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**A Missing Narrative in Civil Disobedience:
How does Civil Disobedience Definitions Work in Less Liberal
Societies?**

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Abstract

The label of Civil Disobedience holds a significant weight in how people perceive different protest actions. However, the definition of Civil Disobedience has been a point of argument for years. It is unlikely there will ever be one definition that can fit all situations, but many do try. Unfortunately, the current definitions generally fail to consider the types of actions and complexities that are unique to less liberal societies. The result is that many actions in these societies ultimately cannot be labelled as Civil Disobedience. This paper looks at how certain elements often described in Civil Disobedience definitions discourse work in less liberal societies. This will be done with the help of the example of the Anti-Extradition Bill Protests in Hong Kong during 2019 and 2020. These protests surrounded the introduction of the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill which became of great controversy in Hong Kong. The introduction of the Bill led to widespread protests throughout the region. However, there are mixed views on whether these protests can be labelled as Civil Disobedience. Ultimately, under the current definitions of Civil Disobedience, the protests would not be considered to fall under the heading. This paper will show how the key elements of Civil Disobedience do not reflect the complex situations that can arise in less liberal societies.

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I Introduction

Defining civil disobedience is not easy. Many have tried. However, many of the conceptions of civil disobedience reflect the societies and time the author is writing in, which is usually from stable more liberal societies. This excludes other types of societies established around the world.

This paper delves into how present definitions of civil disobedience work in less liberal societies. This will be done by looking at certain key recurring elements of civil disobedience definitions, finding similarities and differences, and if they are feasible for a less liberal society. This will also be done by using the Anti-Extradition Bill Protests in Hong Kong during 2019 and 2020 as an example. The Anti-Extradition Bill Protests were chosen because throughout the media many describe it as civil disobedience without fully understanding the meaning behind the term and this may be the same in similar societies.

Ultimately, the Anti-Extradition Bill Protests cannot fit into current civil disobedience definitions because these definitions do not consider the complexities that come with protesting in a less liberal society.

This paper will first examine why Hong Kong is considered a less liberal society, and background into the events of the Anti-Extradition Bill Protests. Next, key elements of civil disobedience will be outlined, different conceptions of the elements will be discussed and then they will be applied to the protests and therefore less liberal societies.

This paper will not provide an answer on whether there is a definition of civil disobedience that could combat the problems highlighted in this paper. Instead it is written as a launching pad into possible further study in this area. However, at the end of the paper it is suggested that maybe it is best to not try and confine civil disobedience to a singular definition at all.

II 'Less Liberal Society' Defined

Before going any further, it is necessary to define what 'less liberal society' means in the context of this paper.

'Less liberal' societies share some characteristics with authoritarianism. There is no one way to define authoritarianism, but it usually consists of the government getting into power

through undemocratic means (democratic means being free and fair elections), the government enforces “strict obedience to authority, as opposed to individual freedom”, and is more involved in personal affairs.¹ Here, ‘less liberal’ society means the society’s laws have allowance for individual freedom and rights, but in reality there is a minority group (who may or may not have been elected democratically) that are authoritatively controlling the laws, and the citizens within their control, which are limiting the majority of the individual’s freedoms and rights. This type of distinction is relevant particularly in the world today, when there is a rise in authoritarian style regimes over more liberal ones.² Given that there are more and more societies across the world slowly moving toward authoritarianism, this paper’s topic is particularly timely.

The reason for choosing the word ‘society’ instead of terms like ‘country’ or ‘state’ is due to the complexities of this world. ‘Society’ is a broader term to use that can encapsulate all types of groupings of people with common rules and leadership. Terms like ‘country’ or ‘state’ cannot do that. For example, with Hong Kong it is neither a country nor a state, rather it is a Special Administrative Region of the People’s Republic of China; however, many Hong Kong residents, especially younger people, do not like being labelled as such.³ So, ‘society’ is a broader term that can fit a multitude of situations.

III Background of Hong Kong Protests

A Hong Kong, a Special Administrative Region of China

Hong Kong is known as an autonomous Special Administrative Region of the People’s Republic of China. This has been the case since China took sovereignty from the United Kingdom at midnight on 1 July 1997 when the Sino-British Joint Declaration took effect (the Handover); and will last until 2047.⁴ As a Special Administrative Region, Hong Kong

¹ Erica Frantz *Authoritarianism: What Everyone Needs to Know* (Oxford University Press, 2018) at 6; *The New Zealand Oxford Dictionary* (2005, online ed) “Authoritarian”.

² Bastian Herre “The world has recently become less democratic” (6 September 2022) Our World in Data <ourworldindata.org>; Carlos Lozada “Authoritarianism is surging. Can liberal democracy fight back?” (13 May 2022) The Washington Post <www.washingtonpost.com>.

³ “76 per cent of young people polled identify as ‘Hongkongers’, while 2 per cent think themselves as ‘Chinese’” (22 June 2023) South China Morning Post <www.scmp.com>.

⁴ Joint Declaration on the question of Hong Kong (with annexes), China–United Kingdom 1399 UNTS 33 (signed 19 December 1984, entered into force 27 May 1985), art 1 – 2.

enjoys a ‘high degree’ of autonomy, and “enjoy[s] executive, legislative and independent judicial power” in accordance with the Basic Law (the highest constitutional document of Hong Kong).⁵ However, China still has control over foreign affairs and defence, for example providing Hong Kong’s military.⁶

Hong Kong is located on the South-East coast of mainland China. Currently it comprises Hong Kong Island, Kowloon Peninsula, and the New Territories and Islands.⁷ In 1841 a British naval party landed on Hong Kong Island and took formal possession of the island for the British Crown.⁸ Willingly or not, the island was officially ceded “in perpetuity” to the British by the Qing dynasty in 1842.⁹ Kowloon was ceded in 1860,¹⁰ and the New Territories in 1898, for a 99-year lease.¹¹

Therefore, for 156 years Hong Kong was a British colony. Hong Kong thrived as a port town under British control, and became one of the leading financial centres in the world. However, Hong Kong being under control of the British meant a divergence from China’s own system. Hong Kong had (and still has) a capitalist economic system, while China went from an imperial system to a socialist one during the time of British control over Hong Kong. Hong Kong also abided by the common law system, while China’s legal system is largely a civil law one. This means that politically and legally China and Hong Kong were vastly different when the Handover came in 1997.

This divergence created the principle “one country, two systems” whereby even though China now has sovereignty over Hong Kong, “the socialist system and policies will not be practised in Hong Kong.”¹² Common sense also dictated that trying to change Hong Kong’s system to China’s system would ruin the status Hong Kong had as a leading financial

⁵ The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China 1990 (Hong Kong), art 2.

⁶ Basic Law, above n 5, art 13 – 14.

⁷ 香港統計數字一覽 *Hong Kong in Figures* (Census and Statistics Department, April 2023) at 3.

