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HONG KONG'S CIVIL DISOBEDIENCE UNDER CHINA'S AUTHORITARIANISM

Shucheng Wang*

ABSTRACT

Acts of civil disobedience have significantly impacted Hong Kong's liberal constitutional order, existing as it does under China's authoritarian governance. Existing theories of civil disobedience have primarily paid attention to the situations of liberal democracies but find it difficult to explain the unique case of the semi-democracy of Hong Kong. Based on a descriptive analysis of the practice of civil disobedience in Hong Kong, taking the Occupy Central Movement (OCM) of 2014 and the Anti-Extradition Law Amendment Bill (Anti-ELAB) movement of 2019 as examples, this Article explores the extent to which and how civil disobedience can be justified in Hong Kong's rule of law-based order under China's authoritarian system, and further aims to develop a conditional theory of civil disobedience for Hong Kong that goes beyond traditional liberal accounts. More specifically, it is argued that an act of civil disobedience targeted at the actions of the central government, which has no democratic accountability to the people of Hong Kong, is one aimed outside the domain of Hong Kong's autonomy, and is thus unlikely to succeed in the Hong Kong context. By contrast, an act of civil disobedience intended to push against the government of Hong Kong acting within its domain of autonomy largely fits into Hong Kong's semi-democratic system. Moreover, it is suggested that both forms of civil disobedience have had significant utilitarian value as a civic educational tool. Finally, this Article reconciles unlawful acts of civil disobedience with Hong Kong's rule of law by establishing clear limitations on permissible conduct, with particular attention paid to non-violence as a fundamental condition, albeit without excluding the use of limited forms of violence as an appropriate strategy, e.g., to invigorate political participation, in particular when available democratic and peaceful channels have been exhausted.

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Keywords: civil disobedience; civic education; Hong Kong; rule of law; authoritarianism

INTRODUCTION

Questions regarding the justification and ethics of civil disobedience have long perplexed academics. It was even claimed that, after Martin Luther King Jr was assassinated, civil disobedience was no longer relevant to life today and thus likely to die out.¹ However, it is very clear that this is not the case for Hong Kong. For example, it is widely accepted that the Occupy Central Movement (OCM) in 2013 was a civil disobedience movement in which leaders mobilized protesters to stage a mass sit-in in order to blockade Hong Kong's Central District; the aim of this movement was to force Beijing to give the people of Hong Kong what they demanded, namely genuine universal suffrage.² In other words, the OCM intended to pressure China's Central Government into withdrawing the framework it had proposed to govern the election of the Chief Executive of Hong Kong. Instead it compelled it to adopt an electoral system that was in accordance with international standards of universal suffrage with respect to the civic nomination for the election of the Chief Executive.³

Furthermore, the ongoing Anti-Extradition Law Amendment Bill (Anti-ELAB) movement has aimed to oppose the enactment of the Fugitive Offenders and Mutual Legal Assistant in Criminal Matters Legislation (Amendment) Bill 2019 ("the Bill") proposed by the Hong Kong government.⁴ The Bill allows fugitives to be transferred to the jurisdiction of Mainland China for trial. Initially, the Bill was proposed in response to a case in which a felon had flown to Hong Kong from Taiwan and could not subsequently be extradited due to the lack of relevant agreement between the two jurisdictions.⁵ Although extradition had been practiced in the past between Hong Kong and other Commonwealth jurisdictions, there was no extradition agreement between Hong Kong and

¹ Herbert J. Storing, *The Case Against Civil Disobedience*, in CIVIL DISOBEDIENCE IN FOCUS 85 (Hugo Adam Bedau ed., Routledge 1991).

² *What is Occupy Central? 10 Key Facts About Hong Kong's Pro-Democracy Movement*, S. CHINA MORNING POST, <http://www.scmp.com/article/1604649/what-occupy-central-10-things-you-need-know> [hereinafter *What is Occupy Central?*]

³ Michael Forsyth, Chris Buckley & Alan Wong, *In Hong Kong, an Unofficial Election Draws Beijing's Ire*, N.Y. TIMES (June 20, 2014), <https://www.nytimes.com/2014/06/21/world/asia/in-hong-kong-an-unofficial-election-draws-beijings-ire.html>.

⁴ Annette Wong, *Desperate for Democracy: A Comparison between Hong Kong's 2014 Umbrella Movement and 2019 AntiELAB Protests (2020)* (Senior Thesis, Claremont College) (on file with Claremont College).

⁵ *Hong Kong China Plans Explained*, BBC NEWS (Dec. 13, 2019), <https://www.bbc.com/news/world-asia-china-47810723>.

Mainland China.⁶ However, the protesters feared that if the Bill passed, residents of Hong Kong and other foreign individuals could be sent to Mainland China and subjected to politically motivated persecution and subsequent unfair trial.⁷

It cannot be denied that the Anti-ELAB movement has been involved with acts of civil disobedience, sometimes even including violence in addition to these lawful protests.⁸ For example, in the three-day, citywide strike at the beginning of August 2019, protesters stormed highways, blocked the Cross-Harbour Tunnel, and occupied the airport; among other actions, marches have frequently escalated into violent clashes with police.⁹

Needless to say, civil disobedience is an issue that has been frequently discussed in literature.¹⁰ According to John Rawls' seminal definition, it is "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government."¹¹ Moreover, in justifying civil disobedience, "one invokes the commonly shared conception of justice that underlies the political order. It is assumed that in a reasonably just democratic regime there is a public conception of justice by reference to which citizens regulate their political affairs and interpret the constitution."¹² Of course, this definition has been hotly debated and even challenged by subsequent scholarship. For example, it has been argued that some limited forms of violence, if used strategically to achieve a specific objective and to enhance the quality of communication by providing "an eloquent statement of both the dissenter's frustration and the importance of the issues he addresses," can be justified in the civil disobedience context.¹³ Indeed,

⁶ *Id.*

⁷ *Hong Kong Protestors Demonstrate Against Extradition Bill*, BBC NEWS (June 9, 2019) <https://www.bbc.com/news/world-asia-china-48572130>.

⁸ Mike Ives & Ezra Cheung, *Protesters Start Three Days of Civil Disobedience in Hong Kong*, N.Y. TIMES (Aug. 3, 2019), <https://www.nytimes.com/2019/08/03/world/asia/hong-kong-protest.html>.

⁹ *Id.*

¹⁰ See also Nathan J. Miller, *International Civil Disobedience: Unauthorized Intervention and the Consequence of the International Community*, 74 MD. L. REV. 315, 315 (2015); WILLIAM SMITH, CIVIL DISOBEDIENCE AND DELIBERATIVE DEMOCRACY 1 (2013); KIMBERLEY BROWNLEE, CONSCIENCE AND CONVICTION: THE CASE FOR CIVIL DISOBEDIENCE 5–6 (2012); George Forji Amin, *Just Laws versus Unjust Laws: Asserting the Morality of Civil Disobedience*, 3 J.L. & POL. 156, 156 (2010); David Lefkowitz, *On a Moral Right to Civil Disobedience*, 117 ETHICS 202, 202 (2007); Martin D. Carcieri, *Grutter v. Bollinger and Civil Disobedience*, 31 U. DAYTON L. REV. 345, 346–47 (2006); Frances Olsen, *Civil Disobedience for Social Change: Constitutional Law as Facilitative or Distracting*, 14 GRIFFITH L. REV. 213, 213 (2005).

¹¹ JOHN RAWLS, A THEORY OF JUSTICE 320 (revised ed., 1999).

¹² *Id.* at 321.

¹³ Candice Delmas, *Civil Disobedience*, 11 PHIL. COMPASS 681, 684 (2016) (quoting Kimberley Brownlee, *Conscience and Conviction: The Case for Civil Disobedience* 349–50 (2004)) (internal citations omitted); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 267 (1979).

some limited forms of violence have also been witnessed in the specific acts of civil disobedience involved in the Anti-ELAB movement, as noted above.

Furthermore, it is generally argued that citizens of a *nearly* just liberal-democratic state have a morally justified claim to political authority and that they enjoy a moral right to engage in acts of suitably constrained civil disobedience or a moral right to public disobedience.¹⁴ It would be erroneous to conflate the general situation of liberal democracies with the situation in Hong Kong; this is because the latter, despite enjoying a number of democratic characteristics, is not a genuine democracy. For example, only half of the legislators of the Legislative Council are elected by their geographic constituencies, in which the vote is allocated on a one person, one vote basis.¹⁵ Of course, Hong Kong has a robust rule of law, judicial independence, and a mini constitution, i.e., the Hong Kong Basic Law, the highest law within the region.¹⁶ Moreover, China's national laws, at least in principle, do not apply within Hong Kong unless they are listed in the Annex of the Hong Kong Basic Law.¹⁷ Notwithstanding this, the Hong Kong Basic Law ultimately gives the National People's Congress Standing Committee (NPCSC) in Beijing the authority to determine the pace of democratic reform in Hong Kong.¹⁸

To be sure, there has been an ongoing political debate over the shape of Hong Kong's future constitutional order, particularly during these demonstrations.¹⁹ However, very little attention has been paid to the civil disobedience itself, under the banner of which a large number of protesters carry out "unlawful" acts, particularly in the liberal context of Hong Kong under China's authoritarian governance. Therefore, this Article addresses the inescapable and challenging issue of civil disobedience in post-handover Hong Kong, aiming to enrich the existing scholarship regarding civil disobedience from Hong Kong's perspective. It does so by examining the following: (1) the nature of civil disobedience, using the OCM and the anti-extradition bill protests as examples; (2) the extent to which civil disobedience can be justified, particularly with regard to the "One Country, Two Systems" rubric; and (3) the extent to which

¹⁴ Lefkowitz, *supra* note 10, at 233.

¹⁵ See also Owen M. Fiss, *Hong Kong Democracy*, 36 COLUM. J. TRANSNAT'L L. 493, 494 (1998).

¹⁶ *Hong Kong: What Is the Basic Law and How Does It Work?*, BBC NEWS (Nov. 20, 2019), <https://www.bbc.com/news/world-asia-china-49633862>.

¹⁷ *Hong Kong Security Law: What is it and is it Worrying*, BBC NEWS (June 30, 2020), <https://www.bbc.com/news/world-asia-china-52765838>.

¹⁸ *Hong Kong: What Is Hong Kong's Basic Law and How Does It Work?*, *supra* note 16.

¹⁹ *Hong Kong's Democracy Debate*, BBC NEWS (June 18, 2015), <https://www.bbc.com/news/world-asia-china-27921954>.

civil disobedience can be reconciled with the rule of law and democratic processes in Hong Kong.

More specifically, the present Article points out that, on its face, the OCM was a form of civil disobedience that was not only “unlawful” from a purely legal perspective, but was also questionable in terms of its utility, given the fact that the region is ultimately subject to the sovereign power of China’s authoritarian regime. Thus, Beijing possesses the final authority regarding Hong Kong’s political development to a large extent.²⁰ Moreover, the OCM did not achieve its original political goal, as the government made no concession to the demands of the large number of protesters.²¹ This is not to say, of course, that peaceful civil disobedience is of no value in retaining Hong Kong’s liberal order; in fact, retaining its liberal tradition of civic education and public participation in the face of China’s authoritarian influence is of extreme importance.

Considering this importance, the present Article goes on to examine the utilitarian value of civil disobedience as a modern form of civic education in Hong Kong. In turn, it seeks to reconcile the utilitarian justifications for civil disobedience with the rule of law by identifying clear limitations on permissible disobedient acts, including the absence of violence as an essential precondition for justifying civil disobedience. In doing so, this paper further contends that, civil disobedience of a kind plays a vital role in civic education which may go some way towards justifying its means. This, in turn, lends support to judicial approaches that place greater emphasis on the fundamental rights of those who exercise civil disobedience when determining whether certain acts of civil disobedience contravene the law. Finally, this Article argues that violent acts in principle cannot and do not constitute justifiable acts of civil disobedience and are also unrealistic in the context of Hong Kong under China’s authoritarian rule, particularly given the importance of retaining a strong rule-of-law tradition in the region. However, this does not exclude the possibility that some limited forms of violence may be used as an appropriate strategy in certain exceptional circumstances, e.g., for enhancing communication, invigorating the public sphere, etc.

I. CIVIL DISOBEDIENCE IN HONG KONG: OCM AND ANTI-ELAB

An act of civil disobedience is a deliberate and open violation of the law with the intent, within the framework of the prevailing form of government, to protest

²⁰ *Hong Kong Security Law: What Is It and Is It Worrying?*, *supra* note 17.

