UNPOPULAR SOVEREIGNTY: CONSTITUTIONAL IDENTITY THROUGH THE LENS OF THE SUNFLOWER AND UMBRELLA MOVEMENTS

Cheng-Yi Huang

“The relevant question is not only whether we govern ourselves in our politics, but also whether we govern ourselves in our constitutionalism.”
- Kathleen M. Sullivan

Sovereignty on the Battlefield

The idea of sovereignty, though fictional, has always been coupled with nations or people. The term underlies the expressive function of a self-ruling polity, which exercises monopolized power over its subjects on an exclusive territory. Ever since the proclamation of the U.S. Constitution, “We the People” has become a magic wand, turning the constitution into the reification of sovereign power. Meanwhile, as the conceptual invention of Abbé Sieyes indicates, “we the people” represents constituent power (pouvoir constitué) at the founding moment, which is quite different from constituted power (pouvoir constituant) in ordinary constitutional politics.

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Associate Research Professor, Institutum Iurisprudentiae, Academia Sinica.


2. As Rosanvallon cogently argues, “[T]he primary character of a democratic regime is the anointment by the people of those who govern. […] It is assumed that the general will coincides with the will of the majority. […] Out of this developed a certain ideal of unanimity, which has been one of the underpinnings of the democratic idea from the beginnings: ‘democratic,’ in the broadest possible sense, means ‘expressive of social generality.’” Peirre Rosanvallon, Democratic Legitimacy: Impartiality, Reflexivity, Proximity, trans. by Arthur Goldhammer (Princeton: Princeton University Press, 2011) 1-2.

3. Sieyes combines the notion of nation with constitutional power. He emphasizes, “The nation is prior to everything. It is the source of everything. Its will is always legal; indeed, it is the law itself.” This political romanticism has great influence upon later German philosophers like Carl Schmitt and Hermann Heller. For Sieyes’ idea of constituent power, please see Emmanuel Joseph Sieyes, What is the Third Estate? [1789], M. Blondel trans. (London: Pall Mall Press, 1963), p. 126.
notion of constituent power enshrines the general will of the founding moment and becomes the origin of political authority in the post-founding era. Therefore, much constitutional theory stipulates that there is nothing more sacred than the constitution, which embodies the constituent moment as well as the general will. It is “we the people” who constitute the political community and enjoy sovereignty over itself after the founding moment.

However in contemporary times the primacy of constitutions as the reification of sovereignty has been thoroughly challenged throughout the world. A wave of constitutional showdowns have emerged from severe political cleavages, mostly through social movements, which have witnessed the fragmentation, transformation and reconfiguration of this nineteenth-century brainchild of popular sovereignty and constitutional legitimacy. This brief chapter explores the disentanglement of sovereignty and people through the cases of the Hong Kong Umbrella Movement and the Taiwan Sunflower Movement.

In 2014 Taiwan and Hong Kong both witnessed gigantic political protests, first initiated by young people but which immediately inflamed their respective societies. The Movements were largely based around issues regarding controversial legislation and political disagreement, but there were overlapping features. Both the Sunflower Movement and the Umbrella Movement fought against their respective governments’ increasing dependence on China, though the former was mainly concerned with economic integration and the latter with political integration. As other authors in this collection have noted, participants in the Sunflower Movement occupied the national legislature and also broke into and briefly occupied the Executive Yuan, the country’s top executive branch. Many have criticized their action as illegal and unjustifiable, though the participants claimed their right to defend the polity against the government’s abuse of power by passing the Service Trade Agreement with China.