⁸ John Carrol *A Concise History of Hong Kong* (Rowman & Littlefield, United Kingdom, 2007) at 1.

⁹ Treaty of Nanjing (Nanking), China–United Kingdom (signed 29 August 1842, entered into force 26 June 1843), art III.

¹⁰ Convention of Peace Between Her Majesty and the Emperor of China, United Kingdom–China (signed 24 October 1860, entered into force 24 October 1860), art 6.

¹¹ Convention Between Great Britain and China respecting an Extension of Hong Kong Territory, China–United Kingdom (signed 9 June 1898, entered into force 6 August 1898).

¹² Basic Law, above n 5, preamble.

centre. This would also have been detrimental to China as Hong Kong was their window to the outside world economically.¹³

As a result, Hong Kong has still been able to be a relatively liberal society, being able to control its own destiny. However, even though the Handover looked good on paper, since 1997 the control of Hong Kong by China has tightened.

B Highlights of Hong Kong Affairs Post-1997

Initially China had a ‘noninterventionist posture’.¹⁴ But this has never been so.

Hong Kong’s Basic Law states free and frank elections for the Chief Executive (the head of Hong Kong’s government) and principal officials of the executive authorities can never happen, instead the Central People’s Government of China elects them.¹⁵ Hongkongers are still able to vote for the majority of their representatives of the Legislative Council (legislative branch) and their local district councils.¹⁶

Also, the Tung Chee-hwa administration’s regime, which was in power for the first five years from the Handover, slowly turned the system into one of “soft authoritarianism”.¹⁷ 2003 was the first pivotal moment that saw real push back against China’s intervention. More than half a million people marched against proposed national security laws, which included laws that would hinder freedom of speech, especially for dissidents against the Chinese government; allow police to enter residential buildings and arrest people without warrants and/or evidence and so on.¹⁸ The Bill was later withdrawn, however not much else changed.

Another encroachment on Hong Kong’s autonomy was with the publishing of a White Paper on the implementation of the “one country, two systems” policy in June 2014. The

¹³ Carrol, above n 8, at 3.

¹⁴ Yiu Chung Wong and Jason K H Chan “Civil Disobedience movements in Hong Kong: A Civil Society Perspective” (2017) 6 Asian Education and Development Studies 312 at 319.

¹⁵ Basic Law, above n 5, art 15.

¹⁶ Basic Law, above n 5, art 68, Annex II.

¹⁷ Jason Kwun-hong Chan and Rami Hin-yeung Chan “Learn to disobey: Evolution of “civil disobedience” and the transforming sociopolitical context of Hong Kong” (2020) 12 Asian Politics & Policy 516 at 527.

¹⁸ National Security (Legislative Provisions) Bill 2003; Benny Yiu-ting Tai “Stages of Hong Kong’s democratic movement” (2019) 4 Asian Journal of Comparative Politics 352 at 356 – 357.

White Paper was published by Mainland authorities and stated Beijing had “comprehensive governance power” over Hong Kong.¹⁹ Some Hongkongers accused the Mainland of “rewriting history”.²⁰ A month later the Standing Committee of the National People’s Congress (China’s main legislative organ) tightened the rules of Chief Executive elections which essentially meant China could “easily screen out” candidates it did not want.²¹ This means that hopes for a full democracy in Hong Kong were effectively ‘dashed’.²²

This triggered the start of the Occupy Central Movement and the Umbrella Movement. These movements, however, did not change the electoral system, but did “irreversibly reshape...the political culture of Hong Kong”.²³ More people were becoming aware and pushing for democracy, while China found more ways to tighten their grip on Hong Kong affairs.

Clearly, Hong Kong cannot be considered fully liberal, but the pro-democracy movement means it cannot fully be authoritarian like China would like. It is safe to say Hong Kong is a less liberal society, and a perfect society to look at for this paper.

IV The Anti-Extradition Bill Protests 2019 to 2020

A The Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 (The Bill)

This Bill was initially introduced because of a 20-year-old Hong Kong resident by the name of Chan Tong-Kai. On 17 February 2018 Tong-Kai murdered his pregnant girlfriend in Taipei, Taiwan. However, before police authorities in Taiwan could catch up with him, he had flown home to Hong Kong. Hong Kong authorities had no power to charge Tong-Kai for murder or extradite him back to Taiwan due to no extradition agreement being in place.²⁴ The Hong Kong Government, wanted to quickly pass the Bill to stop Tong-Kai

¹⁹ Wong and Chan, above n 14, at 325.

²⁰ Wong and Chan, above n 14, at 325.

²¹ Tai, above n 18, at 360.

²² Tai, above n 18, at 360.

²³ Tai, above n 18, at 363 – 364.

²⁴ AFP “Taiwan won’t ask for murder suspect if Hong Kong passes ‘politically motivated’ extradition law” (31 March 2020) Hong Kong Free Press <hongkongfp.com>.

from evading justice.²⁵ The Hong Kong Government also saw it as a perfect opportunity to fix the “loopholes” in the system.²⁶

The Bill was officially gazetted on 29 March 2019, and introduced into the Legislative Council by the Secretary for Security John Lee on 3 April 2019 for its first reading. There had been public consultation between 12 February and 4 March 2019. The Bill had around 4500 submissions, with 3000 submissions in support, 1400 in opposition, and the rest “expressing views or proposing other options”.²⁷ This is why the Bill initially proceeded.

Even though the Bill was only 14 pages long, it caused wide controversy. The Bill was created to change sections in Hong Kong’s Fugitive Offenders Ordinance and its Mutual Legal Assistance in Criminal Matters Ordinance.²⁸ These changes would allow for the Hong Kong Government to approve extraditions on a case-by-case basis to any jurisdiction that does not have a treaty with Hong Kong.²⁹ The Bill would only apply to 37 of the 46 offences described in Schedule 1 of the Fugitive Offenders Ordinance and the offence must be punishable of three years or more.³⁰ It would also take away the independent legislative oversight that is usually in an extradition process.³¹

China does not have a treaty with Hong Kong in order to keep the “one country, two systems principle”. Many people were afraid the Bill would make it easier for Chinese authorities to ask Hong Kong authorities to extradite critics of both Hong Kong and Chinese governments, activists, or human rights defenders living in Hong Kong to China. These people could then be subject to harsh punishment and have their views stifled once in China, which was an all too real reality. For example, a Taiwanese pro-democracy activist by the name of Lee Ming-che, had disappeared in China in 2017 after going to the

²⁵ “Taiwan won’t ask for murder suspect”, above n 24.

²⁶ Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 (Legislative Council Brief) at [2].

²⁷ Legislative Council Brief, above n 26, at [17].

²⁸ Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 (Hong Kong).

²⁹ “Taiwan won’t ask for murder suspect”, above n 24.

³⁰ Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill, Long title, s 4.