²¹ *Id.*

a wrong or to advocate for the betterment of society in some way.²² Put simply, it is an illegal public protest that is non-violent in character.²³ While definitions and descriptions of civil disobedience are numerous, its essential features can be generally summarized as follows: (1) it is conscientious; (2) it breaks the law; (3) it is public; (4) it is an act of protest; and (5) it is non-violent.²⁴ One famous example recounted by Sophocles is that of Antigone, who chose to obey her conscience and violate the state edict issued against providing her brother with a burial after he was decreed a traitor.²⁵ When the dictator Creon reminded her that such deliberate disobedience of the state law would attract a mandatory death sentence, “Antigone nobly replied, ‘[n]or did I think your orders were so strong that you, a mortal man, could overrun the gods’ unwritten and unailing laws.’”²⁶ As Lewis H. Van Dusen commented:

Conscience motivated Antigone. She was not testing the validity of the law in the hope that eventually she would be sustained. Appealing to the judgment of the community, she explained her action to the chorus. She was not secret and surreptitious—the interment of her brother was open and public. She was not violent; she did not trespass on another citizen’s rights. And finally, she accepted without resistance the death sentence—the penalty for violation. By voluntarily accepting the law’s sanctions, she was not a revolutionary denying the authority of the state.²⁷

Regarding the OCM, the organizers of the movement officially announced in 2013 that they would begin to promote protests if the government’s proposal for universal suffrage failed to meet international standards.²⁸ At the time, organizers hoped to persuade at least 10,000 people to join their planned act of civil disobedience.²⁹ On August 31, 2014, the NPCSC in Beijing announced that its decision regarding Hong Kong’s electoral system would be implemented in 2017.³⁰ The electoral framework granted a nominating committee, comprising

²² Morris Keeton, *The Morality of Civil Disobedience*, 43 TEX. L. REV. 507, 508 (1965).

²³ Carl Cohen, *Civil Disobedience and the Law*, 21 RUTGERS L. REV. 1, 3 (1966).

²⁴ RAWLS, *supra* note 11, at 320.

²⁵ Lewis H. Van Dusen, *Civil Disobedience: Destroyer of Democracy*, 55 A.B.A. J. 123, 123 (1969).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Ho Man Leung, *Repertoire, Framing and Visions: The Occupy Movement in Hong Kong* 78 (July 9, 2016) (unpublished Master thesis, Lingnan University) (on file at the Digital Commons at Lingnan University).

²⁹ *Id.*

³⁰ Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xianggang Tebie Xingzhengqu Xingzheng Zhangguan Puxuan Wenti He 2016 Nian Lifahui Chansheng Banfa De Jueding (全国人民代表大会常务委员会关于香港特别行政区行政长官普选问题和2016年立法会产生办法的决定) [The Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for

1,200 members from twenty-eight functional constituencies, the power to nominate two to three candidates for the office of Chief Executive in accordance with democratic procedures.³¹ In turn, the Chief Executive-elect, after being selected through universal suffrage, would have to be appointed by the Central Government.³² Immediately after this reform package was officially adopted by the NPCSC, protests broke out.³³ The reforms were deemed by the pro-democracy camp to restrict political views, as the procedure they laid out effectively enabled only Beijing-approved candidates to advance through the nomination process.³⁴

On September 27, 2014, organizers announced the official commencement of the civil disobedience movement, which had begun as a student protest movement.³⁵ Surprisingly, at its peak, the pro-democracy movement saw tens of thousands of Hong Kong residents from all walks of life take to the streets.³⁶ Interestingly, it was not strong warnings or even threats on the part of the government, but rather an injunction granted by a court that played a primary role in clearing the protest sites and bringing an end to the movement.³⁷ To some extent, the restoration of peace in this instance can be ascribed to Hong Kong's rule of law and judicial independence.

Having said this, it can be seen that the OCM in Hong Kong was not a general public demonstration, but rather an act of civil disobedience involving public violation of the law. The OCM had itself stated that participants in the movement could have been guilty of “obstruct[ing], inconvenien[cing] or endanger[ing], any person or vehicle in a public place,” under the Summary Offenses Ordinance.³⁸ Moreover, according to the Public Order Ordinance, OCM could also have constituted an unlawful assembly: “when 3 or more

Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016] (adopted at the Tenth Session of the Standing Committee of the Twelfth National People's Congress, Aug. 31, 2014).

³¹ *Full Text of NPC Decision on Universal Suffrage for HK Chief Executive Selection*, CHINA.ORG.CN (Aug. 31, 2014), http://www.china.org.cn/china/2014-08/31/content_33390388.htm.

³² *Id.*

³³ Chris Buckley & Michael Forsythe, *China Restricts Voting Reforms for Hong Kong*, N.Y. TIMES (Aug. 31, 2014), <https://www.nytimes.com/2014/09/01/world/asia/hong-kong-elections.html>.

³⁴ Johannes Chan, *Human Rights, the Rule of Law and Democracy: Recent Experience of Hong Kong and China*, U. H.K.FAC. L. RES. PAPER No. 2015/039 (Aug. 4, 2015).

³⁵ *Thousands at Hong Kong Protest as Occupy Central is Launched*, BBC NEWS (Sept. 27, 2014), <http://www.bbc.com/news/world-asia-china-29397738>.

³⁶ *Hong Kong Protests: What Changed at Mong Kok?*, BBC NEWS (Dec. 3, 2014), <http://www.bbc.com/news/world-asia-china-29054196>.

³⁷ *HK Protesters Brace for Clearance after Injunction Published*, BBC NEWS (Dec. 9, 2014), <https://www.bbc.com/news/world-asia-china-30390595>.

³⁸ Summary Offenses Ordinance, (2017) Cap. 228, § 4A.

persons assemble[] . . . to cause any person reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such conduct provoke other persons to commit a breach of the peace[.]”³⁹

Ultimately, a minibus management company, together with Lai Hoi-ping and Tam Chun-hung on behalf of the Taxi Drivers and Operators Association, brought private lawsuits against those members of the movement who unlawfully occupied or remained on the public highway and were granted an injunction order by the court.⁴⁰ In *Chiu Luen Public Light Bus Co. Ltd. v. Persons Unlawfully Occupying or Remaining on the Public Highway* (the “*Public Light Bus Case*”), the Court of First Instance, referring to *Leung Tsang Hung & Another v. The Incorporated Owners of Kwok Wing House*,⁴¹ stated that:

His Lordship identified three elements which constituted the tort of public nuisance: (1) A state of affairs which endangers the lives, safety, health, property, or comfort of the public, or obstructs the public in the exercise or enjoyment of any right that is common to members of the public. (2) An act or omission committed by the defendants that is causative of particular injury to a member of the public. The injury caused to the plaintiffs must be of a foreseeable type. (3) The defendants knew or ought to reasonably to have known that his act or omission would result in the likely consequence of a nuisance hazard presenting a real risk of harm to the public.

On the evidence before me, [Ribeiro PJ] agree[s] with Mr. Mok’s submissions that a state of affairs has arisen which endangers the comfort and convenience of the property as well as obstructs the public in the exercise of enjoyment of their right to use the areas in question as a two-way carriageway for normal vehicular traffic.⁴²

On this basis, the act of civil disobedience in question engaged in by the OCM was held to constitute tortious conduct under Hong Kong common law and was thus determined to be unlawful.⁴³ The court further ruled that:

³⁹ Public Order Ordinance, (2019) Cap. 245, § 18(1).

⁴⁰ *Chiu Luen Public Light Bus Co. Ltd. v. Persons Unlawfully Occupying or Remaining on the Public Highway, Namely, the Westbound Carriageway of Argyle Street Between the Junction of Tung Choi Street and Portland Street and/or Other Persons Hindering or Preventing the Passing or Repassing of Argyle Street*, (2014) 2086 H.K.L.R.D. ¶¶ 4, 5 (C.F.I.) (H.K.).

⁴¹ *See generally* *Leung Tsang Hung v. Incorporated Owners of Kwok Wing House*, (2007) 4 H.K.L.R.D. 654, (C.F.A.) (H.K.).

⁴² *Public Light Bus Co Ltd.*, (2014) 2086 H.K.L.R.D. ¶¶ 17–18 (H.K.).

⁴³ *Id.* ¶¶ 11–13.

[W]hen the demonstration in question based on civil disobedience has taken place for so long, in such a scale which has affected so many people and which has the real risk of turning into civil disorder, . . . the fact that the demonstration is civil disobedience, no matter how noble the underlying cause the participants may consider it to be, can constitute a factor which militates against the granting of an injunction.⁴⁴

In terms of a possible ground for a defense based on the participant's fundamental rights to freedom of speech, assembly, and demonstration, as guaranteed under Article 27 of the Basic Law, the court held that the defendant's conduct in the purported exercise caused an obstruction that far exceeded the bounds of what was reasonable in light of the length of the demonstration, the extent of the demonstration, and the increasingly violent nature of the confrontation between the protesters and the police.⁴⁵ In this way, the court determined that the protesters' conduct was disproportionate and that any defense relying on fundamental rights was unlikely to succeed.⁴⁶

Although OCM has sometimes been referred to as the “[U]mbrella [R]evolution,”⁴⁷ it was not a genuine revolution—i.e., a forcible overthrow of a government or social order—insofar as it was not characterized by the destruction of property, personal injury, and death for many, or the complete disruption of community life.⁴⁸ Of course, civil disobedience might not prohibit minor property damage, which may be inevitable in certain circumstances. Furthermore, it is obvious that the movement was not seeking to overthrow the constituted authority or to repudiate that authority. The organizers of the OCM accepted the established authority and the general legitimacy of the system of laws.⁴⁹ Their overall fidelity to the law can to a certain extent be demonstrated by the effectiveness of the court's ruling ordering the occupied areas to be cleared following the failure of police officers to disperse the protesters.⁵⁰ In fact, the leaders of the movement eventually handed themselves in to police for “taking part in an unauthorised assembly.”⁵¹ Moreover, the actions of the movement differed from direct civil disobedience, which involves disobeying

⁴⁴ *Id.* ¶ 31.

⁴⁵ *Id.* ¶¶ 32, 33.

⁴⁶ *Id.*

⁴⁷ Jonathan Kaiman, *Hong Kong's Umbrella Revolution*, GUARDIAN (Sept. 30, 2014), <https://www.theguardian.com/world/2014/sep/30/-sp-hong-kong-umbrella-revolution-pro-democracy-protests>.

⁴⁸ Cohen, *supra* note 23, at 4.

⁴⁹ For more details about the difference between the revolution and civil disobedience, see Cohen, *supra* note 23, at 3–4.

⁵⁰ *HK Protesters Brace for Clearance after Injunction Published*, *supra* note 37.

⁵¹ Jonathan Kaiman, *Occupy Central Leaders Surrender to Hong Kong Police*, GUARDIAN (Dec. 3, 2014), <http://www.theguardian.com/world/2014/dec/03/occupy-central-surrender-hong-kong-police-protests>.

the law against which the protest is being made.⁵² Thus, OCM was an exercise in indirect civil disobedience, as the disobedience in question was not targeted against laws such as the Summary Offenses Ordinance and the Public Order Ordinance, but instead against the electoral framework proposed by the NPCSC.⁵³

As far as the Anti-ELAB protests are concerned, the protesters have expressed concerns that the Chinese authorities would use the ELAB as a political tool to target persons who have offended Beijing, although the proposed legislation excludes political crimes, and the government of Hong Kong has tried to relieve the public's concerns regarding human rights.⁵⁴ In terms of strategy, the protesters, who are described as being *leaderless*, have employed a variety of tactics, including lawful protests and acts of civil disobedience, as well as radical methods that were adopted largely due to the ineffectiveness of peaceful ones.⁵⁵ The radical methods used included: storming the Legislative Council, blocking major roads to disrupt transportation, calling for city-wide strikes, blocking the toll plaza in Hung Hom, vandalizing shops perceived to be pro-Beijing, paralyzing the train system, etc.⁵⁶ The movement also tried to employ some potentially provocative branding or language tactics, such as the phrase “[U]mbrella [R]evolution”⁵⁷ or the declaration of a “Provisional Government of Hong Kong.”⁵⁸ In so doing, the protesters put “themselves outside [the traditionally] accepted channels of public dissent[.]”⁵⁹

It should be noted that, at the beginning of the protests in March 2019, the demonstrations were lawful and peaceful.⁶⁰ Subsequently, due to the lack of

⁵² Cohen, *supra* note 23, at 23.

⁵³ All acts of civil disobedience can fall into one of two categories: direct disobedience and indirect disobedience. For more details, see Cohen, *supra* note 23, at 4.

⁵⁴ Austin Ramzy, *Hong Kong March: Vast Protest of Extradition Bill Shows Fear of Eroding Freedoms*, N.Y. TIMES (June 9, 2019), <https://www.nytimes.com/2019/06/09/world/asia/hong-kong-extradition-protest.html>.

⁵⁵ Yan Sham-Shackleton, *Hong Kong's Third Generation of Democracy Fighters Are Not Just Rioters, They Are Last Line of Resistance*, H.K. FREE PRESS (July 28, 2019), <https://www.hongkongfp.com/2019/07/28/hong-kongs-third-generation-democracy-fighters-not-just-rioters-last-line-resistance/>.

⁵⁶ *Id.*; Julia Hollingsworth & James Griffiths, *Hong Kong Government Building a 'Big Crime Scene' After Night of Violent Protests*, CNN (July 2, 2019), <https://www.cnn.com/2019/07/02/asia/hong-kong-protests-legco-intl-hnk/index.html>.

⁵⁷ Kaiman, *supra* note 47.

⁵⁸ *Protesters Plan to Topple HK Government, New Manifesto for Provisional Government Recited, Senior Government Officials to be Dismissed*, DIMSUM DAILY (Oct. 5, 2019), <https://www.dimsumdaily.hk/protesters-plan-to-topple-hk-government-new-manifesto-for-provisional-government-recited-senior-government-officials-to-be-dismissed/>.

⁵⁹ Delmas, *supra* note 13, at 685.