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5 For debates over sovereignty in regard to emergence of the European Union, please refer to Hent Kalmo and Quentin Skinner (eds.), Sovereignty in Fragments: The past, present and future of a contested concept, (Cambridge: Cambridge University Press, 2010). In addition to Hong Kong and Taiwan, Japan has also witnessed mass protests about constitutional controversy, please refer to Chaihark Hahm and Sung Ho Kim, Making We the People: Democratic constitutional founding in postwar Japan and South Korea, (Cambridge: Cambridge University Press, 2015) 66-96.
without due process. Accordingly, their actions were a type of civil disobedience that pursues a higher value of democracy and self-government.\(^6\) On the other hand, the Umbrella participants kept urging crowds to obey the law, since the rule of law has been the most significant hallmark of Hong Kong’s legal development.\(^7\) However, the police in Hong Kong were reported to exercise unprincipled discretion when enforcing the law both during and after the Movement,\(^8\) which has prompted many youngsters to reconsider alternatives, including forceful struggle.\(^9\) While Taiwanese protesters appealed to civil disobedience to justify their commitment to democracy, Hong Kong citizens upheld the rule of law as their jurisdiction’s supreme value, which could not be trumped by aspirations for democracy. However, participants in both movements gradually realized the “elephant in the room” was not about the rule of law or democratic values, but the uneasy and unspoken tension between sovereignty and the people.

**Disentangling popular sovereignty**

Hong Kong provides a prominent case of the disentanglement of sovereignty and the people. Since 1997, Hong Kong has officially been a part of China, though its Basic Law follows the institutional design of “One Country, Two Systems,” guaranteeing that the Mainland’s socialist system would not be applied to Hong Kong. Meanwhile, according to Sec 2 of Article 45, the selection of the Chief Executive should be gradually transformed into a Hong Kong general election.\(^{10}\) But even before this, the 800 members of the nominating committee still control who is allowed to be put forward for selection. Moreover, disputes over the meaning of Basic Law are decided by the Standing Committee of National People’s Congress in Beijing. Although the

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\(^6\) Jones and Su characterise it as a case of “confrontational contestation”. Jones and Su, Chapter 1.

\(^7\) See Hualing Fu, Chapter 8 and Chih-Hsing Ho, Chapter 9.

\(^8\) *Ibid.*


\(^{10}\) In fact, the language of Article 45, Section 2 does not directly mention a general election among Hong Kong citizens. It still gives the nomination power to the nominating committee: “[T]he ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures”. See Michael Davis, “Beijing’s Broken Promises” (2015) 26(2) *Journal of Democracy* 101, 104-06.
Court of Final Appeal in Hong Kong enjoys the power of final adjudication, it is the Standing Committee that authorizes the courts in Hong Kong to interpret the Basic Law within the limits of autonomy granted in the Basic Law. Revision of the Basic Law also exclusively belongs to the National People’s Congress rather than any representative institutions in Hong Kong. In brief, the authority of the Basic Law originates from and is dependent upon the political power of the Chinese government, not the people of Hong Kong.

As the premier showcase of “One Country, Two Systems,” it is heatedly debated to what extent the Basic Law is the embodiment of “We the People of Hong Kong”?

Since the political transition from a colony of the United Kingdom to a Special Administrative Region (SAR) of China, people in Hong Kong have had little chance to express their own political preference or cast a vote over their Basic Law, though some legal and political scholars from Hong Kong were invited to participate in the drafting process. The issue of sovereignty was never on the negotiating table between China and the United Kingdom, since the Hong Kong people have not been regarded as a “people” having a right to self-determination. Meanwhile, to most Hong Kongers in the 1990s, the Basic Law was a realisation of Hong Kong autonomy, at least on paper, which could function as the bedrock of self-government.

Nevertheless, it would be far too optimistic to regard the autonomy provided in the Basic Law as the equivalence of self-government. Since 1997, the Basic Law has increasingly functioned like a provincial statute regarding the division of labour in the view of the National People’s Congress Standing Committee (NPCSC), and at most provides a limited amount of rights protection to the Hong Kong people. In this regard, the Basic Law is not Hong Kong’s constitution. In fact, it is the PRC’s constitution that has final authority over Hong Kong’s political structure. “One Country, Two Systems” means there shall be only one constitutional authority. He who rules is the sovereign. Under the current arrangements, no matter how severe the grudge they bear against the Beijing government, the people in Hong Kong are subject to the constitutional authority of the People’s Republic of China. The failure of the Umbrella Movement can be understood as the failure of the Hong Kong people.