³¹ Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill, s 4; Ethan Meick *Hong Kong’s Proposed Extradition Bill Could Extend Beijing’s Coercive Reach: Risks for the United States* (U.S.-China Economic and Security Review Commission, Issue Brief, May 2019) at 1.

mainland through Macau. He was later charged and convicted of “subverting state power”.³²

The Bill also had the possibility of threatening journalists by having a “chilling effect on the freedom of expression in Hong Kong”.³³ The Hong Kong Basic Law specifically allows for freedom of speech, freedom of the press and of publication.³⁴ So the new extradition law would be going against Hong Kong’s highest constitutional document.

The Bill also defined Taiwan as being part of the People’s Republic of China, meaning Taiwanese nationals that had sought refuge in Hong Kong could be extradited to the mainland instead of Taiwan.³⁵ Taiwanese officials had tried to negotiate an extradition treaty in regard to the Tong-Kai case, but Hong Kong ignored all communications.³⁶ As a result, Taiwan said that if the Bill was to pass they would not seek to have Tong-Kai extradited.³⁷ This made the initial point of the Bill redundant.

B The Events of the Anti-Extradition Bill Protests

The first protest was on 31 March 2019, two days after the Bill had been gazetted. The protest was organised by the Civil Human Rights Front (CHRF).³⁸ The CHRF were an organisation that had led many protests in Hong Kong over the years. The CHRF were comprised of many non-governmental organisations (NGOs) and groups whose main aim was for a more democratic Hong Kong.³⁹ According to the CHRF, around 12,000 people marched to the Central Government Complex. However, by police reports it was only 5,200 people at its peak.⁴⁰

³² “Taiwan won’t ask for murder suspect”, above n 24.

³³ Kris Cheng “New extradition law would enable China to capture journalists in Hong Kong, warns media watchdog” (3 April 2019) Hong Kong Free Press <hongkongfp.com>.

³⁴ Basic Law, above n 5, art 27.

³⁵ Legislative Council Brief, above n 26, s 7(b).

³⁶ Meick, above n 31, at 2.

³⁷ “Taiwan won’t ask for murder suspect”, above n 24.

³⁸ The Civil Human Rights Front has since disbanded on 15 August 2021, see Jessie Yeung “Prominent Hong Kong civil rights group disbands, citing government pressure” (15 August 2021) CNN <edition.cnn.com>.

³⁹ Yeung, above n 38.

⁴⁰ Holmes Chan “In Pictures: 12,000 Hongkongers march in protest against ‘evil’ China extradition law, organisers say” (31 March 2019) Hong Kong Free Press <hongkongfp.com>.

The next protest, partially in response to some pro-democracy jailings which had happened in the interim, took place on 28 April 2019, after the Bill had officially been introduced into the Legislative Council.⁴¹ This march garnered 130,000 people according to the CHRF.⁴² Again, police estimated only 22,800 people were involved at its peak.⁴³ However, whatever estimate was given, many compared it to one of the largest ever protests since the Umbrella Movement in 2014.⁴⁴ In response to this march, the Extradition Bill was altered, but many said these concessions were merely cosmetic.⁴⁵

Then, on 6 June 2019, around 3,000 lawyers, legal academics and law students dressed in black, held a silent march.⁴⁶ Walking from the Court of Final Appeal to the Central Government Offices. It was a rare sight to see the legal profession protesting.⁴⁷

Up until this point, the marches had been relatively small and calm. The only violent actions were within the Legislative Council itself, where scuffles had broken out between pro-democracy and pro-Beijing members while discussing the Bill.⁴⁸ However, this quickly changed with the next march.

On 9 June 2019, the CHRF reported one million people came out to protest the Bill. The police only estimated 240,000 people.⁴⁹ This came with a few skirmishes during the day.⁵⁰ Police had also been accused of blocking metro stations and roads, to funnel the protestors through narrow thoroughfares, halting the movement of the protest and cramming people together during a hot day.⁵¹ However, by nightfall things changed. A few hundred protesters had stayed in front of the Central Government Complex, to sit and wait until 12

⁴¹ “Timeline: Key Dates in Hong Kong’s anti-government protests” (30 May 2020) Reuters <www.reuters.com>; Helen Davidson “Clashes in Hong Kong after vast protest against extradition law” (9 June 2019) The Guardian <www.the-guardian.com>.

⁴² “Huge Protest in Hong Kong against China extradition plan” (28 April 2019) Al Jazeera <www.aljazeera.com>.

⁴³ “Huge Protest in Hong Kong against China extradition plan”, above n 42.

⁴⁴ “Huge Protest in Hong Kong against China extradition plan”, above n 42.

⁴⁵ “Timeline: Key Dates in Hong Kong’s anti-government protests”, above n 41.

⁴⁶ “Hong Kong Lawyers hold silent march against controversial extradition bill” (7 June 2019) South China Morning Post <www.scmp.com>.

⁴⁷ “Timeline: Key Dates in Hong Kong’s anti-government protests”, above n 41.

⁴⁸ “Timeline: Key Dates in Hong Kong’s anti-government protests”, above n 41.

⁴⁹ Jennifer Creery “Over a million attend Hong Kong demo against controversial law, organisers say” (9 June 2019) Hong Kong Free Press <honkongfp.com>.

⁵⁰ “Hong Kong: Timeline of extradition protests” (4 September 2019) BBC <www.bbc.com>.

⁵¹ Davidson, above n 41.

June, as that was the day the Legislative Council was supposed to have its second reading on the Bill. But the permission organisers had to protest expired at midnight (9 June). Police officers moved in to disperse the remaining protestors and this ended in violence. Protestors reacted by throwing bottles and metal barricades. Eventually riot police were called in, they used pepper spray and batons to remove the protestors, who did eventually disperse.⁵²

A new protest took place on 12 June 2019, due to the second reading of the Bill in the Legislative Council. This protest soon turned into one of the “most violent protests in decades”.⁵³ Thousands of people took to the streets, making their way to the outside of the Legislative Council Complex. The goal was to disrupt the second reading. However, many had not known the second reading had already been postponed in the morning as the mobile signal was bad in the area.⁵⁴ The 12 June protest was not a sanctioned protest unlike previous ones, so many people were more on edge over repercussions from the police.⁵⁵

The protests took a turn for the worse in the afternoon. Police arrived in riot gear and had a banner saying, “disperse or we fire”.⁵⁶ Clashes broke out when protestors blocked the roads around the building and a group moved the police cordon.⁵⁷ Police responded with pepper spray, firing rubber bullets, beating protestors with their batons and using water cannons against protestors.⁵⁸ Protestors in turn threw umbrellas, bricks, and metal barriers at the officers.⁵⁹ For the most part, the crowds did disperse, and video evidence shows officers beating some protestors that were unarmed and trying to leave.⁶⁰

The day ended with 81 injured protestors, with two men in a serious condition, 22 injured police officers and 11 arrests.⁶¹ The Police Commissioner defended the actions of the Hong Kong police, classifying the protest as a “riot”. The Commissioner stated the police were

⁵² Davidson, above n 41.