⁶⁰ Amy Qin, *Hong Kong's Leader, Faced with More Clashes, Condemns Violence*, N.Y. TIMES (July 15,

government response to the public demands, a later protest march at the peak of the movement on June 16, 2019, was attended by around two million people, as estimated by the organizers.⁶¹

Admittedly, unlike the large-scale OCM demonstrations, during which the government made no concessions whatsoever,⁶² the Anti-ELAB protests resulted in at least some government response to the demands of the public: the bill in question, although rhetorically supported by the Central Government of China, was formally withdrawn by the Hong Kong Chief Executive Carrie Lam on July 9, 2019.⁶³ It should be noted that after a series of mostly peaceful demonstrations, some violent clashes or incidents between the protesters and the police did occur during demonstrations.⁶⁴ Clashes between pro-Beijing demonstrators and pro-democracy protesters also took place.⁶⁵ One such clash occurred in the Yuen Long train station, where an unknown group of masked people dressed in white attacked protesters in black and some civilians as they were marching.⁶⁶ While the protests have gained tremendous support from the international community,⁶⁷ the protesters have not yet received any positive response on the part of the government to their other demands, which include the withdrawal of the characterization of the June 12 protests as a “riot,” the unconditional release of all arrested protesters, and universal suffrage for the government of Hong Kong.⁶⁸

2019), <https://www.nytimes.com/2019/07/15/world/asia/hong-kong-carrie-lam-sha-tin-protest.html>.

⁶¹ ‘Nearly 2 Million’ People Take to Streets, Forcing Public Apology from Hong Kong Leader Carrie Lam as Suspension of Controversial Extradition Bill Fails to Appease Protesters, S. CHINA MORNING POST (June 17, 2019), <https://www.scmp.com/print/news/hong-kong/politics/article/3014737/nearly-2-million-people-take-streets-forcing-public-apology>.

⁶² Jeffie Lam, *Four Years on from Failed Occupy Protests, What Next for Hong Kong’s Deflated Democracy Movement?*, S. CHINA MORNING POST (Sept. 28, 2018), <https://www.scmp.com/print/news/hong-kong/politics/article/2166075/four-years-failed-occupy-protests-what-next-hong-kongs>.

⁶³ *Hong Kong Extradition Bill “is Dead” Says Carrie Lam*, BBC NEWS (July 9, 2019), <https://www.bbc.com/news/world-asia-china-48917796>; *Hong Kong Leader Carrie Lam Announces Formal Withdrawal of the Extradition Bill and Sets up a Platform to Look into Key Causes of Protest Crisis*, S. CHINA MORNING POST (Sept. 4, 2019), <https://www.scmp.com/print/news/hong-kong/politics/article/3025641/hong-kong-leader-carrie-lam-announce-formal-withdrawal>.

⁶⁴ Qin, *supra* note 60.

⁶⁵ *Hong Kong Protesters Clash with Pro-Beijing Counterparts*, AL JAZEERA (Sept. 15, 2019), <https://www.aljazeera.com/news/2019/09/hong-kong-protesters-clash-pro-beijing-counterparts-190914140138713.html>.

⁶⁶ Mike Ives, *Mob Beats Antigovernment Protesters in Hong Kong*, N.Y. TIMES (July 21, 2019), <https://www.nytimes.com/2019/07/21/world/asia/hong-kong-protest-police.html>.

⁶⁷ Victor Ting, Phila Siu & Cherie Chan, *From Vancouver to New York to Brisbane, Rallies Around World Express Solidarity with Hong Kong’s Mass Protest Against Extradition Agreement*, S. CHINA MORNING POST (June 9, 2019), <https://www.scmp.com/print/news/hong-kong/politics/article/3013748/berlin-brisbane-rallies-12-countries-express-solidarity>.

⁶⁸ Kris Cheng, *Hong Kong Anti-extradition Law Demonstration Set for Sunday*, H. K. FREE PRESS

Meanwhile, it is also interesting to note that during the ongoing Anti-ELAB protests, the voter turnout in the local District Council elections on November 24, 2019, was the highest since elections began in Hong Kong in 1999.⁶⁹ Due to the fact that elections were conducted during the ongoing Anti-ELAB protests, they have been widely considered a *de facto* referendum on the ongoing pro-democracy movement.⁷⁰ Although Beijing and its allies considered the elections to be a way to hear the voice of a silent majority after the months of increasingly violent protests, the democrats' triumph in the elections—seizing control of seventeen of Hong Kong's eighteen district councils by taking more than 340 of the 452 seats—has clearly shown the overwhelming popular support for the movement in Hong Kong.⁷¹ The outcome, which largely stood in opposition to Beijing's rhetoric of labelling the protesters as “rioters,” even caused China's state-controlled media to lapse into silence; it described the detailed results as neither a win nor a loss.⁷²

To contrast OCM with the anti-extradition bill protests, the former was less likely to impose substantial pressure on the Hong Kong government to respond to the demands of large-scale protests effectively under the “One Country, Two Systems” principle. This decision was to be made by the NPCSC, although the government of Hong Kong did have some initiative.⁷³ Under China's authoritarian system, it is a basic principle that an inferior authority, i.e., the government of Hong Kong, should be submissive to the formal decisions made by the NPCSC.⁷⁴ To a certain extent, the withdrawal of the NPCSC decision

(July 18, 2019), <https://www.hongkongfp.com/2019/07/18/hong-kong-anti-extradition-law-demo-set-sunday-pro-beijing-lawmakers-urge-govt-ban-protests-till-sept/>.

⁶⁹ K.K. Rebecca Lai & Jin Wu, *Hong Kong Election Results Mapped*, N.Y. TIMES (Nov. 24, 2019), <https://www.nytimes.com/interactive/2019/11/24/world/asia/hong-kong-election-results.html>.

⁷⁰ Shibani Mahtani, Simon Denyer, Tiffany Liang & Anna Kam, *Hong Kong's Pro-democracy Parties Sweeping Aside Pro-Beijing Establishment in Local Elections, Early Results Show*, WASH. POST (Nov. 24, 2019), https://www.washingtonpost.com/world/record-turnout-in-hong-kong-election-seen-as-a-referendum-on-the-pro-democracy-protest-movement/2019/11/24/31804b00-0df5-11ea-8054-289acf6e38a3_story.html.

⁷¹ Tony Cheung, *Hong Kong Elections: Pro-Beijing Collapse Shows Identity Politics More Important than Community Issues for District Council Success, Analysts Say*, S. CHINA MORNING POST (Nov. 25, 2019), <https://www.scmp.com/news/hong-kong/politics/article/3039201/hong-kong-elections-pro-beijing-collapse-shows-identity>.

⁷² Keith Bradsher, *Hong Kong Election Landslide Signals More Frictions with Beijing*, N.Y. TIMES (Nov. 25, 2019), <https://www.nytimes.com/2019/11/25/world/asia/hong-kong-election-protests.html>; Jillian Kay Melchior, *After Hong Kong's Democratic Landslide*, WALL ST. J. (Dec. 5, 2019), <https://www.wsj.com/articles/after-hong-kongs-democratic-landslide-11575591771>.

⁷³ Albert H.Y. Chen, *Hong Kong's Internal Contradiction of “One Country, Two Systems”*, ECONOMIST (Oct. 11, 2019), <https://www.economist.com/open-future/2019/10/11/hong-kongs-internal-contradiction-of-one-country-two-systems>.

⁷⁴ Mike Ives, *What is Hong Kong's Extradition Bill*, N.Y. TIMES (June 10, 2019), <https://www.nytimes.com/2019/06/10/world/asia/hong-kong-extradition-bill.html>.

would somehow imply that the decision was wrong, or at least inappropriate.⁷⁵ A concession of this kind, which is extraordinarily rare in an authoritarian regime, would be a danger for the higher authority as it is likely to encourage additional civil rights movements in the future.⁷⁶ This is a scenario that an authoritarian regime generally attempts to avoid as much as possible. By contrast, the anti-extradition bill protests have presented a direct challenge to the decision of the government of Hong Kong itself; it is responsive to a certain extent to a domestic public demand in the current semi-democratic system.⁷⁷ This situation can be distinguished from the OCM protests in that there is no effective constitutional channel by which the Hong Kong people can challenge any decision of the NPCSC.⁷⁸ In this regard, civil disobedience against the actions or inactions of the Hong Kong government within its domain of autonomy, rather than similar measures taken against the external NPCSC, is more likely to be workable in the context of Hong Kong's semi-democratic system. In Hong Kong, civil liberties (in particular the freedoms of speech, press, association, and assembly) and civil society can largely flourish, although the government is only elected by a select Election Committee with 1,200 members at present.⁷⁹

II. JUSTIFICATION FOR CIVIL DISOBEDIENCE IN HONG KONG?

Admittedly, justifying the need for civil disobedience in society tends to be complicated as it involves a range of interacting factors.⁸⁰ Keeton outlined these factors as follows:

⁷⁵ Ryan Hass, *Why Now? Understanding Beijing's New Assertiveness in Hong Kong*, BROOKINGS (July 17, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/07/17/why-now-understanding-beijings-new-assertiveness-in-hong-kong/>.

⁷⁶ *Id.*

⁷⁷ See generally *Hong Kong Leader Carrie Lam Announces Formal Withdrawal of the Extradition Bill and Sets up a Platform to Look into Key Causes of Protest Crisis*, S. CHINA MORNING POST (Sept. 4, 2019), <https://www.scmp.com/print/news/hong-kong/politics/article/3025641/hong-kong-leader-carrie-lam-announce-formal-withdrawal>.

⁷⁸ See Kimmy Chung, *Hong Kong Courts Have No Power to Challenge Decisions of China's Top Legislative Body, Says Beijing Loyalist Maria Tam*, S. CHINA MORNING POST (Dec. 30, 2017), <https://www.scmp.com/news/hong-kong/article/2126239/little-chance-china-forcing-through-decision-national-security-law>; see also Song Sio-Chong, *NPCSC's Decision Cannot be Challenged*, CHINA DAILY, http://www.chinadaily.com.cn/hkedition/2014-09/22/content_18636420.htm (Sept. 22, 2014).

⁷⁹ Michael Delaney, *What Just Happened in Hong Kong's Elections?*, FOREIGN POL'Y (Nov. 28, 2019), <https://foreignpolicy.com/2019/11/25/what-happened-hong-kong-elections/#>.

⁸⁰ Keeton, *supra* note 22, at 508.

Among the important ones are:

- (1) serious injustice or major opportunity for betterment, as perceived by the victim or others, in the laws or in their application;
- (2) lack of a reasonable prospect for the aggrieved to obtain remedy through recourse to due process of law;
- (3) unavailability of effective non-legal recourses that are less hazardous or costly to the protesters than civil disobedience;
- (4) availability of tactics and strategy of civil disobedience that create a minimum of costs to other rights and to social order;
- (5) incompatibility of the offending law or its implementation with a more fundamental law of the land;
- (6) strength of the injured parties' conviction, or conviction that they are under religious or moral compulsion to act, and ability on their part to muster the courage and other means to persist in their protest;
- (7) availability of a moral or legal basis in the thinking of non-committed bystanders to which the injured can appeal to gain support, or at least neutralize opposition; and
- (8) compatibility of the use of civil disobedience with the legal system and culture of the society.⁸¹

Again, it can be seen that these conditions are very complex. However, generally speaking, two approaches to justifying civil disobedience may be employed: higher law justification and utilitarian justification.⁸²

A. *Higher Law Justification*

Under the rule of law, everyone is equal before and has a duty to obey the law.⁸³ Given that civil disobedience involves illegality, it is impossible to justify such conduct merely by appealing to positive laws. Any such justification must therefore be made by appealing to a "law" higher than positive laws, such as "divine law," "natural law," "justice," or "conscience."⁸⁴ It could be argued that such laws or principles "impose duties so compelling that they override and cancel out any conflicting obligations"—in short, that "no statute devised by

⁸¹ *Id.* at 513.

⁸² Cohen, *supra* note 23, at 12–13.

⁸³ *What is the Rule of Law*, UNITED NATIONS, <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> (last visited Oct. 2, 2020).

⁸⁴ *See generally* Kent Greenawalt, *The Natural Duty to Obey the Law*, 84 MICH. L. REV. 1, 38–48 (1985).

humans can outweigh them.”⁸⁵ By this reasoning, civil disobedience can be justified in situations where positive laws have been exhausted but justice has yet to be achieved.⁸⁶ Such a defense of civil disobedience is compatible with the natural law theory, namely, that:

A just law is a man made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of Saint Thomas Aquinas: An unjust law is a human law that is not rooted in eternal and natural law.⁸⁷

However, when appealing to a “higher law” or “natural law” that is not subject to public verification, each person may well make their own reasonable but different moral judgements on the subject; this leads to a clear impasse.⁸⁸ Of course, in a modern society, “[i]n justifying civil disobedience one does not appeal to principles of personal morality or to religious doctrines, though these may coincide with and support one’s claims. . . . Instead one invokes the commonly shared conception of justice that underlies the political order.”⁸⁹ This is because “[i]t is assumed that in a reasonably just democratic regime there is a public conception of justice by reference to which citizens regulate their political affairs and interpret the constitution.”⁹⁰

The higher law justification is generally applicable to direct civil disobedience where the positive law has been considered insufficient for upholding justice.⁹¹ Under modern constitutionalism, the justification for the illegality involved in civil disobedience is plausible only if the constitutional law or some of its provisions are considered unjust.⁹² If the highest positive law, i.e. constitutional law, is able to uphold justice, then there will be no need to resort to civil disobedience that involves illegality.⁹³ For example, citizens can simply bring a lawsuit before a court to review the constitutionality of a specific statute by claiming that such an unjust law violates some civil and political rights entrenched in the Hong Kong Basic Law.⁹⁴

⁸⁵ Cohen, *supra* note 23, at 10.