12 Ibid., especially the four interpretations by NPCSC, pp. 172-179.
to demarcate the boundaries of their political community so as to promote their own
their own political constitution.

Two years after the Umbrella Movement, in 2016, six candidates in local elections
that lent their support to the independence movement of Hong Kong were disqualified
from the election,\(^{13}\) and yet the first rally for the Hong Kong independence
movement attracted more than two thousand five hundred people, according to Hong
Kong police.\(^{14}\) But whether or not Hong Kong independence is a politically viable
strategy is not the issue this chapter aims to address. Its emergence and increasingly
popularity should provide serious concern for Beijing. From the perspective of
constitutional authority, the origins of the Hong Kong independence movement lie at
the heart of sovereignty. China claims its sovereignty over Hong Kong, while Hong
Kong asserts that self-government is provided by its Basic Law. The conflict remains
unresolved, and the arrangement of “one country, two systems” will only perpetuate
this conflict.

**Unpopular Sovereignty: Dislocation of the ROC Constitution**

If Hong Kong presents a pessimistic story about sovereignty and self-government,
Taiwan provides the other side of the coin. As mentioned above, the unspoken issue
behind Hong Kong’s Umbrella Movement was “people without sovereign power”.
Taiwan’s Sunflower Movement in turn revealed the uncomfortable truth of
“sovereignty without people,” which can be described as “unpopular sovereignty”.
The government in Taiwan, namely the Republic of China, still claims its sovereignty
over Mainland China, given the People’s Republic of China has taken over power
since 1949. In reality, Taiwan hardly enjoys any type of sovereignty over China, but
according to the Constitution of the Republic of China, it does.

The Constitution of the Republic of China—which is now valid only in
Taiwan—was adopted in 1946 by representatives from each province of China,

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including Taiwan, and went into effect on 25 December 1947. However during the civil war the KMT (Chinese Nationalist Party) was defeated by the Chinese Communist Party (CCP) and retreated from Mainland China to Taiwan in 1949. The KMT ruled Taiwan with martial law for about forty years. Martial law was lifted in 1987 and general elections for the National Assembly and the Legislative Yuan resumed in 1991 and 1992, respectively. The reason elections were suspended for over forty years was because the KMT government continued to claim their sovereignty over China during this period. Thus as political symbolism, the representative institutions, including the Legislative Yuan, National Assembly, and the Control Yuan, had to be composed of members elected before 1949, representing the whole constituency of China. However, as a Greek philosopher once pointed out, “change presides over all things mortal”. In 1969 President Chiang Kai-shek announced in an administrative rule that the three representative institutions should hold elections for the vacancy left by the deceased members. Even so, the majority in the three branches were still composed of representatives from Mainland China.

This arrangement was held in place until 1991, when the Temporary Provisions Effective During the Communist Rebellion (“Temporary Provisions”) were abolished and the government held national elections for the representative institutions, voted on by the Taiwanese people. The “old delegates” from China had all retired. From the perspective of political constituency, the Legislative Yuan (Taiwan’s parliament) now represents constituencies from Taiwan, and does not include any from China. However, the 1947 Constitution remains intact. Although the Temporary Provisions are no longer in effect, the original texts of the Constitution regarding constituency are still suspended. Before the “old delegates” had left, Taiwan passed an Additional Article, which acknowledges the current situation as pre-unification, so the country as a whole consists of two parts: the free area, i.e. Taiwan, and the mainland area, i.e. the PRC and Mongolia. Without a doubt, the ROC Constitution has turned out to be the most important symbol of political legitimacy in the KMT’s claim of sovereignty over China.