⁵³ “Timeline: Key Dates in Hong Kong’s anti-government protests”, above n 41.

⁵⁴ Damien Gayle and Kate Lyons “Hong Kong Protest: police fire teargas at demonstrators - as it happened” (12 June 2019) The Guardian <www.theguardian.com>.

⁵⁵ Gayle and Lyons, above n 54.

⁵⁶ Gayle and Lyons, above n 54.

⁵⁷ Pablo Robles, Darren Long and Dennis Wong “100 days of protests rock Hong Kong” (17 September 2019) South China Morning Post <www.scmp.com>.

⁵⁸ Gayle and Lyons, above n 54; Sophie Williams and others “As it happened: Chaotic scenes as HK protests turn violent” (12 June 2019) BBC <www.bbc.com>.

⁵⁹ Gayle and Lyons, above n 54; Grace Tsoi “‘Shield Girl’: The face of Hong Kong’s anti extradition movement” (15 June 2019) BBC <www.bbc.com>.

⁶⁰ Gayle and Lyons, above n 54.

⁶¹ Robles, Long and Wong, above n 57.

correct to act in the way they did, as they were under attack. One worry for the protestors, however, was the fact the Commissioner also stated China's People's Liberation Army were not going to be called in "at this stage".⁶²

One thing needs to be made clear, not all protestors were violent. Many protestors were still peaceful, instead creating ways to protect themselves, such as handing out umbrellas, and being wrapped in clingfilm for protection from the teargas.⁶³ One woman even meditated while the police stood calmly behind her.⁶⁴ As with the marches that will soon be described, many of the protests were largely peaceful until pockets of protestors became wayward. This sort of thing had happened in previous movements like the Umbrella Movement, which undermined those actions. However, during the Anti-Extradition protests, moderate and radical groups agreed to "cooperate, collaborate and tolerate each other's methods."⁶⁵ A popular slogan between protestors has been "two brothers climb a mountain, each making his own effort (兄弟爬山，各自努力)," a metaphor for saying they accept they can use their own tactics to get to the same outcome.⁶⁶ This description mainly talks about the events in a broader overview, rather than talking of specific actions of these two groups.

Because of the events of 12 June, Carrie Lam – the Chief Executive of Hong Kong at the time – stated the Bill will be indefinitely delayed. However, the Bill had not been fully withdrawn. This is also where you see a turn from just protesting against the Bill toward protesting about a broader anti-authoritarian movement, "a movement about protecting freedom, demands for universal suffrage, and police accountability" start to arise.⁶⁷

So, another march took place on 16 June. The CHRF estimated around two million people had taken part in the march, while Hong Kong police again contradicted this stating only around 338,000 people were involved at its peak.⁶⁸ The protestors this time were not only

⁶² Gayle and Lyons, above n 54.

⁶³ Gayle and Lyons, above n 54.

⁶⁴ Tsoi, above n 59.

⁶⁵ Anthony Kuhn "In Hong Kong, Moderate And Radical Protestors Join Forces To Avoid Past Divisions" (25 August 2019) NPR <www.npr.org>.

⁶⁶ Kuhn, above n 65; Lai Tsz-him "Understanding the Use of Violence in the Hong Kong Protests" in Kwok Pui Lan and Francis Ching-Wah Yip (eds) *The Hong Kong Protests and Political Theology* (Rowman & Littlefield, London, 2021) 75 at 76.

⁶⁷ Tsz-him, above n 66, at 75.

⁶⁸ "Hong Kong protest: 'Nearly two million' join demonstration" (17 June 2019) BBC <www.bbc.com>.

wanting the Bill fully withdrawn, but were marching for those “brutally treated by the police” at the 12 June protest.⁶⁹ This protest was peaceful.

From then there were a few smaller protests, like some protestors surrounding Hong Kong Police Headquarters in Wan Chai, trapping staff for the day, and throwing eggs at the building.⁷⁰

The next major march came on 1 July, the anniversary of the Handover. The march itself went by peacefully; however, in the afternoon a splinter group decided to storm the Legislative Council building. They smashed windows, vandalised the building, sprayed graffiti on the walls, and even defaced the Hong Kong emblem.⁷¹ The protestors did eventually leave after police had threatened to move in, stating they would “use appropriate level of force in case their actions are met with obstruction or resistance.”⁷² 54 protestors and 13 policemen were injured. The police made 12 arrests.⁷³

On 9 July Carrie Lam stated the Bill was “dead”, yet still refused to withdraw it.⁷⁴ Many more pockets of protests started popping up in other areas of Hong Kong, not just at the Government Buildings situated in Admiralty.

The real catalyst for widespread anger among the Hong Kong people came on 21 July. Earlier in the day protestors again had marched and also vandalised China’s Liaison Office. But as protestors were leaving at night, an incident occurred at the Yuen Long underground train station. A group of men wearing white t-shirts and masks indiscriminately started attacking protestors, journalists and innocent bystanders, using iron bars and wooden clubs.⁷⁵ They were very indiscriminate, even beating women and children according to one woman who had been attacked.⁷⁶ 45 people were injured, leaving one man in a critical condition and three in a serious condition.⁷⁷ It was suspected these men were members of

⁶⁹ “Hong Kong protest: ‘Nearly two million’ join demonstration”, above n 68.

⁷⁰ Robles, Long and Wong, above n 57.

⁷¹ Robles, Long and Wong, above n 57.

⁷² Bill Chappell “Hong Kong Protestors Storm Legislative Council On Anniversary Of Handover to China” (1 July 2019) NPR <www.npr.org>.

⁷³ Robles, Long and Wong, above n 57.

⁷⁴ “Hong Kong: Timeline of extradition protests”, above n 50.

⁷⁵ Robles, Long and Wong, above n 57.

⁷⁶ Lily Kuo “‘Where were the police?’ Hong Kong outcry after masked thugs launch attack” (22 July 2019) The Guardian <www.theguardian.com>.

⁷⁷ Kuo, above n 76.

gangs (called triads) who had planned the attack with the support of the police. The police took around 39 minutes to respond to the incident, and arrived once the men had left, making no arrests that night.⁷⁸ One pro-democracy law maker tweeting “Hong Kong has one of the world’s highest cop to population ratio. Where were @hkpoliceforce?”⁷⁹ People were even more distrustful of the police now, and truly feared for their lives. One lawmaker stating, “Hong Kong is no longer a safe city.”⁸⁰

The Yuen Long attack was retaliated with a protest on 27 July. This protest was unauthorised, leading to police firing teargas and pepper spray at the protestors. Protestors responded by throwing stones and using metal poles as weapons.⁸¹ Other marches on 28 July and 3 August also descended into violence when protestors split from pre-approved routes.⁸² Protests were now happening all over Hong Kong and usually ending in violent clashes with police nearly every day – this paper would be too long, if it detailed every single one.⁸³ These were not only marches on the roads, or demonstrations in squares, but also demonstrations at Hong Kong’s airport halting hundreds of flights.⁸⁴ By the middle of August, it had been reported Chinese police and military had started to gather in Shenzhen just across the border, creating even more tension.⁸⁵

Finally, on 4 September, after three months of violent clashes, Carrie Lam announced she would formally withdraw the Bill from the Legislative Council agenda.⁸⁶ Lam did this to ease tensions, however some said it was “too little, too late”.⁸⁷ Protests continued past this announcement, as protestors moved their attention to a wider pro-democracy stance. Protestors wanted the “riot” description on the 12 June march removed, an amnesty for all protestors that had been arrested, an independent inquiry into alleged police brutality,

⁷⁸ Kuo, above n 76.