⁸⁶ *Id.*

⁸⁷ Letter from a Birmingham Jail [King, Jr.], to Fellow Clergymen (Apr. 16, 1963) (on file with American Studies Center-University of Pennsylvania).

⁸⁸ Cohen, *supra* note 23, at 12.

⁸⁹ RAWLS, *supra* note 11, at 321.

⁹⁰ *Id.*

⁹¹ *See* Cohen, *supra* note 23, at 12.

⁹² *See generally id.*

⁹³ *Id.*

⁹⁴ *See* J.F. Mathews, *The Legal System of the Hong Kong Special Administrative Region*, 18 U. PA. J. INT’L ECON. L. 3, 5 (1997).

It can be clearly seen from the above that the OCM did not resort to a “higher law,” “natural law,” or the like to justify its actions. Instead, on the surface, the movement attempted to use the notion of democracy with “international standards” as justification.⁹⁵ Of course, to a certain extent, democracy with “international standards” itself is not a universally accepted “higher law”; the idea of universal democracy is relatively new and is a product of the twentieth century.⁹⁶ As an example, consider the United Nations (U.N.): while, as human rights principles have evolved to become one of the central arms in the U.N.’s machinery, the organization holds a very powerful institutional position in the international arena,⁹⁷ it must be admitted that democracy has no such equivalent ideological standing at the UN.⁹⁸ As Sen stated, “democracy is not yet universally practiced, nor indeed universally accepted, in the general climate of world opinion[.]”⁹⁹ Thus, it would be difficult to conclude that “democracy in accordance with international standards” should be taken as a “law” occupying a higher position than constitutional law or other positive laws.¹⁰⁰ In fact, it is democratic governance that has now achieved primacy, and the civil and political rights listed in the International Covenant on Civil and Political Rights (ICCPR) are viewed as essential for modern democracy.¹⁰¹

Moreover, democracy is very valuable for underpinning human rights.¹⁰² Sen summarizes the way this has been achieved.¹⁰³ “First, political freedom is a part of human freedom in general, and exercising civil and political rights is a crucial part of good lives of individuals as social beings.”¹⁰⁴ Secondly, “democracy has an important *instrumental value* in enhancing” people’s ability to be heard when expressing and supporting their claims to political attention (including claims of economic needs).¹⁰⁵ Thirdly, “the practice of democracy

⁹⁵ See Leung, *supra* note 28, at 78; see also Amartya Sen, *Democracy as a Universal Value*, 10 J. DEMOCRACY 3, 4 (1999).

⁹⁶ Sen, *supra* note 95, at 4.

⁹⁷ See Gudmundur Alfredsson, *The United Nations and Human Rights*, 25 INT’L J. LEGAL INFO. 17, 17 (1997).

⁹⁸ Christof Heyns & Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, 23 HUM. RTS. Q. 483, 535 (2001); see ANNE GALLAGHER, MANUAL ON HUMAN RIGHTS MONITORING: AN INTRODUCTION FOR HUMAN RIGHTS FIELD OFFICERS 1–2 (2008).

⁹⁹ Sen, *supra* note 95, at 5.

¹⁰⁰ Prospects for Democracy and Press Freedom in Hong Kong: Roundtable Before the Congressional-Executive Comm. on China, 113th Cong. 7 (2014) (statement of Martin Lee, Founding Chairman, Democratic Party of Hong Kong).

¹⁰¹ Discussion Paper, Democracy and Human Rights: The Role of the UN 12 (Sept. 2013).

¹⁰² See *id.* at 7.

¹⁰³ See *id.*

¹⁰⁴ Sen, *supra* note 95 at 10.

¹⁰⁵ *Id.* at 8.

gives citizens an opportunity to learn from one another, and helps society to form its values and priorities.”¹⁰⁶ These aforementioned values are strengthened by democracy. In the liberal context of Hong Kong, the values enshrined in democracy have been widely shared and accepted during the OCM and Anti-ELAB movement, and consequently may be treated as a kind of “higher law.”

Despite this, however, it is worth noting that there are usually two forms of civil disobedience: direct and indirect.¹⁰⁷ The former refers to instances in which an unjust law that is opposed by the disobedient actors is broken, while the latter refers to breaking a just law in order to protest against another law or policy.¹⁰⁸ For example, as Cohen wrote, “if the object of protest is the conduct of a war or other foreign policy it may be impossible for the protester to violate that policy directly.”¹⁰⁹ Furthermore, “if the object of a protest is not a law but the absence of a law, or other administrative nonfeasance, direct civil disobedience would be impossible.”¹¹⁰

When compared with direct civil disobedience, the justification for civil disobedience may necessarily differ in the context of indirect civil disobedience.¹¹¹ As Cohen has pointed out:

[I]ndirect civil disobedience may involve the violation of statutes themselves entirely wholesome, in the effort to remedy serious injustice in another but related sphere. And the law thus broken will be admittedly a matter of careful human selection, not divine command. Such indirect protest could not be defended as the consequence of a conflict between divine and positive laws.¹¹²

Even in cases where the law being broken (for example, the Public Order Ordinance in the OCM) is not the object of the protest, it cannot be concluded that indirect civil disobedience cannot be justified. Given that civil disobedience is a political act, it certainly can be justified so long as the action addresses the majority that holds political power by appealing to the commonly shared conception of justice that underlies the political order, as “[i]t is assumed that in a reasonably just democratic regime there is a public conception of justice by

¹⁰⁶ *Id.* at 10.

¹⁰⁷ Cohen, *supra* note 23, at 4.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 5.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 12.

¹¹² *Id.*

reference to which citizens regulate their political affairs and interpret the constitution.”¹¹³

With that said, it can be seen that the OCM can be categorized as an act of indirect civil disobedience, as Hong Kong people were unable to directly act in violation of the NPCSC decision; instead, they chose indirect civil disobedience as a means of protest. However, given that Hong Kong is a special autonomous regime under China’s authoritarian system,¹¹⁴ the theories of either direct or indirect civil disobedience, as applicable in a “reasonably just democratic regime,” cannot be simply applied to Hong Kong under the circumstances.¹¹⁵ Given the high degree of Hong Kong’s autonomy, there are actually two types of objects of the protest in civil disobedience: one is within the autonomy of Hong Kong’s common law system, while the other is outside.

More specifically, the OCM broke the common laws of Hong Kong in order to protest against a decision, claimed to be unjustified by protesters according to the values of democracy, that was not drawn from Hong Kong but rather from *outside* Hong Kong.¹¹⁶ It is thus even more complicated to justify civil disobedience from a “higher law” perspective under these circumstances, as the protesters used the common values of democracy to override the NPCSC decision in Beijing. This represented a direct challenge to the authority of China’s Central Government, along with its sovereign power and lack of democratic accountability to Hong Kong under the framework of “One Country, Two Systems.”¹¹⁷ In other words, if Beijing was to make an arbitrary decision regarding a jurisdiction, but had no democratic accountability to the people in this jurisdiction, it would be impractical for people living there to protest against Beijing’s decision through civil disobedience, precisely due to the absence of democratic accountability on the part of Beijing.

Although Hong Kong has been a part of China since its handover in 1997,¹¹⁸ along with decisive authority over Hong Kong’s democratic development according to the Hong Kong Basic Law, China has no democratic accountability

¹¹³ RAWLS, *supra* note 11, at 320–21.

¹¹⁴ See *Hong Kong’s National Security Law: The Nail in the Coffin for One Country, Two Systems*, HUM. RTS. FOUND. (July 1, 2020).

¹¹⁵ RAWLS, *supra* note 11, at 321.

¹¹⁶ See Natasha Khan, *Professor Who Inspired Hong Kong’s Mass Protests is Sent to Jail*, WALL ST. J. (Apr. 24, 2019), <https://www.wsj.com/articles/professor-who-inspired-hong-kongs-mass-protests-is-sent-to-jail-11556099967>.

¹¹⁷ *Hong Kong Stages Huge National Day Democracy Protests*, BBC NEWS (Oct. 1, 2014), <https://www.bbc.com/news/world-asia-china-29430229>.

¹¹⁸ Steven Levine, *Hong Kong’s Return to China*, ENCYC. BRITANNICA (Oct. 8, 1998).

to the people of Hong Kong under the “One Country, Two Systems” principle;¹¹⁹ it is thus also impractical for the people of Hong Kong to protest against a decision made by Beijing specifically by breaking Hong Kong’s common law. In this regard, pragmatically speaking, civil disobedience may make sense when undertaken against the action or inaction of the Hong Kong government within the domain of Hong Kong’s autonomy, through resorting to some “higher law” in whatever form this may take, such as the common values of democracy and the rule of law cited by the Anti-ELAB movement. This is largely because the government of Hong Kong does have a degree of democratic accountability to the people of Hong Kong under its current semi-democratic system. It can thus be seen that the withdrawal of the Hong Kong government-proposed extradition bill, which occurred largely due to the increasing pressure imposed by the Anti-ELAB movement, may to a certain extent constitute evidence that civil disobedience against the government of Hong Kong in its domain of autonomy (rather than directly against the acts of Central Government outside the domain of autonomy) may be effective in certain circumstances. Of course, this is by no means intended to deny that people have a right to civil disobedience in an illiberal state; as Raz stressed, “members of the illiberal state do have a right to civil disobedience which is roughly that part of their moral right to political participation which is not recognized in law.”¹²⁰ Indeed, the justification discussed here is not applicable to civil disobedience in general, but rather to the particular acts of unlawful disobedience that occurred in Hong Kong under the “One Country, Two Systems” framework.

B. Utilitarian Justification

Applying a utilitarian approach, it is possible to argue that the “deliberate disobedience of a particular law at a particular time, under particular circumstances, with the normal punishment for that disobedience ensuing, is likely to lead in the long run to a better or [more] just[] society than would compliance (under those circumstances) with the law in question.”¹²¹ However, this is only the beginning, as two kinds of considerations—moral and factual—need to be employed.¹²²

Factually speaking, those wishing to engage in civil disobedience must first seek solutions within the legal system.¹²³ If not all channels within the law have

¹¹⁹ Chen, *supra* note 73.

¹²⁰ RAZ, *supra* note 13, at 273.

¹²¹ Cohen, *supra* note 23, at 12–13.

¹²² *See id.* at 13.

¹²³ *See id.* at 14.

been explored, or if these channels have not been explored fully enough, it is unjustifiable to resort to law-breaking.¹²⁴ No one can deny that civil disobedience can encourage lawlessness and potentially undermine the most basic values of a law-abiding society. Even if a participant in civil disobedience insists upon submitting themselves for public punishment and humiliation for their disobedience to demonstrate respect for the legal system,¹²⁵ at the same time, civil disobedience is more likely to encourage others to impulsively break the law.¹²⁶ This is consistent with the fact that a large number of illegal acts and many complaints followed from the OCM and Anti-ELAB protests.¹²⁷

In addition, civil disobedience can cause inconvenience and injury to the community.¹²⁸ For example, it was reported that chaos continued to reign in Mong Kok for a sustained period during the OCM, and that many people were subjected to violence.¹²⁹ Moreover, the sporadic violence intensified in Yuen Long in July 2019, when protesters continued their march for a full withdrawal of a suspended bill following the mostly peaceful protests in the earliest stage.¹³⁰ As far as economic costs are concerned, it was reported that the OCM movement cost Hong Kong up to 350 billion Hong Kong Dollars.¹³¹ Moreover, the Anti-ELAB movement has had a tremendous negative impact on Hong Kong's economy. For example, statistics show that the number of tourists traveling to Hong Kong declined by forty percent in August 2019 compared to August of the last year,¹³² while retail sales experienced the worst decline on record over the summer, exceeding even that which occurred in 1998 during the Asian financial

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ Lewis Powell, *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 205, 228 (1966).

¹²⁷ For example, it was reported by the Security Bureau that 955 persons were arrested during the Occupy Central Movement period, while forty-eight persons were arrested afterwards for crimes. *Police Made Over 1,000 Occupy-Related Arrests, New Figures Show, as Lawmaker Suggests Harsher Punishments*, H. K. FREE PRESS (Mar. 2, 2016), <https://www.hongkongfp.com/2016/03/02/police-made-over-1000-occupy-related-arrests-new-figures-show-as-lawmaker-urges-harsher-punishments/>.

¹²⁸ See Cohen, *supra* note 23, at 14.

¹²⁹ See *Anti-Occupy Central Group Storms Mong Kok Protest Site*, S. CHINA MORNING POST (Oct. 25, 2014), <http://www.scmp.com/news/hong-kong/article/1624070/anti-occupy-central-mob-storms-mong-kong-protest-site?page=all>.

¹³⁰ See, e.g., *As it Happened: Bloody Clashes and Tear Gas Fired as Hong Kong Protesters Descend on Yuen Long*, S. CHINA MORNING POST (July 27, 2019), <https://www.scmp.com/news/hong-kong/politics/article/3020340/knife-attack-yuen-long-tensions-mount-ahead-hong-kong>.

¹³¹ Jackie Chan Criticizes Economic Cost of Occupy Central, *Calls on Hongkongers to "Love the Country"*, S. CHINA MORNING POST (Oct. 10, 2014), <https://www.scmp.com/news/hong-kong/article/1613588/jackie-chan-criticises-economic-cost-occupy-central-calls-hongkongers>.