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15 Taiwan’s Constitutional Court, The Council of Grand Justices, regarded these three branches all together as the parliament provided in the original text of the ROC Constitution. Please see Judicial Yuan Interpretation No. 76 of May 3, 1957. For the description of this constitutional history of “legitimacy-maintenance”, please refer to Jiunn-rong Yeh, The Constitution of Taiwan: A contextual analysis, Hart Publishing, 2016, pp. 32-34.

What does this history matter to the Sunflower Movement? Article 11 of the Additional Article provides that “Rights and obligations between the people of the Chinese mainland area and those of the free area, and the disposition of other related affairs may be specified by law”. This is the delegating clause that enabled the Legislative Yuan to pass the Act Governing Relations between the People of the Taiwan Area and the Mainland Area (“Cross-Strait Act”). The negotiation, execution and approval of the Economic Cooperation Framework Agreement (ECFA) and the Service Trade Pact were—and still are, for that matter—regulated by the Cross-Strait Act (Article 4, 4-2, 4-3, 4-4, Article 5, 5-1, 5-2). According to Article 5 of the Cross-Strait Act, the agreement shall be sent to the Legislative Yuan for “consideration” (ex post review), if the content of the agreement requires “any amendment to laws or any new legislation”. The process of legislative review is not specified in the law regarding the authority of the Legislative Yuan. Therefore, the KMT caucus decided to approve the Service Trade Pact swiftly, literally within thirty seconds. This enraged thousands of youngsters concerned with the relationship and on-going negotiations between China and Taiwan. They went all out to occupy the Legislative Yuan.

The root of this political outrage is not primarily about the free trade issue, nor the legislative process. The overwhelming anxiety comes from worries about derogation of Taiwan’s sovereignty. On the one hand, the Additional Article created a dilemma between the post-1991 political constituency and the 1947 constitution. The constitution still claims its validity throughout China on the basis of its constituent power derived from “We the People” of 1947. However, since 1949 the document no longer enjoys any political power over China, the political constituency has changed, and the Additional Article of 1994 provided a constitutional basis for popular election of the president. In 1996, Lee Teng-hui was elected to the presidency through universal suffrage in Taiwan. Thereafter, the president has possessed two identities: from a Constitutional perspective, she or he represents the Republic of China, which still covers all of China; but from the level of democratic election, she or he represents the population of Taiwan. Her political power comes from Taiwanese citizens, but her

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17 The Legislative Yuan has still failed to pass any replacement for the Cross-Strait Act, which was one of the Sunflower Movements main demands.
constitutional authority emanates the ROC constitution. This schizophrenic constitutional identity is the root of Sunflower Movement.

As president, Ma Ying-jeou oversaw his executive members to negotiate with the Beijing government on the ECFA and the Service Trade Agreement; as the chairman of the KMT, he demanded its caucus in the Legislative Yuan approve the Service Trade Agreement as soon as possible. President Ma believed his actions strictly followed the requirements of the ROC Constitution, which requires him to be the president of China, both of the free area and the mainland area. In actuality this is more like a delusion. The Republic of China has lost its “people” for over sixty years. The sovereignty it claims over China is “sovereignty without people” (or unpopular sovereignty). However, the expressive function of the KMT’s “unpopular sovereignty” is not to ask China to return the territory or its people to the ROC government. On the contrary, it restrains people in Taiwan from establishing a different country, or leaving “China”, both politically and constitutionally. And yet the KMT party also understands that their ideology of “one China means the Republic of China” (or “reclaiming mainland China”) is widely unpopular, if not a fantasy nowadays, given the increasing political-economic power of China and intricacies of international politics. The only way to carry out their agenda of unification is to work with the Chinese Communist Party to push economic—and then political—integration. From the perspective of Sunflower participants, this means that Taiwan would eventually be integrated into China, rather than continuing to have a mutually agreeable political structure with China. In the Sunflowers’ view, Taiwan’s citizens elect the president, and the citizenry in a democratic society determines the boundaries of the political community. Therefore, the president should represent his or her constituency rather than assume a hypothetical role of “Chinese president”. The Movement believed that the president should put the interest of the Taiwanese people beyond any unification agenda located in the ROC Constitution.