⁷⁹ Kuo, above n 76.

⁸⁰ Kuo, above n 76.

⁸¹ Robles, Long and Wong, above n 57.

⁸² Robles, Long and Wong, above n 57.

⁸³ Robles, Long and Wong, above n 57.

⁸⁴ Robles, Long and Wong, above n 57.

⁸⁵ “Hong Kong: Timeline of extradition protests”, above n 50.

⁸⁶ “Hong Kong: Timeline of extradition protests”, above n 50.

⁸⁷ “Hong Kong: Timeline of extradition protests”, above n 50.

universal suffrage in Chief Executive and Legislative Council elections, and Lam to resign.⁸⁸

This is where my description of the protests will end, with the Bill officially being withdrawn on 23 October 2019.⁸⁹ However, protests and violence continued through into 2020, before finally petering out due to the Covid-19 Pandemic. Protestors tried to continue through, but it was just too difficult. This is the moment this paper is going to classify the movement as ending, even if the Bill was officially withdrawn months earlier. There is no reason on commenting on the events of later 2019 and early 2020, as they were similar to the types of protests already described and would not add anything to this paper.

V An Overview of Civil Disobedience Definitions

It is clear from scholarship that there has been much talk over whether civil disobedience actually works in more liberal societies. It is generally accepted that civil disobedience is less justified in more liberal societies, while there are more justifications for people to take actions of civil disobedience in less liberal societies.⁹⁰

This proposition comes about because, first civil disobedience is usually the minority deliberately breaking a law that the majority has created. Essentially, “to violate the law is to supplant majority rule with minority rule and to make democracy impossible.”⁹¹ Whereas, with a less liberal society, where say a minority group is authoritatively controlling the laws, it would be more justified for people to engage in civil disobedience if there is no fair way for them to have their say within the system itself.

Second, this also goes to the point that if the person has voted for the government, then they had a hand in making the legislation, so they cannot later go and disobey it when it suits.⁹² Again, someone in a less liberal society has more justification for engaging in an

⁸⁸ “Hong Kong: Timeline of extradition protests”, above n 50; Wong Tsui-kai “Hong Kong protests: What are the ‘five demands’? What do protestors want?” (20 August 2019) South China Morning Post <www.scmp.com>.

⁸⁹ “Timeline: Key Dates in Hong Kong’s anti-government protests”, above n 41.

⁹⁰ Mateusz Pilich “Disobedience of Judges as a Problem of Legal Philosophy and Comparative Constitutionalism: A Polish Case” (2021) 27 Res Publica 593 at 599.

⁹¹ Menachem Marc Kellner “Democracy and Civil Disobedience” (1975) 37 The Journal of Politics 89 at 900.

⁹² Kellner, above n 91, at 901.

act of civil disobedience as they have not been involved in being able to make and properly accept the law.

Third, it is harder to justify civil disobedience in liberal societies because there are more lawful channels and ways to effect legal change within the system without having to resort to civil disobedience.⁹³ A citizen living in a less liberal society may not have these same legal channels to protest against a law or a government policy in the same way, therefore justifying actions considered to be civilly disobedient.

There has been much scholarship on trying to explain why civil disobedience can be justified in liberal societies and counter these problems just stated. However, the problem is that even though it may be more justified to act civilly disobedient in a less liberal society, the types of definitions created for civil disobedience cater more to a liberal society.

There is no one definition of civil disobedience that has been fully accepted. Instead there are many definitions that have been created over the years. A couple of key definitions to highlight are John Rawls and Robin Celikates. According to Rawls, civil disobedience is, “a public, nonviolent, and conscientious act contrary to law usually done with the intent to bringing about a change in the policies or laws of the government,” and includes appealing to the sense of justice of the majority and accepting punishment to stay within the limits of fidelity to the law.⁹⁴ On the other side of the definition spectrum Celikates states civil disobedience as:⁹⁵

An intentionally unlawful and principled collective act of protest (in contrast to both legal protest and ‘ordinary’ criminal offences or ‘unmotivated’ rioting), with which citizens – in the broad sense that goes beyond those recognized as citizens by a particular state – pursue the political aim of changing specific laws, policies, or institutions (in contrast to conscientious objection, which is protected in some states as a fundamental right and does not seek such change) in ways that can be seen as civil (as opposed to military).

These two definitions are seen essentially as either sides of a spectrum where one is the most liberal view and the other reflects the most radical view. But there are many

⁹³ Kellner, above n 91, at 900.

⁹⁴ John Rawls “The Justification of Civil Disobedience” in Kavanagh and Oberdiek (eds) *Arguing About Law* (Routledge, London, 2009) 244 at 247.

⁹⁵ Robin Celikates “Democratising Civil Disobedience” (2016) 42 *Phils Soc Crit* 982 at 985.

definitions in between. However, there are certain elements that seem to keep cropping up in many of these definitions. These elements are committing an unlawful act, non-violence, accepting punishment, publicity and accepting the legitimacy of the state.

The next part will first highlight different conceptions of the element from different theorists, before trying to apply the element to the Anti-Extradition Bill Protests. Ultimately, the objective is to see how the conventionally accepted elements of a civil disobedience definition are catered to more liberal societies rather than less liberal societies.

VI Analysis of Different Civil Disobedience Elements

A Committing an Unlawful Act

1 Theory

One of the key elements that runs through literature of civil disobedience is that a civil disobedient must commit an unlawful act for them to name themselves as such. From the standard liberal definitions to deliberative democratic definitions and even radical democratic definitions, the element is always present.

Unsurprisingly, the element relies on the fact the action must break the society's law in some way. A "lawful protest, however vigorous, unusual, or unwise, is not disobedience."⁹⁶

Yet, unlawful acts usually "impose...burdens on others, including inconvenience, economic costs, and – in some contexts at least – significant political and societal upheaval."⁹⁷ Also, "lawbreaking, no matter how conscientious, was directly tied to a

⁹⁶ Carl Cohen "Civil Disobedience and the Law" (1966) 21 Rutgers Law Review 1 at [2.11].

⁹⁷ William Smith "Deliberative Democratic Disobedience" in William E Scheuerman (ed) *The Cambridge Companion to Civil Disobedience* (online ed, Cambridge University Press, Cambridge, 2021) 105 at 107.

general degradation of state authority that would lead to violence, criminality, and anarchy.”⁹⁸ So why have this element in the first place?