¹³² Donny Kwok, *Hong Kong August Visitors Plunge 40% Year-on-Year, Hotels Half-Full: Finance Chief*, REUTERS (Sept. 9, 2019), <https://www.reuters.com/article/us-hongkong-protests-tourism/hong-kong-august-visitors-plunge-40-year-on-year-hotels-half-full-finance-chief-idUSKCN1VU0GO>.

crisis.¹³³ There is no doubt that a large number of businesses and citizens have suffered because of the protest movements.

Notwithstanding these limitations, from a moral perspective, Hong Kong's community—with its liberal traditions—has shared common values of democracy and rule of law, albeit democracy according to international standards is not a “higher law” than positive law.¹³⁴ In this regard, civil disobedience in Hong Kong's liberal context can be justified by the role it plays in the civic education of the Hong Kong polity.

Hong Kong enjoys autonomy under the “One Country, Two Systems” rubric, but delivery of *traditional* forms of civic education in the region has proven challenging in the shadow of China's authoritarian influence.¹³⁵ For example, while Hong Kong's 1996 *Guidelines on Civic Education in School* emphasized human-rights education, education on democracy, education on the rule of law, global education, and education on critical thinking, the resumption of Chinese sovereignty has seen nationalism and patriotism become the central elements of curriculum development.¹³⁶ In particular, the new civic-education guidelines that have replaced the 1996 guidelines emphasize students becoming “‘good citizens’, shouldering duties and obligations of the individual to society, having virtues associated with traditional Chinese culture and values, and having a strong attachment to ethno-cultural nationalism[.]”¹³⁷

The above has important implications in post-handover Hong Kong, as civic education is linked to a healthy civic life in modern, democratic societies. Indeed, one global study has identified civic education as contributing to: (i) significant increases in rates of political participation, especially at the local level; (ii) more moderate (but still significant) increases in participants' knowledge about their political system, as well as democratic structures and

¹³³ Denise Tsang & Danny Lee, *Hong Kong Retail Sales Suffer Worst Decline on Record Amid Anti-Government Protests and US-China Trade War*, S. CHINA MORNING POST (Oct. 2, 2019), <https://www.scmp.com/news/hong-kong/hong-kong-economy/article/3031278/hong-kong-retail-sales-suffer-worst-decline-record>.

¹³⁴ Cohen, *supra* note 23, at 10–12. In extraordinary cases, the civilly disobedient person may adopt moral standards in sharp conflict with those professed by his community. For example, a racist may engage in civil disobedience to defend segregation or members of the Nazi Party may practice civil disobedience to further their ends. Employing such moral standards, the utilitarian defense of civil disobedience is certain to fail; it can hope to succeed only when the moral ideals of the disobedient are themselves defensible. *See id.* at 13.

¹³⁵ Kerry J. Kennedy, *Comparative Insights on Civics and Citizenship Education and the Curriculum: A View from Hong Kong*, in *CIVICS AND CITIZENSHIP EDUCATION IN AUSTRALIA: CHALLENGES, PRACTICES, AND INTERNATIONAL PERSPECTIVES* 245, 245, 247–48 (Andrew Peterson & Libby Tudball eds., 2018).

¹³⁶ *Id.* at 249–50.

¹³⁷ Lau Chui Shan, *Challenges to Teaching Citizenship Education in Hong Kong After the Handover*, E-JOURNAL EDUC. POL'Y (2011) (citation omitted).

institutions in general; and (iii) an increase in participants' sense of political efficacy.¹³⁸ Civic education has thus been identified as “an antidote for political apathy.”¹³⁹

Despite the strong colonial tradition of political protest in Hong Kong, a survey published in 2000 indicated growing passivity within the Hong Kong polity. Notably, 90.1% of Hongkongers interviewed stated that they were not motivated to vote in District Council elections, as they believed that such participation would have little effect on Hong Kong's overall political structure and policy.¹⁴⁰ These results are consistent with general trends in other authoritarian regimes, in which polities gradually lose political consciousness and descend into apathy over time.¹⁴¹

Against this background—particularly considering the limitations placed on more ‘traditional’ forms of civic education in Hong Kong—civic disobedience (such as that undertaken by OCM and those involved in the Anti-ELAB movement), together with lawful protests, necessarily has an important educational function. Indeed, civic disobedience is a well-accepted form of modern civic education¹⁴² in which participants experientially learn about civic matters (such as democratic standards and political and constitutional processes, as well as non-democratic aspects such as the nature of dictatorship, human-rights abuses in authoritarian states, etc.) through their civic action.¹⁴³

In fact, empirical evidence suggests that experiential education of this nature may be the most effective means of fostering civic learning and engagement.¹⁴⁴ Up to 100,000 protesters are reported to have participated in the OCM, meaning that the Movement had significant educative reach in Hong Kong.¹⁴⁵ Moreover, as noted above, there were more than two million protesters involved in the anti-

¹³⁸ USAID: OFFICE OF DEMOCRACY AND GOVERNANCE, BUREAU FOR DEMOCRACY, CONFLICT, AND HUMANITARIAN ASSISTANCE, APPROACHES TO CIVIC EDUCATION: LESSONS LEARNED 1 (2002), https://pdf.usaid.gov/pdf_docs/PNACP331.pdf.

¹³⁹ Margaret Stimmann Branson, *Civic Education: An Antidote for Political Apathy?*, BPB (Apr. 1, 2003), <http://www.bpb.de/veranstaltungen/dokumentation/130056/civic-education-an-antidote-for-political-apaty>.

¹⁴⁰ SIU-KAI LIU, SOCIAL DEVELOPMENT AND POLITICAL CHANGE IN HONG KONG 302 (2000).

¹⁴¹ See JUAN J. LINZ, TOTALITARIAN AND AUTHORITARIAN REGIMES 167 (2000).

¹⁴² See Jack Crittenden & Peter Levine, *Civic Education*, STAN. ENCYC. PHIL., <http://plato.stanford.edu/entries/civic-education> (Aug. 31, 2018).

¹⁴³ See *id.*

¹⁴⁴ *Id.*

¹⁴⁵ Anne Marie Roantree & Lisa Jucca, *Thousands Denounce HSBC Board Member's Likening of Hong Kong People to Freed Slaves*, REUTERS (Oct. 31, 2014), <http://www.reuters.com/article/us-hongkong-china-idUSKBN0IK0DV20141031>.

extradition bill protests (as claimed by the organizers).¹⁴⁶ Indeed, the large-scale, peaceful movement “certainly made some people more aware of the meaning of universal suffrage[.]”¹⁴⁷

Furthermore, movements such as the OCM impact upon political engagement. Notably, in Hong Kong's November 2015 District Council elections, a record forty-seven percent of eligible voters turned out to vote.¹⁴⁸ Moreover, three “Umbrella Soldier” candidates (i.e. those who participated in the pro-democratic Umbrella Movement protests) won electoral seats.¹⁴⁹ This indicates that the OCM, by providing an experiential, civic-learning platform, has had a lasting impact on Hong Kong's political landscape, encouraging more active, political participants.¹⁵⁰ In addition, during the Anti-ELAB movement, a record number of voters registered for the District Council election of 2019, including about 390,000 new voter registrations.¹⁵¹ In particular, many pro-democracy candidates who had actively participated in the Anti-ELAB movement eventually won their electoral seats, which clearly indicates the increasing popular awareness of the importance of Hong Kong's pro-democracy movement.¹⁵²

In this way, civic education through civic disobedience can be understood as playing a self-perpetuating role in maintaining Hong Kong's longstanding tradition of public protest, as well as contributing to a more robust civic life. This is particularly important given the increasing difficulties faced in Hong Kong in mobilizing the public and staging open confrontational action in relation to China.

¹⁴⁶ *Hong Kong Protest: 'Nearly Two Million' Join Demonstration*, BBC NEWS (June 17, 2019), <https://www.bbc.com/news/world-asia-china-48656471>.

¹⁴⁷ JOSEPH CHENG, *NEW TRENDS OF POLITICAL PARTICIPATION IN HONG KONG* 473 (2014).

¹⁴⁸ Gary Cheung et al., *Record Turnout for Hong Kong's District Council Elections; Two Pan-Democratic Big Guns Out, Three New Pro-Occupy Candidates Win*, S. CHINA MORNING POST (Nov. 29, 2015), <https://www.scmp.com/news/hong-kong/politics/article/1881914/polarised-voters-turn-out-record-numbers-hong-kongs-district>.

¹⁴⁹ *Id.*

¹⁵⁰ See Alice Wu, *District Council Election Results Shatter Myth of Political Apathy in Hong Kong*, S. CHINA MORNING POST (Nov. 29, 2015), <http://www.scmp.com/comment/insight-opinion/article/1884113/district-council-election-results-shatter-myth-political>.

¹⁵¹ Lai & Wu, *supra* note 69.

¹⁵² *See id.*

III. RECONCILING CIVIL DISOBEDIENCE AND THE RULE OF LAW IN HONG KONG

Notwithstanding the value of civil disobedience in terms of civic education, one relevant and unavoidable issue under the utilitarian approach concerns how civil disobedience can be reconciled with the rule of law in Hong Kong.

A. *Civil Disobedience vs. Rule of Law*

In a modern, liberal society, it is generally accepted both that no one is above the law and that no one has the right to break the law. Of course, this is not to say that there are no circumstances under which people have a right to disobey the law.¹⁵³ In particular, when a law wrongly infringes on a person's rights against the government, that person has a right to disobey the law.¹⁵⁴ However, civil disobedience is not above the law; after all, people are "conscientious" when engaging in breaching the law and willing to accept the legal consequence of their unlawful acts, which clearly shows their overall "fidelity" to the law in general (despite being at the outer edge thereof).¹⁵⁵ Nonetheless, when considered as a matter of fact, civil disobedience is against the law. When a participant in civil disobedience states that he is above the law because of some "moral standard," he is in fact stating that democracy is beneath him, insofar as the law is grounded in democracy as the legislative mechanism.¹⁵⁶ In this regard, his disobedience demonstrates a distrust for the democratic system. He is saying that since democracy does not work, he can see no reason to help make it work.¹⁵⁷

Although the case of Hong Kong may be slightly different from similar cases in liberal democracies, the intrinsic nature of disobedience against the law and even democracy is no different. Hong Kong is, at the very least, a law-abiding "thin" democracy, albeit one with some distinctive features.¹⁵⁸ The government of Hong Kong is divided into three usual branches.¹⁵⁹ Apart from the Chief Executive, which remains a significant departure from the democratic ideal, Hong Kong's legislative power is vested in the Legislative Council, which "shall

¹⁵³ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 192 (1977).

¹⁵⁴ *Id.*

¹⁵⁵ RAWLS, *supra* note 11, at 322.

¹⁵⁶ *See generally* RAWLS, *supra* note 11, at 409.

¹⁵⁷ *But see* Wu, *supra* note 150.

¹⁵⁸ *See generally* Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT'L L. 471, 472 (2002).

¹⁵⁹ *See* XIANGGANG JIBEN FA art. 2 (H.K.).

be constituted by election[s][,]”¹⁶⁰ and “has 70 Members for the sixth term, with 35 Members returned by geographical constituencies through direct elections, and 35 Members by functional constituencies.”¹⁶¹ There is free press and freedom of speech, as well as a multitude of political parties.¹⁶² All of these are requirements for democracy. In addition, the law of Hong Kong is based on the rule of law and the independence of the judiciary.¹⁶³

Overall, Hong Kong enjoys a high degree of autonomy. However, it does not have its own sovereignty, which is claimed exclusively by China’s Central Government.¹⁶⁴ In principle, national laws are not applicable in Hong Kong, as the highest law within the jurisdiction is the Hong Kong Basic Law.¹⁶⁵ Therefore, whether protesters are pursuing certain aims by disobeying what they consider to be an immoral law (direct civil disobedience), or even disobeying a law they consider to be moral law to accomplish some other objective (indirect civil disobedience), they are disrespecting the current semi-democratic system and the rule of law.¹⁶⁶ Similarly, they hold the belief that “the process for democratic relief is too slow, that only mass confrontation can bring immediate action, and that any injuries are the inevitable cost of the pursuit of justice. . . . simply put, that the end justifies the means.”¹⁶⁷ Of course, it would be possible to argue for any illegal form of demonstration as a form of dissent in this way; however, this threatens to destroy a society built on the rule of law, and could lead to “serious disorder” that could “undermine the efficacy of the just constitution.”¹⁶⁸

If the rule of law is substantially threatened, this may be dangerous for society, leading to a certain degree of anarchy or even totalitarianism. As John Locke once wrote, “[w]her-ever law ends, tyranny begins,” and the people are “absolved from any further obedience.”¹⁶⁹ “Governments are dissolved from within” when the legislative chamber is altered.¹⁷⁰ When the government

¹⁶⁰ *Id.* art. 68.

¹⁶¹ *LegCo Today*, LEGIS. COUNCIL H.K. SPECIAL ADMIN. REGION CHINA, https://www.legco.gov.hk/general/english/intro/about_lc.htm (last visited Nov. 8, 2020).

¹⁶² *Id.* art. 27; see *The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/fields/315.html>.

¹⁶³ For more details about Hong Kong democracy, see Fiss, *supra* note 15, at 497.

¹⁶⁴ See XIANGGANG JIBEN FA, Preamble (H.K.).