Ironically, the Chinese government also claims sovereignty over Taiwan. The PRC passed an Anti-Secession Law in 2005 and it keeps reiterating that “Taiwan is a part of China”, even though the Chinese Communist Party has never controlled this region before or after 1949. Therefore, there is an overlapped claim of sovereignty: the ROC government claims to rule China on the ground of its Constitution, regardless of the constituency change, while the PRC government also claims to rule Taiwan since it succeed the political status of the ROC after 1949. Therefore both governments are making claims of sovereignty without the consent of people in either China or Taiwan. In this convoluted penumbra of overlapped sovereignty, the citizens of
Taiwan lose their own political identity, as both the PRC and the ROC regards them as “part of China”. Therefore, to the disappointment of hundreds and thousands Taiwanese citizens, their country, Taiwan, is not a sovereign state…even under the ROC Constitution. They are, like the people of Hong Kong, a people without sovereignty, though they do have their own constitution, democratic institutions, and periodic elections. But their democracy does not bring them any sovereign power over themselves. They are ruled by an “unpopular sovereignty” enshrined in the ROC Constitution.

**Owning Sovereignty: Democratic Deepening vs The Rule of Law in Practice**

The situation in Hong Kong and Taiwan leads us to ponder where the notion of sovereignty comes from. All political theories regarding sovereignty would confirm that sovereignty is a mythical construction, not only formulated by domestic public law, but also reflecting the Westphalia order of international law. Popular sovereignty implicates that “We the People” have the supreme power to govern the political community under the foundations of the constitution, either written or unwritten. However, as Taiwan’s constitutional history shows, sovereignty is not necessarily derived from the will of the people. Neither can the Constitution reflect the exact scope of sovereignty. As Joseph de Maistre insightfully observed two centuries ago, “the people are the sovereign which cannot exercise their sovereignty". This oft-cited quote precisely describes the dilemma faced by contemporary Taiwan and, more or less, post-1997 Hong Kong.

The ROC Constitution has gradually become a symbolic representation of a national narrative, which has been separated from the people it claims to rule as well as from the people it rules. Although scholars often argue that after more than two hundred years the United States Constitution has become a political symbol rather than a living document ratified by each generation of American citizens, the U.S.

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government has never claimed to legitimately rule Canada or the United Kingdom through its Constitution. However, every President elected after 1996 in Taiwan has vowed to obey the ROC Constitution, which commands them to be President for all of China. Thus, the ROC Constitution preserves an outdated sovereignty rejuvenated by popular elections every four years in Taiwan. Taiwanese people attempt to broaden the practice of democracy so that they can assert their popular sovereignty. However, the democratic approach to generating sovereignty suffers vicious “defects” when the President assumes her or his constitutional role. This perennial self-contradiction entails a fundamental inquiry for the legitimacy of the reunification, mainly located in the Preamble and Article 11 of the Additional Articles. The Sunflower Movement urged the government to initiate a Citizens Assembly for Constitutional Reform, an extra-constitutional mechanism focused on resolving the legitimacy issue. Given that it would be extra-constitutional, it would not be confined to the current constitutional framework of Chinese representativeness. In this regard, the Sunflower Movement actually crystallizes the constituent moment defined by Abbé Sieyes. The constituent power, coming before constitution making, engenders the political genesis of order in a constitutional democracy. The predecessor of the Sunflower Movement, the Wild Lily Movement of 1990, successfully pushed the government to abolish the Temporary Provisions and to get rid of the “old delegates”. In fact, the democratic approach to sovereignty in Taiwan owes its debts to the Wild Lily Movement. However, ever since President Lee Teng-hui compromised with KMT’s intraparty leaders and military juntas, the symbolic representation of the ROC Constitution has been preserved by way of the Additional Articles. The Sunflower Movement brought this undemocratic compromise into the fold again. However, the elections after 2014 have once again diminished the necessity for reshaping Taiwan’s constitutional identity. Most of the post-Sunflower proposals for constitutional reform focused on issues of separation of powers or institutional choices like semi-presidentialism, parliamentarism or presidentialism. These institutional designs were responses to the expansion of presidential power under the Ma administration. However, once the focal point was redirected to constitutional powers, the constituent moment faded away.