The element is needed because there is no other legal option for the civil disobedient. Civil disobedience is considered to be the last resort, thus allowing for law breaking. There also usually needs to be some moral reasoning behind the lawbreaking besides from just being the last resort. Depending on which theory you look at this can be protesting a certain law, or overall oppressions of a state.

The element is described and labelled in many ways, but it is essentially the same element. Rawls describes it as an “act contrary to law”, Celikates states “an intentionally unlawful...act of protest”, while Carl Cohen states it as “an illegal...protest”.⁹⁹ No matter what wording used, the element is still the same in that the civil disobedient needs to commit an unlawful act in whatever society they are in.

The unlawful action can be either direct or indirect. A direct action is when the law that has been broken is the exact law that the civil disobedients are protesting against.¹⁰⁰ While indirect means the law that has been broken is not the object of the protest, but is usually a related law.¹⁰¹ The Anti-Extradition Bill Protests would be considered indirect. Not only because there were a vast assortment of laws that were broken by the protestors, but they were also protesting against a Bill. A Bill is only proposed law, not actual law; meaning there is no possibility of the protestors being able to break anything that had been proposed in the Bill yet.

There is one caveat to this element though. The unlawful act has a gloss, in that it must be deliberate, principled and conscientious.¹⁰² Celikates in his definition clearly states the act must be “intentionally” unlawful.¹⁰³ While Cohen, even though not specifically in his

⁹⁸ Erin Pineda “Martin Luther King, Jr. and the Politics of Disobedient Civility” in William E Scheuerman (ed) *The Cambridge Companion to Civil Disobedience* (online ed, Cambridge University Press, Cambridge, 2021) 56 at 57.

⁹⁹ Cohen, above n 96, at [2.2]; Celikates “Democratising Civil Disobedience”, above n 95, at 985; Rawls, above n 94, at 247.

¹⁰⁰ Cohen, above n 96, at [4.1].

¹⁰¹ Cohen, above n 96, at [4.1].

¹⁰² Candice Delmas and Kimberly Brownlee “Civil Disobedience” in Edward N Zalta and Uri Nodelman (eds.) *The Stanford Encyclopaedia of Philosophy* (Online ed, Stanford University, 2023) (forthcoming) at [1.1].

¹⁰³ Celikates “Democratising Civil Disobedience”, above n 95, at 985.

definition, throughout his explanation of the element, implies that underlying the element is this idea of it needing to be deliberate.¹⁰⁴ This means that a civil disobedient must clearly plan an action knowing that action to be unlawful. If a lawful protest eventually turns into some or all of the people involved in the protest to commit unlawful acts, this would not be considered civil disobedience; as they have initially not been there to commit an unlawful act.

So then how does this element work for actions in less liberal societies?

2 *Committing an Unlawful Act in a Less Liberal Society*

On the face of it, this element does actually look like it can work in less liberal societies compared to more liberal societies.

First, in less liberal societies there is more chance of laws being able to be broken. For example, even though under the Basic Law, Hong Kong residents have “freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration,” there are a lot of laws that confine this.¹⁰⁵ The Public Order Ordinance is the main piece of legislation that controls protests. The Public Order Ordinance has been amended since the Anti-Extradition Protests. Hong Kong helpfully has a source called *Hong Kong e-Legislation* which allows anyone to look at all of Hong Kong’s legislation, past and present. Under the legislation that was in force during the protests, for a meeting in a public space of over 50 persons, you had to notify the Commissioner of Police of your intention for the gathering no later than a week before said gathering.¹⁰⁶ However, the Commissioner of Police may prohibit the gathering if “he reasonably considers such prohibition to be necessary in the interests of national security or public safety, public order or the protection of the rights and freedoms of others”.¹⁰⁷ Now this all seems reasonable, many other societies, even more liberal societies like the United States of America and New Zealand have similar state laws or bylaws.¹⁰⁸

¹⁰⁴ Cohen, above n 96, at [2.11].

¹⁰⁵ Basic Law, above n 5, art 27.

¹⁰⁶ Cap. 245 Public Order Ordinance 1967 (Hong Kong), as amended 29 June 2017, ss 7(2)(a), 8(1)(a). This Act has since been amended, the reference here is to what was in force at the time of the protests.

¹⁰⁷ Cap. 245 Public Order Ordinance, s 9(1).

¹⁰⁸ For example, in New Zealand peaceful protest is protected under the New Zealand Bill of Rights Act 1990, and depending on the region, some councils have bylaws when it comes to affecting traffic and so on, like the Wellington City Council Public Places Bylaw 2022; or in the United States of America, peaceful

However, in this same Public Order Ordinance there are many more detailed rules that differ from those present in more liberal societies in regard to protests. For example, flags, banners or other emblems could be prohibited if a police officer reasonably believes they could lead to breach of the peace, which is quite a wide ambit.¹⁰⁹ There are also laws around disorderly behaviour at a public gathering, including distributing or displaying writing that could provoke breach of the peace.¹¹⁰ Laws for unlawful assembly;¹¹¹ riot like behaviour;¹¹² for even just proposing violence;¹¹³ and curfews can also be put in place.¹¹⁴ There seem to be many potential laws that a resident of Hong Kong can easily break while involved in the Anti-Extradition Bill Protests, and this is just from one piece of legislation.

Second, this element fits the justification that breaking the law is usually the last resort. As said previously, less liberal societies do not have the same amount of legal channels that can be utilised to show discontent with the society's laws. With Hong Kong resident's not having the same ability to fairly choose many of their officials in government, it was unlikely to be able to get rid of the Bill at a later date by voting out the government who had introduced it. However, the first protests in March and April were not illegal suggesting breaking the law was not the last resort. Yet, the first illegal acts happened on 9 June, and the Bill was not indefinitely delayed until 15 June, which suggests the illegal acts between 9 June to 15 June were a big reason for the announcement of the Bill being delayed rather than the prior peaceful protests.¹¹⁵ Therefore, breaking the law was the last resort, as protestors could see the peaceful protests were not working. This type of thinking would be similar to many less liberal societies dynamics; as in more liberal societies it is thought governments will listen to protestors before they have to resort to breaking the law and so are not actually civil disobedients.

protest is protected under the United States Constitution, amend I, but there are some state laws due to safety concerns like not protesting near pipelines, see "US Protest Law Tracker" (21 June 2023) ICNL <www.icnl.org>.

¹⁰⁹ Cap. 245 Public Order Ordinance, s 3(1).

¹¹⁰ Cap. 245 Public Order Ordinance, s 17B.

¹¹¹ Cap. 245 Public Order Ordinance, s 18.

¹¹² Cap. 245 Public Order Ordinance, ss 19–22.

¹¹³ Cap. 245 Public Order Ordinance, s 26.

¹¹⁴ Cap. 245 Public Order Ordinance, s 31.