¹⁶⁵ See *id.* art. 18.

¹⁶⁶ Cohen, *supra* note 23, at 4.

¹⁶⁷ Dusen, *supra* note 25, at 124.

¹⁶⁸ RAWLS, *supra* note 11, at 328.

¹⁶⁹ JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 202, 222 (C.B. McPherson eds., 1980).

¹⁷⁰ *Id.* § 212.

becomes “arbitrary disposers of lives, liberties, and fortunes of the people,”¹⁷¹ such revolutions happen.

It can be seen from the OCM and Anti-ELAB movements that, other than some political dialogue, China has (pragmatically) made no formal response to the demands of either the movement as a whole or the protesters involved. Moreover, the OCM failed to achieve its aims, namely having the NPCSC withdraw its decision and the government of Hong Kong relaunch the Five-Step Process of Political Reform.¹⁷²

Subsequently, the OCM actually prompted the Legislative Council to veto the reform package.¹⁷³ To a certain extent, this cast doubt on the effectiveness of taking shortcuts to bypass democratic methods of petitioning, debating, and assembling.¹⁷⁴ Although the *pressure* imposed by the OCM may have been legitimate to some extent, this type of pressure can easily become illegitimate if it shakes people’s confidence in the rule of law, or even brings Hong Kong into chaos. Arguably, the pressure applied by demonstrations is “desirable only if” it takes place “within the limits allowed by [common] law” and also does not subvert, or at least threaten, the rule of law system of Hong Kong.¹⁷⁵ This is not to say that civil disobedience can never be justified in the Hong Kong context; in fact, given that Hong Kong has a liberal (albeit semi-democratic) constitutional system, it is definitely possible that the people may resort to civil disobedience after exhausting all other available measures of achieving justice, particularly when the law has at some point become *instrumental* for the government.¹⁷⁶ For example, although the right to freedom of assembly and association is a fundamental constitutional right in Hong Kong, it is possible that the government might unconstitutionally restrict such a fundamental right through refusing to grant a letter of no objection for a peaceful rally in the name of *public safety*, or similar.¹⁷⁷ In this situation, although a march may be labeled

¹⁷¹ *Id.* § 222.

¹⁷² THE SIX-MONTHLY REPORT ON HONG KONG 1 JULY TO 31 DECEMBER 2015, FOREIGN & COMMONWEALTH OFFICE 13 (Feb. 11, 2016) <https://www.gov.uk/government/publications/six-monthly-report-on-hong-kong-july-to-december-2015>. For more details about the “Five-Step Process”, see *Questions and Answers on Constitutional Development*, THE HONG KONG SPECIAL ADMINISTRATIVE REGION GOVERNMENT: 2017 MAKE IT HAPPEN, <http://www.2017.gov.hk/en/liberal/faq.html> (June 24, 2015).

¹⁷³ Donny Kwok & Yimou Lee, *Hong Kong Vetoes China-Backed Electoral Reform Proposal*, REUTERS (June 17, 2015), <https://www.reuters.com/article/us-hongkong-politics/hong-kong-vetoes-china-backed-electoral-reform-proposal-idUSKBN00Y06320150618>; see *What is Occupy Central?*, *supra* note 2.

¹⁷⁴ Dusen, *supra* note 25, at 124.

¹⁷⁵ *Id.*

¹⁷⁶ Iain Marlow & Daniel Flatley, *What Hong Kong Losing Its ‘Special Status’ Would Mean*, WASH. POST (May 27, 2020).

¹⁷⁷ XIANGGANG JIBEN FA art. 27 (H.K.).

“unlawful” by the government, the state cannot deny people’s constitutional right to march from a common law perspective.¹⁷⁸

B. Civil Disobedience under China’s Authoritarian System

As China is an authoritarian state, it is understandable that, in general, there was little to no hope that the OCM would bring about change with respect to a political decision made by the Central Government. This can largely be ascribed to the key characteristics of authoritarianism, which can typically be divided into four components: (1) “limited, not responsible, political pluralism,” that is, constraints on political institutions and groups (such as legislatures, political parties and interest groups); (2) a basis for legitimacy based on emotion, especially the identification of the regime as a necessary evil to combat easily recognizable societal problems such as underdevelopment or insurgency; (3) neither “extensive nor intensive political mobilization” and constraints on the masses (such as repressive tactics against opponents and a prohibition on anti-regime activity); and (4) “formally ill-defined” executive power, often shifting or vague.¹⁷⁹

Following the handover of Hong Kong to China, there has been no doubt that, under the “One Country, Two Systems” principle, China has been able to influence Hong Kong’s constitutional order in accordance with the Hong Kong Basic Law.¹⁸⁰ Although the Hong Kong Basic Law is sometimes considered a “mini-constitution” within the jurisdiction, it was never voted on by the people of Hong Kong, nor approved by them or their representatives; it was simply adopted by the National People’s Congress in Beijing.¹⁸¹ According to Articles 158 and 159 of the Hong Kong Basic Law, the power to amend and interpret the Basic Law is vested in the NPCSC, although the courts may also interpret other provisions of the Basic Law when adjudicating cases.¹⁸² Although Article 45 of the Hong Kong Basic Law states that the Chief Executive of Hong Kong “shall

¹⁷⁸ In fact, during the anti-extradition protests in Yuen Long, the police issued a letter prohibiting the protest, stating that “[w]e have reason to believe that the marchers will engage in physical confrontation with villagers, and will pose a danger to marchers, villagers and other members of the public[;]” however, the government did not fully respond to the public demand for a full withdrawal of the extradition bill. For more details, see Kris Cheng & Holmes Chan, *Hong Kong Police Ban Saturday’s Yuen Long Protest Against Mob Attacks*, H. K. FREE PRESS (July 25, 2019), <https://www.hongkongfp.com/2019/07/25/breaking-hong-kong-police-ban-yuen-long-protest-saturday/>.

¹⁷⁹ LINZ, *supra* note 141, at 159.

¹⁸⁰ See *Hong Kong: What is the Basic Law and How Does it Work?*, *supra* note 16; see generally XIANGGANG JIBEN FA (H.K.).

¹⁸¹ See *Hong Kong: What is the Basic Law and How Does it Work?*, *supra* note 16; see generally XIANGGANG JIBEN FA (H.K.).

¹⁸² See XIANGGANG JIBEN FA arts. 158, 159 (H.K.).

be selected by election or through consultations held locally and be appointed by the Central People's Government[,]" and that the ultimate aim was the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures, the NPCSC still has the complete authority to determine the specific meaning of this Article.¹⁸³ As a result, the NPCSC gave a detailed decision, stipulating four requirements for the selection of the Chief Executive:

- (1) A broadly representative nominating committee shall be formed. The provisions for the number of members, composition and formation method of the nominating committee shall be made in accordance with the number of members, composition and formation method of the Election Committee for the Fourth Chief Executive.
- (2) The nominating committee shall nominate two to three candidates for the office of Chief Executive in accordance with democratic procedures. Each candidate must have the endorsement of more than half of all the members of the nominating committee.
- (3) All eligible electors of the Hong Kong Special Administrative Region have the right to vote in the election of the Chief Executive and elect one of the candidates for the office of Chief Executive in accordance with law.
- (4) The Chief Executive-elect, after being selected through universal suffrage, will have to be appointed by the Central People's Government.¹⁸⁴

As has been pointed out by pro-democracy activists, this decision effectively enables only Beijing-approved candidates to get through the nomination process, since the members of the Election Committee for the Fourth Chief Executive are only to be elected by functional constituencies.¹⁸⁵ Furthermore, in terms of the makeup of the selection committee, the sectors that were politically closer to Beijing, such as traditional Chinese medicine, were over-represented in proportion to their share of the population when compared to sectors deemed hostile, such as social workers or lawyers.¹⁸⁶ Purely from a legal perspective, these regulations do not contravene the letter of the Hong Kong Basic Law.

¹⁸³ XIANGGANG JIBEN FA art. 45 (H.K.).

¹⁸⁴ *Full Text of NPC Decision on Universal Suffrage for HK Chief Executive Selection*, *supra* note 31.

¹⁸⁵ *See Hong Kong Election Candidates to be Screened, Reform Proposal Says*, BBC NEWS (Apr. 22, 2015), <https://www.bbc.com/news/world-asia-china-32397179>.

¹⁸⁶ *See Keith Bradsher, Beijing Switches Sides in the Race for Hong Kong's Chief Executive*, N.Y. TIMES (Mar. 21, 2012), <https://www.nytimes.com/2012/03/22/world/asia/beijing-switches-support-in-race-for-hong-kong-chief.html>.

Nevertheless, the NPCSC made a highly restrictive interpretation of Article 45 and its relation to universal suffrage.¹⁸⁷

In addition, procedurally speaking, according to the Hong Kong Basic Law and the Interpretation of NPCSC in 2004, amendments to the election methods for the Chief Executive were subject to a “Five-step Process”:

- (1) The Chief Executive should report to the NPCSC and invite it to decide whether any amendments to the selection method are necessary;
- (2) The NPCSC should “make a determination on whether any amendment to the selection method may be made;”
- (3) If the NPCSC determined that the method should be amended, the Hong Kong Government should “introduce to the Legislative Council (‘LegCo’) a resolution on the amendments to the method for selecting the” Chief Executive and the method for forming the Legislative Council, “to be passed by a two-thirds majority of all” Legislative Council Members;
- (4) The Chief Executive should “consent to the resolution as passed by the LegCo;” and
- (5) The Chief Executive should lodge the relevant bill “to the NPCSC for approval” or for the record.¹⁸⁸

On its face, these procedures are compatible with the basic “One Country, Two Systems” principle.¹⁸⁹ On the one hand, under China’s sovereignty and the Hong Kong Basic Law, the NPCSC has the power to determine the meaning of Article 45, even if that meaning is highly restrictive.¹⁹⁰ As to the NPCSC’s decision regarding the second step, the Legislative Council, as the representative of the people of Hong Kong, can only choose not to pass the resolution introduced by the government. In other words, regarding the democratic development of Hong Kong, it is Beijing, rather than Hong Kong, that has the decisive authority. Of course, as an authoritarian state, China will clearly act to ensure that Hong Kong’s democratic development is not even an incremental threat to its authority; this is because, geopolitically speaking, there is a fear that any democratic developments in Hong Kong may eventually be appealing to the

¹⁸⁷ XIANGGANG JIBEN FA art. 45 (H.K.).

¹⁸⁸ THE HONG KONG SPECIAL ADMINISTRATIVE REGION GOVERNMENT, 2017 MAKE IT HAPPEN: METHOD FOR SELECTING THE CHIEF EXECUTIVE BY UNIVERSAL SUFFRAGE, 1, 2 (Apr. 2015).

¹⁸⁹ *Hong Kong Election Candidates to be Screened, Reform Proposal Says*, *supra* note 185.

¹⁹⁰ XIANGGANG JIBEN FA art. 45 (H.K.).

rest of China.¹⁹¹ Although the OCM may have brought to bear greater legitimate pressure than was possible through standard channels, the long-term utility of this pressure is questionable.¹⁹² Notwithstanding that the Legislative Council voted against the NPCSC's electoral system proposal, the NPCSC has yet to respond with a framework that loosens Beijing's control.¹⁹³ Indeed, given the authoritarian nature of the Chinese Central Government, particularly with respect to the significant constraints placed on intensive or extensive political mobilization on the mainland, mass public civil disobedience in Hong Kong places the Central Government in a difficult position: in short, the Central Government will likely wish to avoid granting concessions that could be perceived as capitulation in the face of civil disobedience, as this would ultimately pose a threat to its authority.¹⁹⁴

In this regard, as discussed above, it would be strategically rational for Hong Kong, if plausible, to reform or strengthen its democratic system from the inside, and perhaps to resort sometimes to support from the international community with common shared values. Moreover, if justified, civil disobedience is more likely to impose substantial pressure on the Hong Kong government to respond to the demand for justice within its domain of autonomy, rather than on the external Beijing, which has no democratic accountability towards the people of Hong Kong. Of course, although some affairs may fall within the autonomous domain of Hong Kong's government, given the principal-agent relationship between the government of Hong Kong and the Central Government of China, civil disobedience may be less likely to exert pressure on the government of Hong Kong to make some pragmatic concessions if Beijing plays an implicit but dominant role therein.¹⁹⁵ For example, although the extradition bill was proposed by the government of Hong Kong within its autonomous domain according to Hong Kong Basic Law, the suspension of the bill, proposed by the Chief Executive, was in fact agreed to by China's Vice Premier Han in a closed-door meeting before its announcement.¹⁹⁶

¹⁹¹ See Audrey Jiajia Li, *Hong Kong Protest Tactics: The Risks of Radicalism*, N.Y. TIMES (July 24, 2019), <https://cn.nytimes.com/china/20190724/hongkong-larry-diamond/zh-hant/dual/>.

¹⁹² *Id.*

¹⁹³ Kwok & Lee, *supra* note 173.

¹⁹⁴ See Dusen, *supra* note 25, at 124.

¹⁹⁵ Keith Zhai et al., *Exclusive: China Sets up Hong Kong Crisis Centre in Mainland, Considers Replacing Chief Liaison*, REUTERS (Nov. 25, 2019), <https://www.reuters.com/article/us-hongkong-protests-shenzhen-exclusive/exclusive-china-sets-up-hong-kong-crisis-center-in-mainland-considers-replacing-chief-liaison-idUSKBN1Y000P>.