On the other hand, the appeal to Basic Law has allowed a very distinctive way of Hong Kong political activism after the handover. Although it was not passed by Hong Kong citizens, it has applies to Hong Kong citizens since 1997. Meanwhile, it is not
like the ROC Constitution, which unrealistically claims to be applied to China. The debates surrounding the application of the Basic Law have entrenched it as Hong Kong’s Constitution, which is quite a phenomenon given that it has been in force for less than two decades. Before 1997, the Basic Law was regarded only as a political document that demonstrated “One Country, Two Systems”. It had nothing to do with the political identity of Hong Kong. However, much social activism emerged in the first decade of the Twenty-first century (such as the high-speed rail controversy, the public schools textbook debates, or the social benefits issues), and Hong Kong people gradually realised their loss of political autonomy. At the same time, lawyers, pro-democracy legislators, and public intellectuals in Hong Kong started to build their argument for self-government on the autonomy promised in the Basic Law. Even in the post-Umbrella election in 2016, most candidates for the Legislative Council asserted to uphold the Basic Law as the fundamental political document in Hong Kong. However, when the SAR government proposed to enact legislation regarding Article 23 of the Basic Law, the argument of the Basic Law as the Constitution of Hong Kong appeared to be moot. When the State Council in Beijing issued the White Paper in June 2014 on the Practice of “One Country, Two Systems” policy in Hong Kong, it became clear that final authority for interpreting the Basic Law lies in


21 This could be interpreted as the chilling effect of ousting the pro-independence candidates. The SAR government declared that all the candidates should “love Hong Kong, love China”. (Stuart Lau, “Legco election candidates to face ‘follow-up action’ if they back Hong Kong independence, government warns” South China Morning Post (30 August 2016), available at http://www.scmp.com/news/hong-kong/politics/article/2011174/legco-election-candidates-face-follow-action-if-they-back.

22 Article 23 of the Basic Law provides, “The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies”. 
hands of the PRC Central Government. Finally, when the National People’s Congress Standing Committee (NPCSC) announced that the design of the nominating committee for the 2017 election of the Chief Executive would be similar to current election committee, the decision aroused the Hong Kong people’s consciousness regarding their self-determination. To the extent that the Basic Law could bring about autonomy for Hong Kong now appears to be a contradictory thesis.

“Democratic deepening” and “the rule of law tradition” are the two different routes taken by Taiwan and Hong Kong in the past twenty years, with both aiming towards self-government. Outcomes of the Sunflower Movement and the Umbrella Movement reflect the divergence and convergence of political reform in these two polities.

Concluding Remarks: One Sovereignty, Two Tales
Two years after the Sunflower movement, Taiwan witnessed landslide victories of the opposition Democratic Progress Party (DPP) against the KMT in local and national (legislature and presidential) elections in 2015 and 2016. Critics have commented that this is a strong rejection to the pro-China policy advanced by the presidency of Ma Ying-jeou. Periodic election allows “political revolution” without any further turbulence or mass protest. Political optimists believe this is the great power of democracy, which creates peaceful turnover of political power; “If you don’t like this president, wait for the next one”. On the other hand, after the Umbrella Movement, the people of Hong Kong are trying to reclaim their political autonomy through a democratic game, i.e. election. The surprise victory of pro-democracy candidates in 2016 Legislative Council (LegCo) elections breathed some fresh air into the desperate politics of Hong Kong. Among them, Eddie Chu Hoi-dick, a long time social activist got more than 70,000 votes, becoming the largest winner, and Nathan Law Kwun-chung, a Umbrella Movement student leader, become the LegCo’s youngest legislator. The LegCo election is the first of its kind post-Umbrella Movement, so