¹¹⁵ Robles, Long and Wong, above n 57; "Timeline: Key Dates in Hong Kong's anti-government protests", above n 41.

Lastly, there is the assumption that in less liberal societies legal protests are more easily able to escalate into illegal ones, thus satisfying this element. This can clearly be seen with the Anti-Extradition Bill Protests, by the fourth major march on 9 June. But this is a very generalised assumption, as it really depends on the circumstances of the movement. For example, the Black Lives Matter Movement over the past decade which is in the more liberal society of the United States, easily escalated into illegal acts.¹¹⁶ But then again, just looking at Hong Kong alone, there had been the Occupy Central Movement, the Umbrella Movement and now the Anti-Extradition Bill Protests all of which happened within a decade and escalated into illegal acts.

However, there are still some issues that arise from this element in regard to less liberal societies.

One issue comes with the gloss that the unlawful act must be deliberate, principled and conscientious. For less liberal societies it does not seem like doing something unlawful is actually what is intended at first, usually due to worrying about the harsher punishments protestors will get from authorities compared to more liberal societies. The unlawful acts usually grow out of the legal protests, usually due to frustration. On 9 June, there had been just over two months of peaceful protest, but protests turned illegal on 9 June because a few of the activists refused to leave their protest site outside the Legislative Council Complex. This broke the lawful time they had been given to protest which was until midnight. Once they had broken this law, police officers including the riot police moved in to disperse them. This created even more unlawful acts with some protestors now throwing bottles and metal barricades at officers in response to the batons and pepper spray used on them.¹¹⁷ Many were also angry because of the accusations of police closing metro stations and thoroughfares making large crowds stuck in the heat.¹¹⁸ The intention of the protest on 9 June was for a peaceful legal march, however, that eventually grew into illegal activities. Nobody planned to become violent, but due to the circumstances that is what happened. These illegal acts would not be considered to be deliberate, principled or conscientious in the sense it is implied by those who have added this gloss.

One can ask whether there is even a need to have this element in the first place? In a less liberal society, activists know there is a bigger chance of harsher punishments for their

¹¹⁶ See Derrick Bryson Taylor “George Floyd Protests: A Timeline” (5 November 2021) The New York Times <www.nytimes.com> for one example.

¹¹⁷ Davidson, above n 41.

¹¹⁸ Davidson, above n 41.

deeds. Should they even be thinking about whether participating in an unlawful act is the best way to protest, just so they can have the label of being a civil disobedient? With the Public Order Ordinance, there is an allowance for protestors to be able to protest lawfully and peacefully. But when any of the rules are broken there are quite big penalties for it. For example, if you intentionally go off the route the Police Commissioner has outlined, play too loud music, or stay too long after the lawful protest, this can lead to a fine of \$10,000 Hong Kong Dollars (HKD) and imprisonment of 12 months.¹¹⁹

To distinguish civil disobedience from other forms of protest it seems there needs to be the idea of an unlawful act element, but because of the punishments it may not always be the best idea for someone in a less liberal society. Yet if the other elements are satisfied, could we maybe have some leeway in saying some legal forms of protests could be civil disobedience for less liberal societies? But then the question becomes where would the line be drawn? However, that is not for this paper to consider.

But overall, this element does seem to fit circumstances in less liberal societies. There are a couple of issues, but they are issues that are sometimes present in more liberal societies too.

B Non-Violence

The idea of non-violence has been around since the start of the idea of civil disobedience. In Henry Thoreau's essay "Resistance to Civil Government" (now more commonly referred to as "Civil Disobedience"), the word 'resistance' "belies an unequivocal commitment to nonviolence".¹²⁰

However, non-violence has, like many of the elements, had a lot of debate surrounding whether the element is necessary in regard to a definition of civil disobedience. According to standard liberal views any type of violence is not allowed, while later scholarship has argued for lessening these rules for different reasons. Therefore, "the dichotomy of

¹¹⁹ Cap. 245 Public Order Ordinance, s 17A; Cap. 221 Criminal Procedure Ordinance 1997 (Hong Kong). As amended 1 February 2018, sch 8, s 113B; these Acts have since been amended, the reference here is to what was in force at the time of the protests.

¹²⁰ Russel Hanson "The Domestication of Henry David Thoreau" in William E Scheuerman (ed) *The Cambridge Companion to Civil Disobedience* (online ed, Cambridge University Press, Cambridge, 2021) 29 at 29–30.

violence and nonviolence is unavoidable given its centrality to the theory and history of civil disobedience”.¹²¹

But first, why label the element non-violence rather than violence? From the history of definitions, the starting point was outright no violence at all; however even though the later conceptions state it should not be as black and white they never advocated that violence should be used in all forms of civil disobedience, rather violence may be necessary depending on the justifications behind it. So, the element is best described as non-violence rather than violence, as no one is actually advocating for there to be violence.

The discussion of this element will now be split into two parts. First the standard liberal definition which advocates that absolutely no violence can be allowed in civil disobedience. Second, the wider concept of the element, where some violence is allowed but for justifiable reasons.

1 Standard Liberal Definition

As stated the standard liberal definition, usually attributed to Rawls states that absolutely no violence toward another being or any other being’s property is allowed in civil disobedience, as violence would then interfere with the basic rights of others.¹²²

There are many reasons on why definitions advocate for non-violence, however many of these reasons have not considered how problematic it actually is for protestors in less liberal societies to stay non-violent. A number of these reasons will now be looked at in turn.

First, as Rawls states, the reason we need non-violence is in order to appeal to the sense of justice of the majority.¹²³ It is human nature for people to disregard or oppose those who have interfered with their personal rights.¹²⁴ There does seem to be logic in the fact more people will allow civil disobedience if they feel they are not being personally affected by it. However, there is a problem with this reasoning in regard to a less liberal state like Hong

¹²¹ Alexander Livingston “Nonviolence and the Coercive Turn” in William E Scheuerman (ed) *The Cambridge Companion to Civil Disobedience* (online ed, Cambridge University Press, Cambridge, 2021) 254 at 256.

¹²² Rawls, above n 94, at 248.

¹²³ Rawls, above n 94, at 248.

¹²⁴ Livingston, above n 121, at 255.

Kong, that problem being the majority are actually already on the side of the protestors. But note, not all less liberal societies are the same, and there will be some societies where the majority are actually in support of the authoritarian style regime, so this argument is not a one size fits all argument but is still valid nonetheless. Even though there are inconsistencies from reports of police or protest organisers in regard to how many protestors came to marches throughout the Anti-Extradition Bill Protests; overall it seems like the majority of the people of Hong Kong were supporting the protests.¹²⁵ In past movements, it was usually only students involved in the protests, for example the Occupy Central Movement was a student led protest.¹²⁶ Whereas the Anti-Extradition Bill Protests saw all walks of life getting involved, from the lawyers march on 6 June,¹²⁷ and staff working at financial institutions holding their own protest on 1 August,¹²⁸ to over one hundred companies in Hong Kong going on strike in June.¹²⁹ Not only were the younger students involved, but even older people were helping out with aid and support for the protestors on the front lines. There were even family friendly and ‘silver hair’ (senior citizens) rallies, protesting against the Bill and the “heavy-handed tactics used by police” on the youth rallies.¹³⁰ Hong Kong shows how the majority are the ones being oppressed, so when civil disobedience does occur, the majority of people will already support it, no matter if there is violence or not.