¹⁹⁶ *See id.*

As evidenced by the OCM and the Anti-ELAB movement, there is no doubt that large-scale disobedience, if staged appropriately, may favor pro-democracy politics in District Council and Legislative Council elections within Hong Kong. Nonetheless, to take an extreme example, if civil disobedience is making Hong Kong chaotic or even causing it to substantially threaten China's authoritarian regime, such disobedience may actually spawn far more injustices than it removes, including a further tightening of mainland control. Indeed, as Dusen perceptively argued, "[i]f citizens rely on antidemocratic means of protest, they will help bring about the undemocratic result of an authoritarian or anarchic state."¹⁹⁷ Moreover, as Larry Diamond pointed out, that Hong Kong is not part of Mainland China only means that the threshold at which Beijing will use military or similar force to crack down on these protests is relatively high.¹⁹⁸ Beijing may take some coercive measures, perhaps in some combination with local ones, if the unending protests or defiance cross Beijing's red line and substantially challenge its authority or position.¹⁹⁹

C. *Reconciling Civil Disobedience*

The question that therefore arises is how civil disobedience can be reconciled with respect for the rule of law and democratic processes. Hall argued that a just and stable society can in fact handle a modicum of unlawful civil disobedience, provided that clear limitations are placed on the illegal conduct that is permissible.²⁰⁰ As previously noted, this reconciliation requires that acts of civil disobedience have underlying social value and take place non-violently, with a minimum of force, and with respect for the rights and interests of others.²⁰¹ More precisely, "[u]nlike the rioter [who uses violence], the true civil disobedient commits no violence. Unlike the mob demonstrator, he commits no trespass on others' rights."²⁰²

In reconciling the rule of law and civil disobedience, it is also relevant to emphasize that the rule of law in Hong Kong entails the constitutional protection of freedom of speech, freedom of assembly, and freedom of demonstration by virtue of Article 27 of the Basic Law.²⁰³ The "rule of law" may not entirely

¹⁹⁷ Dusen, *supra* note 25, at 125.

¹⁹⁸ See Li, *supra* note 191.

¹⁹⁹ *Id.*

²⁰⁰ Matthew R. Hall, *Guilty but Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law*, 28 CARDOZO L. REV. 2083, 2095 (2007).

²⁰¹ *Id.* at 2089.

²⁰² Dusen, *supra* note 25, at 125.

²⁰³ XIANGGANG JIBEN FA art. 27 (H.K.).

protect the civil disobedience that occurred during the OCM, but it does provide some limited acceptability. Even so, the rights to freedom of expression and assembly are not absolute, and restrictions may be permitted in the interests of (amongst other matters) public safety, public order, and the protection of others' rights and freedoms where the restriction is both (i) necessary and (ii) the least intrusive means of protecting such interests under the circumstances.²⁰⁴

Proportionality considerations thus favor that individuals should exhaust all reasonably available, effective, lawful, and democratic channels before resorting to civil disobedience.²⁰⁵ Such channels include formal party participation, lobbying of members of parliament, collective action mediated by both party and electoral politics, and commencement of proceedings before courts under the rule of law.²⁰⁶ In addition, proportionality considerations also strongly favor the nonviolent exercise of constitutionally protected rights.²⁰⁷ Given that violent acts threaten public order and public safety, and are also likely to infringe on the individual rights of others (such as the right to security of person and property), the exercise of such rights in the context of violent civil disobedience is likely to be deemed disproportionate by a court.²⁰⁸ Moreover, the converse is also true: in cases where civil disobedience is carried out in a nonviolent manner and constitutes little threat to the social order, any limitations placed on participants' rights to freedom of speech and assembly become less permissible.²⁰⁹ Indeed, as previously noted, in the *Public Light Bus* case the Court of First Instance emphasized in *obiter dictum* that violence is a factor when balancing rights and interests.²¹⁰ There, Judge Jeremy Poon noted that the disproportionately violent nature of confrontations between the protesters and police during the OCM meant that any of the protesters' defenses, grounded in their fundamental rights to freedom of assembly and demonstration, would be unlikely to succeed.²¹¹

From a strategic perspective, given that Hong Kong is a relatively fragile semi-democracy under China's authoritarian governance, civil disobedience—

²⁰⁴ DANNY GITTINGS, INTRODUCTION TO THE HONG KONG BASIC LAW 292–94 (2013).

²⁰⁵ See RAWLS, *supra* note 11, at 327.

²⁰⁶ Actually, exhausting existing legal channels as a prerequisite for resorting to disobedience can be reflected in the religious practice. See Delbert D. Smith, *The Legitimacy of Civil Disobedience as a Legal Concept*, 36 Fordham L. Rev. 716 (1968).

²⁰⁷ See RAWLS, *supra* note 11, at 321–22.

²⁰⁸ *Id.* at 321.

²⁰⁹ *Id.* at 339.

²¹⁰ See *Chiu Luen Public Light Bus Co. Ltd. v. Persons Unlawfully Occupying or Remaining on the Public Highway Namely, the Westbound Carriageway of Argyle Street Between the Junction of Tung Choi Street and Portland Street and/or Other Persons Hindering or Preventing the Passing or Repassing of Argyle Street*, (2014) 2086 H.K.L.R.D. ¶ 26 (C.F.I.) (H.K.).

²¹¹ *Id.* at 13.

particularly if it involves inappropriate violence or other destructive measures, such as property damage—is more likely to be counterproductive, as civil disobedience is more likely to succeed when it engages in a patient and highly coordinated program of continued, nonviolent protest aimed at mobilizing the broadest possible support.²¹² Moreover, radicalism resulting from violence may even provide pretext or justification for Beijing to intervene in Hong Kong's autonomous affairs, as under Article 14 of the Garrison Law of the People's Republic of China.²¹³ This issue was mentioned by a spokesperson from China's Defense Ministry when asked by reporters how the Ministry planned to handle Hong Kong's "separatists."²¹⁴ The spokesperson stated that the Hong Kong government may, if necessary, ask the central government for assistance, as the People's Liberation Army stationed in the city may be deployed for the maintenance of public order or in cases of disaster relief.²¹⁵

It is clear that most people possess a common-sense morality according to which they may take defensive action against government agents who commit injustice, in the same way that it may be considered justified to lie or even use violence in self-defense or in defense of others when faced with a murderer at the door. Although nonviolence should be a fundamental principle underpinning civil disobedience, as Jason Brennan says, if peaceful methods fail to stop the injustice, "[t]he common-law doctrine of self-defense is always governed by a necessity proviso: you may lie or use violence only if . . . peaceful actions are not as effective."²¹⁶ Although, according to Rawls, "any interference with the civil liberties of others tends to obscure the civilly disobedient quality of one's act[.]"²¹⁷ this should by no means be used to deny the possibility of a limited form of violence that can be used strategically without losing its "civil" value; for example, a limited form of violence that enhances the communicativeness and publicity of one's act.²¹⁸

²¹² Li, *supra* note 191.

²¹³ See Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Zhujun Fa (中华人民共和国香港特别行政区驻军法) [Garrison Law of the Hong Kong Special Administrative Region of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 30, 1996, effective July 1, 1997), art. 14 (China).

²¹⁴ See Kris Cheng, *Hong Kong Gov't Says It Will Not Ask for Assistance from the Chinese Military to Tackle Protests*, H.K. FREE PRESS (July 26, 2019), <https://www.hongkongfp.com/2019/07/26/hong-kong-govt-says-will-not-ask-assistance-chinese-military-tackle-protests/>.

²¹⁵ *Id.* Regarding the anti-extradition bill protests, the Hong Kong government has clarified that it will not ask for any assistance from the Chinese army stationed in the city to handle protests. See *id.*

²¹⁶ Jason Brennan, *When the State is Unjust, Citizens May Use Justifiable Violence*, PRINCETON UNIV. PRESS (Jan. 29, 2019), <https://press.princeton.edu/ideas/jason-brennan-when-the-state-is-unjust-citizens-may-use-justifiable-violence>.

²¹⁷ RAWLS, *supra* note 11, at 321.

²¹⁸ Piero Moraro, *Violent Civil Disobedience and Willingness to Accept Punishment*, 8 ESSAYS IN PHIL.:

Conceptually, it has been perceived that the distinction between violence and nonviolence—along with the necessarily nonviolent character of civil forms of contestation—may be politically instrumentalized, as it is more likely that the government will “pursue a strategy of divide and rule with regard to protest by portraying and celebrating certain forms of protest as good . . . and labelling and repressing other forms of protest—often those of marginalized groups—as violent, uncivil and criminal.”²¹⁹ Meanwhile, “violence” may refer to either physical (as traditionally understood) violence or psychological violence, although the latter might be excluded under narrower definitions.²²⁰ By their nature, both are a form of coercion.²²¹ This dual nature means that a government agency may take the form of coercion that is non-physical; for example, regarding the anti-extradition bill protests, it has been argued “that the protesters’ anger stems from the structural violence that Beijing has stealthily inflicted on them over the past decade.”²²²

Accordingly, as John Morreall points out, if we entirely rule out all forms of coercion in acts of civil disobedience, we may have gone too far, as we have actually “ruled out the greater share of what has traditionally been called civil disobedience, on the grounds that practically all of it has involved some form of coercion.”²²³ In fact, even Rawls does not deny that “[s]ometimes[,] if the appeal fails in its purpose, forceful resistance may later be entertained.”²²⁴

Because people tend to disapprove of violence in general, justifying the use of violence, within a limited scope, if used as a tactic in an act of civil disobedience will largely depend on how the public reacts to it, along with whether it is able to have the proper effect on the public,²²⁵ as it gives voice to “conscientious and deeply held convictions[.]”²²⁶ Interestingly, to a certain extent, this has been evidenced by the triumph of pro-democratic forces in the District Council election during the anti-extradition bill protests, which certainly involved certain forms of violence, as mentioned above. Undoubtedly, the limited violence deployed as a tactic in an act of civil disobedience must not aim at seriously injuring or even killing other individuals, and those who engage in civil disobedience should be both conscientious about the violence involved and

A BIENNIAL J. (2007), <https://commons.pacificu.edu/work/sc/514c5bac-deff-448e-a38d-25c3fbf1f014>.

²¹⁹ Robin Celikates, *Democratizing Civil Disobedience*, 42 PHIL. & SOC. CRITICISM 982, 984 (2016).

²²⁰ John Morreall, *The Justifiability of Violent Civil Disobedience*, 6 CAN. J. PHIL. 35, 37 (1976).

²²¹ *See id.*

²²² Ian Johnson, *How China’s Rise Has Forced Hong Kong’s Decline*, N.Y. REV. (Nov. 26, 2019).

²²³ Morreall, *supra* note 220, at 41–42.

²²⁴ RAWLS, *supra* note 11, at 321–22.

²²⁵ Morreall, *supra* note 220, at 47.

²²⁶ RAWLS, *supra* note 11, at 322.

willing to accept the punishment resulting from their unlawful and violent acts.²²⁷

Overall, protesters who engage in any future civil disobedience in Hong Kong must not only eschew violence at the outset of their actions but must also assess their ability to remain peaceful given the reasonably foreseeable consequences of their conduct. Arguably, where no threat of violence exists and where particular regard is given to the value of permitting nonviolent acts of civil disobedience in Hong Kong—insofar as civil disobedience plays a fundamental, educative role in promoting the citizenry's capacity to engage in the political process—a balance can be more readily struck in favor of permitting such acts. On the other hand, where civil disobedience is accompanied by violence, such acts cannot be reconciled with the rule of law; this is particularly true in the context of Hong Kong, where preservation of the rule of law and Hong Kong's autonomy within the "One Country, Two Systems" rubric is paramount. In those instances, violent civil disobedience should be restricted as far as possible, or even punished according to the law.

CONCLUSION

Based on the Sino-British Joint Declaration of 1984, it was agreed that the "One Country, Two Systems" framework would shape the future of Hong Kong.²²⁸ As a consequence, Hong Kong has formed and developed a distinctive semi-democratic system with judicial independence under China's authoritarian system, as is currently enforced by the Hong Kong Basic Law.²²⁹ Although China has claimed its sovereignty over Hong Kong, under the "One Country, Two Systems" principle Hong Kong has been allowed to enjoy far greater autonomy than any other Chinese territory. In a civilized society built on the rule of law, all available legal and democratic channels should be used, if necessary, to create social change.²³⁰ Hong Kong's legal system guarantees a wide variety of opportunities to use mass meetings, public parades, and organized demonstrations to stoke public sentiment, characterize issues, and cause change.²³¹

²²⁷ Moraro, *supra* note 218.

²²⁸ Sino-British Joint Declaration on the Question of Hong Kong, China-U.K., Dec. 19, 1984, 1399 U.N.T.S. 23391.

²²⁹ Eleanor Albert & Lindsay Maizland, *Democracy in Hong Kong*, COUNCIL ON FOREIGN REL. (June 30, 2020), <https://www.cfr.org/backgrounder/democracy-hong-kong>.

²³⁰ See RAWLS, *supra* note 11, at 327.

²³¹ See XIANGGANG JIBEN FA art. 27 (H.K.).