many feel very optimistic about the outcome.\textsuperscript{24} However, it also shows that after the Movement, Hong Kong is trying a more democratic approach, and setting aside their more traditional rule of law approach. Since the majority in the Legislative Council is still consists of legislators from the so-called functional constituencies, the victory is more symbolic than practical. Moreover, once Hong Kong steps onto the journey of democratic election, it will be very hard to keep the Basic Law as the constitutional document of Hong Kong. Citizens will realize a political document like the Basic Law, without any democratic participation from local citizens, does not equate to self-government at all. Nevertheless, if the end of political autonomy means singular sovereignty, the Hong Kong people should look to Taiwan as an unpromising lesson: periodic election that includes true universal suffrage still has not generated any seeds of Taiwanese sovereignty.

The two movements tell a similar tale about sovereignty. While Taiwan is still confined to the ROC Constitution’s political symbolism, Hong Kong strives to maintain its autonomy from the grounds of the Basic Law. While political movements in Taiwan have washed away the party state and democratic election has become a fixture of everyday life, Hong Kong is pursuing universal suffrage and direct election for the Chief Executive and members of the Legislative Council. Democracy does give people in Taiwan the opportunity to change the government every four years. It makes the politician and parties more responsive to popular votes and to some extent, more accountable. And yet responsiveness and accountability promise good governance, but not sovereignty. In realpolitik, Taiwan is still not a member of the United Nations, and its sovereignty is still highly contestable in the international realm. On the other hand, everything written in the Basic Law is subject to the final control by the People’s Congress in Beijing. The endeavour to uphold the rule of law seems simply to reaffirm the legal order ordained by the PRC Central Government. Constitutional legitimacy, if that is an argument for defending the Basic Law, has to derive from civic engagement and mutual consent in the process of constitutional life,

rather than a decree from the outside the community. The situation is the same in Taiwan. The cycle of national elections for the ROC president or legislators simply reaffirms the existence of the ROC constitutional order, but the question of Chinese representativeness remains. Unless Taiwan can demarcate a clear line of its citizenship and therefore establish a boundary for its political community, the ROC Constitution refers to an unsettled constitutional identity.

Sovereignty is a two-way street. It certainly shapes the constitutional identity of the people. However, it also depends on how people rule themselves, with fundamental documents agreed upon by the citizenry. As Kathleen Sullivan argues, “The relevant question is not only whether we govern ourselves in our politics, but also whether we govern ourselves in our constitutionalism”. Constitutionalism does not merely mean the formality of separation of powers and the establishment of rule of law. It is deeply intertwined with how a political community defines itself and rules itself. A constitution is the product of identity formation growing out of political self-consciousness. Therefore, it should not be something imposed by an authority other than the people itself, as the Beijing government has done to Hong Kongers or the 1947 ROC Constitution has done to contemporary Taiwanese. Democratic processes may entail the formation of political identity, but it will not necessarily bring a constituent moment that creates an authentic constitution. An authentic constitution will encourage its citizens to engage in constant democratic participation and vindicate the rule of law within the self-governing political community. The boundaries of the political community may wax or wane over time, but sovereignty is a Hamletian question of existence. The outburst from the Sunflower and Umbrella Movements came close to the tipping point of a constituent moment, although the regularity of constitutional politics gradually tamed this vital moment. The dialectic of democracy and the rule of law has very little to do with the dilemma of unpopular sovereignty. Only when democratic practice (be it electoral or deliberative) is attached to an authentic constitution of the people will popular sovereignty come into being. Until then, unpopular sovereignty will remain an unending spell on these two political communities. Further disenchantment is certainly on its way.