and accountability, chapter 5 illustrated that hybrid regimes can falsify transparency and accountability because there are no effective monitoring actors to keep the police accountable. Hybrid regimes can implement discursive accountability techniques to frame an incident as if there is no wrongdoing. Independent social actors (including civil society groups), although they exist in hybrid regimes, do not have the capacity to keep their government in check. Most importantly, these regimes have no effective impartial mechanism to review police operations.

Finally, in relation to the subordination of the police to a civil authority, this study found that the incumbents in the three hybrid regimes have modified their police structures to make them responsive only to their command (rather than to civil authorities, in indeed these can be said to exist at all). They staff the decision making bodies on public order policing with pro-regimes supporters. Also, they retain the option of delegating public order policing tasks to other standing security forces which are less likely to refuse to act in favour of the incumbents. In my opinion, it is this ability to channel public order policing tasks from the normal police force to special units more loyal to the regime that enables public order policing in hybrid regimes to 'swing' between the policing styles associated with closed authoritarian regimes and consolidated democracies. When the regimes mobilise these special units, public order policing becomes more authoritarian and, in the absence of any credible principle of democratic policing, the law enforcement agents involved are willing to enforce the law arbitrarily to protect the incumbents' dominance.

This thesis has shown that the incumbents in Russia, Cambodia, Malaysia, and Thailand have curtailed the exercise of the freedom of assembly specifically through legal frameworks governing public assembly and public order policing. Social movement scholars and political scientists should therefore look more closely to these two legal factors when assessing the nature of contention, and the variables that shape it, in hybrid regimes. Similarly, legal scholars should not neglect the incumbents' incentive to use legal mechanisms to shield themselves from street protests and mobilise their supporters to display dominance. This thesis has sought to

address this gap by explaining why the authorities in hybrid regimes do not always uphold IHRL and international standards. All the evidence in chapter 4 and chapter 5 points to the conclusion that the scope of freedom of assembly in hybrid regimes has been *legally* managed so as to secure regime stability (a point that further underscores the important distinction in IHRL, as noted in chapter 2, that international standards confer protection on 'peaceful' assemblies, not merely 'lawful' assemblies).

To enable public assemblies as a part of the democratic process, there is a need to ensure that both legal frameworks and public order policing comply with international standards and IHRL – in particular, by ensuring narrowly-framed legal grounds for restricting freedom of assembly. The case law from the CCPR and ECtHR provide the judiciary with interpretative guidance and this jurisprudence ought to inform any adequate process of judicial review. Issues regarding public order policing should not be justified by relying exclusively on domestic legal frameworks. Rather, IHRL and the international standards on public assemblies ought to have greater traction in domestic legal systems. Furthermore, in structural terms, the law enforcement agencies responsible for public order policing should be insulated from political influence and should themselves also be encouraged to adhere to IHRL and international standards.

In my opinion, freedom of assembly in hybrid regime can be improved significantly through the judicialization of politics – the process by which courts and judges increasingly dominate the making of public policies that had previously been made by legislatures and executives through judicial process.[5] When this process occurs, politicians will be more aware of the review power of the judiciary.[6] With an effective judicial review, courts can expand existing civil rights, including freedom of assembly, through their evolving jurisprudence.[7] I see that the international standards on public assemblies and IHRL should be incorporated into domestic

[5] Javier Couso, 'The Judicialization of Chilean Politics: The Rights Revolution That Never Was' in Rachel Sieder, Line Schjolden and Alan Angell, *The judicialization of politics in Latin America* (Palgrave Macmillan 2005) 106; Torbjörn Vallinder, 'The Judicialization of Politics. A World-Wide Phenomenon: Introduction' (1994) 15 International Political Science Review / Revue internationale de science politique 91.

[6] For example, after almost two decades under Pinochet's rule, the Chilean court became active in expanding civil rights since the country returned to democracy. Although the government and the legislature failed to uphold the constitution and the international human rights treaties that were parts of Chile's domestic law, the court played an important role in defensing and expanding individual rights. See futher Couso (n 5) 114.

[7] ibid 3.

law.[8] However, this thesis (in chapter 4) has noted that the judiciary in hybrid regimes refrains from judicial review – even when the legal frameworks governing public assemblies provide opportunities for judicial review. It is plausible to conclude that the judiciary in hybrid regimes, like the police, have also been manipulated by the regime incumbents in order to consolidate their political dominance. The politics of the judiciary in hybrid regimes ensures that adherence to international standards is superficial at best. O'Donnell has noted that demands for order and national security can lead to judicial tolerance of unlawful actions committed by the authorities, especially the police and law enforcement agents.[9] Therefore, I suggest that the role of the judges in defending freedom of assembly in hybrid regimes should also be studied further.

Case law from the CCPR, especially those complaints submitted by applicants from Belarus and Russia, demonstrates that the first Optional Protocol provides both a feasible and robust channel of external review in relation to public order policing in hybrid regimes (notwithstanding the protracted nature of this process). I strongly believe that international standards on public assemblies and IHRL should have greater traction in hybrid regimes and that ratification of the ICCPR and its first Optional Protocol must be the first step in ensuring that individuals are able to enjoy freedom of assembly. Of-course, any such developments may themselves signal a broader trajectory of transition towards 'democratic' forms of governance. However, a hybrid regime will not become a democracy by only ratifying the ICCPR and its first Optional Protocol (or else Russia and Belarus would be classified as democracies just because they were parties to these instruments). To enhance freedom of assembly in hybrid regimes, one should pay more attention to the particular image of democracy enshrined in IHRL (as explored in chapter 2). Therefore, while the thesis has primarily sought to illustrate the ways in which *law* shapes the nature of political contention in hybrid regimes, it might also be concluded that the reforms needed to afford greater protection to freedom of assembly are the same reforms that might catalyse the transformation of politics in these jurisdictions.

[8] For example, the constitution of Turkey empowers domestic judges to give priority to obligations under IHRL over domestic law. The Constitution of Turkey article 90, para 5 states: International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. (Sentence added on May 7, 2004; Act No. 5170) In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.

[9] Gullermo O'Donnell, 'Afterword' in Sieder, Schjolden, and Angell (n 5) 294.

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