Although civil disobedience may be justified under certain circumstances, the threshold of injustice as a trigger for civil disobedience is usually high.²³² It must always be borne in mind that:

[T]he greatest danger in condoning civil disobedience as a permissible strategy for hastening change is that it undermines our democratic processes. To adopt the techniques of civil disobedience is to assume that representative government does not work. To resist the decisions of courts and the laws of elected assemblies is to say that democracy has failed.²³³

Dusen provided examples to illustrate his view of the true nature of civil disobedience:

When militant students storm a college president's office to achieve demands, when certain groups plan rush-hour car stalling to protest discrimination in employment, these are not dissent, but a denial of rights to others. Neither is it the lawful use of mass protest, but rather the unlawful use of mob power.²³⁴

Nonetheless, this does not deny that the people of Hong Kong may be prevented from self-legislating effectively due to the shortcomings of Hong Kong's semi-democratic system. Civil disobedience—as an integral part of any democratic society with institutional defects—can be considered not only as a transitory response under extreme circumstances, but also as a democratizing force to initiate and reopen deliberations. This is especially true when people face the “failures of government to debate or enact important policy options, where the discussion or enactment of those options is obstructed by the phenomenon of deliberative inertia[,]”²³⁵ or even authoritarian tendency. Just as Hannah Arendt says, mass civil disobedience is inevitable in unstable political circumstances and can ultimately equilibrate and stabilize society.²³⁶ It “enables the reenactment of the horizontal social contract between the people through an eruption of ‘civic freedom’ and ‘public happiness’, thus strengthening civic bonds and invigorating the public sphere.”²³⁷

Specifically, regarding Hong Kong's semi-democracy under China's authoritarian system, the above analysis suggests that the OCM was largely

²³² See RAWLS, *supra* note 11, at 326.

²³³ Dusen, *supra* note 25, at 125.

²³⁴ *Id.*

²³⁵ Celikates, *supra* note 219, at 986.

²³⁶ Delmas, *supra* note 13, at 686 (quoting Hannah Arendt, *Reflections on Civil Disobedience*, NEW YORKER (Sept. 12, 1970), at 70).

²³⁷ *Id.*

misplaced in Hong Kong, as the protesters attempted to pressure China's Central Government despite its lack of democratic accountability to the people of Hong Kong.²³⁸ The strategy of pressuring the Central Government to withdraw its proposed electoral framework largely ignored the fact that Hong Kong's host country is an authoritarian state, which has not previously been responsive to civil disobedience in a way that would be typical of a liberal democracy. Nonetheless, the movement did transgress the just laws of Hong Kong.²³⁹ This was particularly concerning due to its potential to undermine the rule of law and encourage lawlessness, as was evident during the latter stages of the OCM, which involved many incidents of violence.²⁴⁰ By contrast, during the anti-extradition bill protests, the civil disobedience may have been pragmatically appropriate under the "One Country, Two Systems" principle as it was placing pressure on the government of Hong Kong, which is at least somewhat responsive to the people of Hong Kong under its current semi-democratic system.²⁴¹ In effect, the Hong Kong government, which proposed the bill within its domain of autonomy, did make some concessions in its move to withdraw the extradition bill, in contrast to the lack of concessions made during the OCM.²⁴² Retrospectively, the organizers of the OCM once claimed that civil disobedience would be the most lethal weapon available to the Hong Kong people in their struggle for democracy.²⁴³ However, the concern remains that under the framework of "One Country, Two Systems," the outcome of the OCM could prove less of a weapon against the Central People's Government, and more likely a weapon against Hong Kong itself concerning the sacrifice of its rule of law if the strategy is not adopted appropriately.

Although the OCM did not achieve its goals pragmatically, this is not to say that people should refrain from civil disobedience in the face of an authoritarian regime.²⁴⁴ Rather, Hong Kong, as a civilized rule-of-law region under the "One Country, Two Systems" framework, should be concerned with maintaining and

²³⁸ *Explainer: What was Hong Kong's 'Occupy' Movement All About?*, REUTERS (Apr. 23, 2019), <https://www.reuters.com/article/us-hongkong-politics-occupy-explainer/explainer-what-was-hong-kongs-occupy-movement-all-about-idUSKCN1S005M>.

²³⁹ Michael C. Davis, *Occupy Protests Breaking Law, but Not Undermining Hong Kong's Rule of Law*, S. CHINA MORNING POST (Nov. 7, 2014), <https://www.scmp.com/comment/insight-opinion/article/1634329/occupy-protests-breaking-law-not-undermining-hong-kongs-rule>.

²⁴⁰ Elizabeth Barber, *Hong Kong Protests Reach Violent High as Students Clash with Police Overnight*, TIME (Dec. 1, 2014), <https://time.com/3611250/hong-kong-occupy-central-umbrella-revolution-lung-wo/>.

²⁴¹ *Hong Kong Extradition Protests: Government Suspends Bill*, BBC NEWS (June 15, 2019), <https://www.bbc.com/news/world-asia-china-48645342>.

²⁴² *Id.*

²⁴³ Lai Tung Kwok, *What 'Occupy Central' May Mean for HK*, CHINADAILY.COM (June 12, 2014), http://www.chinadaily.com.cn/hkedition/2014-06/12/content_17580645.htm.

²⁴⁴ *See Hong Kong Security Law: What is it and is it Worrying?*, *supra* note 17.

fostering its core value of the rule of law and making use of all legally available channels to fight for justice. Otherwise, under China's authoritarian system, Hong Kong may lose its most basic characteristic: the rule of law. It could then degenerate into a less democratic region and rapidly become semi-authoritarian.²⁴⁵

Notwithstanding these concerns, the fact remains that Hong Kong still has a long tradition of public protest.²⁴⁶ The OCM and those involved in the Anti-ELAB movement have proven particularly significant for Hongkongers as civic education tools that encourage political engagement, as evidenced by record turnouts in Hong Kong's district council elections and the subsequent election of the "Umbrella Soldiers."²⁴⁷ Indeed, notwithstanding the level of autonomy enjoyed by Hong Kong under "One Country, Two Systems," certain limitations placed on its democratic institutions by the Hong Kong Basic Law make the maintenance and development of its liberal traditions an ongoing difficulty.²⁴⁸

In the face of China's authoritarian sovereign power, the risk is that democratic consciousness may wane if robust public protest is not maintained. Thus, in order to reconcile the costs and benefits of civil disobedience in Hong Kong, the absence of violence becomes a fundamental condition. In cases where civil disobedience proceeds peacefully, its civic education benefits are more readily justified, and arguably provide greater support for a judicial approach that favors upholding the fundamental rights that underpin an individual's participation in civil disobedience (such as freedom of speech and freedom of assembly).²⁴⁹ By contrast, where civil disobedience involves illegal acts of violence, it can hardly be justified. An even worse outcome would be one in which the citizens engage in violence or chaotic behavior, crossing Beijing's bottom line, with the result that the mainland government takes coercive measures to maintain the "One Country, Two Systems" principle, perhaps in the name of "state sovereignty" or "national security." Of course, this should by no

²⁴⁵ For more discussion, see generally Benny Tai, *Round Three of Hong Kong's Constitutional Game: From Semi-Democracy to Semi-Authoritarianism*, 49 H.K. L. J. 335, 335–56 (2019).

²⁴⁶ Antony Dapiran, *City of Dissent: Hong Kong has a Proud Tradition of Protesting to Protect its Unique Identity*, CNN (June 15, 2019), <https://www.cnn.com/2019/06/14/asia/hong-kong-protest-story-intl-hnk/index.html>.

²⁴⁷ *Hong Kong Sees Mixed Results in First District Election Since 'Umbrella Protests'*, DW (Nov. 23, 2015), <https://www.dw.com/en/hong-kong-sees-mixed-results-in-first-district-election-since-umbrella-protests/a-18868205>.

²⁴⁸ Richard C. Bush, *How Hong Kong Got to this Point*, BROOKINGS (Sept. 12, 2019), <https://www.brookings.edu/blog/order-from-chaos/2019/09/12/how-hong-kong-got-to-this-point/>.

²⁴⁹ Michelle Nicholassen, *Nonviolent Resistance Proves Potent Weapon*, HARV. GAZETTE (Feb. 4, 2019).

means be used to exclude the possibility that limited forms of violence may be strategically and appropriately used as tactics in civil disobedience.

It is worth noting that after Hong Kong's National Security Law (NSL) was enacted by the NPCSC in June 2020, it has become very clear that China cannot tolerate any acts involving potential secession, subversion, terrorism, and/or collusion with foreign powers, all of which have been criminalized by the NSL.²⁵⁰ More specifically, in addition to the new Hong Kong national security body established under the NSL (the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region, or HKNSC), the Central People's Government has also established another new office in Hong Kong, the Office for Safeguarding National Security of the Central People's Government in the Hong Kong Special Administrative Region (CPGNSO), which is not subject to Hong Kong's jurisdiction.²⁵¹ According to Article 55 of the NSL, the CPGNSO has exclusive jurisdiction over a case:

[C]oncerning offence endangering national security under [the NSL], if: (1) the case is complex due to the involvement of a foreign country or external elements, thus making it difficult for the Region to exercise jurisdiction over the case; (2) a serious situation occurs where the Government of the Region is unable to effectively enforce [the NSL]; or (3) a major and imminent threat to national security has occurred.²⁵²

When a case arises concerning an offense believed to endanger national security pursuant to Article 55 of the NSL, the CPGNSO, rather than the Hong Kong authorities, shall initiate investigation into the case, which will subsequently fall under the jurisdiction of the prosecutors and courts in Mainland China;²⁵³ furthermore, the decision made by the HKNSC cannot be amended via Hong Kong's judicial review.²⁵⁴ From a legal perspective, moreover, the definitions of these crimes as listed in the NSL are somewhat ambiguous²⁵⁵ and open to broad interpretation, where such interpretative power is vested in the NPCSC according to the NSL.²⁵⁶ Given the status of Hong Kong as a common law jurisdiction under "One Country, Two Systems," this does not

²⁵⁰ Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (promulgated by the Standing Comm. Nat'l People's Cong., June 30, 2020, effective June 30, 2020) (China).

²⁵¹ *Id.* arts. 12, 48, 60.

²⁵² *Id.* art. 55.

²⁵³ *Id.* art. 55–57.

²⁵⁴ *Id.* art. 14.

²⁵⁵ Stuart White, *Here are Some of the Most Controversial Points of Hong Kong's Dreaded Security Law*, VICE (July 1, 2020).

²⁵⁶ Law on Safeguarding National Security in the Hong Kong Special Administrative Region, art. 65.

technically prohibit Hong Kong courts from developing a common law jurisprudence by interpreting the NSL when handling such cases.²⁵⁷ Having said this, in terms of civil disobedience within Hong Kong, the NSL clearly provides both China and the pro-Beijing government of Hong Kong with a legal channel to exercise a wide range of discretion when handling a case suspected to involve NSL-listed crimes.²⁵⁸ If the case involves openly advocating for the overthrow of the Chinese government under CCP's leadership or calling for Hong Kong's independence, it will very likely be treated as a national security case by the government.²⁵⁹

It is clear that one consequence of passing the NSL has been a certain intimidating effect on Hong Kong's human rights advocates.²⁶⁰ A number of pro-democracy political organizations once run by activists for democracy have ceased operating since the NSL came into effect, while some prominent political activists have fled Hong Kong to escape the potential dangers posed by the NSL.²⁶¹ Of course, this is not to say that people have surrendered to fear since the NSL was enacted, although fear may certainly be used by politicians as a tool to change people's attitudes and behaviors.²⁶² On the contrary, there is strong evidence that people are still searching for new means of resisting authoritarian rule.²⁶³ One example of this involves the unprecedented support expressed by investors of Jimmy Lai, who was arrested under the NSL; following his arrest, investors bought shares in the company he owned, causing the stock value to rise more than 2,000% to a twelve-year high.²⁶⁴ Another example concerns the long queues of people lining up to purchase the anti-government tabloid *Apple Daily* in the early hours of the day immediately after the arrest.²⁶⁵ More than half a million copies of the paper were published that day, a significant increase from the usual 100,000.²⁶⁶ Of course, given that the governments of both Hong Kong and China have been granted a wide range of discretion in applying the NSL, it seems very likely that there is almost no space

²⁵⁷ Hualing Fu, *A Note on the Basic Law and the National Security Law*, HKU LEGAL SCHOLARSHIP BLOG (Aug. 12, 2020), <http://researchblog.law.hku.hk/2020/08/hualing-fu-on-relationship-between-hong.html>.

²⁵⁸ White, *supra* note 255.

²⁵⁹ *Id.*

²⁶⁰ *China Passes Hong Kong Security Law, Deepening Fears for Future*, AL JAZEERA (June 30, 2020).

²⁶¹ *Id.*; Nathan Law, *Leading Young Democracy Activist Flees Hong Kong*, BBC NEWS (July 3, 2020), <https://www.bbc.com/news/world-asia-china-53271740>.

²⁶² *China Passes Hong Kong Security Law, Deepening Fears for Future, supra* note 260.

²⁶³ *See, e.g., Support for Arrested Owner Drives Next Digital Shares, Watchdog Urges Caution*, REUTERS (Aug. 11, 2020), <https://www.reuters.com/article/us-next-digital-stocks/hks-next-digital-hits-12-year-high-after-campaign-to-support-arrested-owner-idUSKCN2570Y2>.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

for any large-scale civil disobedience involving illegal acts of violence, as such activities could easily be categorized as crimes under the NSL.²⁶⁷ Despite this, there is undoubtedly still hope given Hong Kong's unflagging spirit of resistance.

²⁶⁷ White, *supra* note 256.