This reasoning also goes to contradicting the argument that non-violent acts of civil disobedience attract more participation.¹³¹ In less liberal societies, sometimes those that are oppressed just reach a breaking point, that no matter what the circumstances violence or no violence they believe they need to participate. This can be seen with the organisation of the two tactical groups (moderates and radicals) in the Anti-Extradition Bill Protests. The moderates were those who advocated for peaceful protest, while the radicals participated in violence for their message to get across.¹³² In past campaigns they have undermined each

¹²⁵ Robert Chung and others *Survey on Hong Kong people's views regarding the Anti-Extradition Bill Movement (Round 4)* (Hong Kong Public Opinion Program of Hong Kong Public Opinion Research Institute, October 2020) at 7.

¹²⁶ Chan and Chan, above n 17, at 532.

¹²⁷ “Timeline: Key Dates in Hong Kong’s anti-government protests”, above n 41.

¹²⁸ Robles, Long and Wong, above n 57.

¹²⁹ Amy Gunia “‘It’s Not a Fight About Money.’ Why Bankers and Entrepreneurs Have a Stake in Hong Kong’s Protests” (11 July 2019) TIME <time.com>.

¹³⁰ Robles, Long and Wong, above n 57; “Hong Kong: ‘Silver protest’ as elderly march in support of youths” (17 July 2019) Sky News <news.sky.com>.

¹³¹ Livingston, above n 121, at 265.

¹³² Kuhn, above n 65.

other.¹³³ However, in the Anti-Extradition Bill Protests they successfully united under their slogan “two brothers climb a mountain, each making his own effort”.¹³⁴ A couple of examples of this cooperation are radicals using violence on the front lines, but moderate protestors helping to negotiate between the radical protestors and police in order to get injured demonstrators out of the front lines, or both groups communicating over online forums on united tactics, whether that included violence or not.¹³⁵ The radical movement did not actually detract from others participating in the protests, rather it was more about the goal in itself which all who participated in the protests cared about.

Violence is also not allowed in civil disobedience because, “a minority that coercively imposes its will on a majority puts democratic institutions at risk and runs roughshod over the need for consent.”¹³⁶ However, this assumes the ones involved in civil disobedience are the minority, and that violence puts “democratic institutions” at risk. Hong Kong, even though a guise of being a democratic society is, as already stated “soft-authoritarianism”, so the ‘minority’ of the National People’s Congress of China are the ones actually in control of Hong Kong rather than the majority through universal suffrage. The National People’s Congress are also using coercive control in regard to continually threatening Hong Kong with its military.¹³⁷ As a result, civil disobedients may need to use violence in defence from the coercive control that is being imposed on them. This self-defence type argument will be looked at further in the next section; but for now it just needs to be stated that violence for self-defence can be justified in a less liberal society due to the minority actually being the ones in control and are acting coercively.

Another argument is that civil disobedience is there to communicate not to disrupt.¹³⁸ Ronald Dworkin states that “when protestors stop trying to merely persuade and start interfering with the conduct of others, they move from civil disobedience to “civil blackmail”.”¹³⁹ However, in less liberal states many acts of civil disobedience where there is no violence falls on deaf ears. Communication only works if the other side are willing to have dialogue, but in less liberal societies there is this lack of willingness from

¹³³ Kuhn, above n 65.

¹³⁴ Kuhn, above n 65.

¹³⁵ Kuhn, above n 65.

¹³⁶ Livingston, above n 121, at 258.

¹³⁷ Erin Hale “Chinese troop movement into Hong Kong prompts unease” (29 August 2019) The Guardian <www.theguardian.com>.

¹³⁸ Livingston, above n 121, at 257.

¹³⁹ Livingston, above n 121, at 257.

authorities.¹⁴⁰ Advocates for non-violence usually say they do not want violence not because non-violence is right, but because it works, especially as a communicator.¹⁴¹ In Hong Kong, protestors actually turned to violence because peaceful protest actually did not work. Especially after the 2014 Umbrella Movement, the “Hong Kong people question[ed] the effectiveness of nonviolent resistance in the face of an authoritarian regime” as they had peacefully protested since 1967, yet nothing had changed.¹⁴² For around 50 years Hong Kong protestors only used peaceful protest, but clearly their communications were not getting through, and thus peaceful protest did not work in their less liberal society.

However, there is an argument under the example of the Anti-Extradition Bill Protests that still holds up. That is, non-violence can be used as an advantage by transforming repression “from a liability into a strength”.¹⁴³ Regimes apply repression in order to “enforce obedience” and breaking protestor’s “will to fight”.¹⁴⁴ When this is applied to a non-violent movement, the effects can rebound, by clearly making the regime look like the bad guy.¹⁴⁵ Because there was violence on both sides in regard to the Anti-Extradition Bill Protests, it is hard to determine whether this argument could suffice for a less liberal society. So it seems the argument stands for both liberal and less liberal societies for now.

But overall, the standard liberal definition does not consider situations in less liberal societies, as shown by the number of problems with the definition compared to the one argument that does hold up in regard to the Anti-Extradition Bill Protests.

If the standard liberal definition does not cater to less liberal societies, is a wider scope to the element going to cater to them?

2 *Wider Ambit to the Idea of Non-Violence*

One scholar that creates a wider ambit to allow violence is Celikates with his radical democratic definition. As stated above, his definition does not actually have a specific element around violence. First, it looks like Celikates is fine with violence in civil

¹⁴⁰ William Smith “Policing Civil Disobedience” (2012) 60 Political Studies 826 at 827.

¹⁴¹ Livingston, above n 121, at 263.

¹⁴² Tsz-him, above n 66, at 78.

¹⁴³ Livingston, above n 121, at 266.

¹⁴⁴ Livingston, above n 121, at 266.

¹⁴⁵ Livingston, above n 121, at 266.

disobedience, which is true to an extent. Celikates adds to his definition that as citizens, the civil disobedients “acknowledge some kind of civil bond with their adversaries” which shows self-restraint but not as restrained as the standard liberal meaning.¹⁴⁶ This means some violence can be allowed but it is restrained to violence toward property, or oneself or is allowed for some resistance of punishment.¹⁴⁷

At first, this interpretation of the non-violence element looks like it caters more to circumstances that are usually in a less liberal society. Especially in the Hong Kong context, protestors did destroy property, however for the most part it was planned to not do damage to innocent bystander’s property. For example, this largely involved moving and damaging barricades police had put up; and a bit more controversially, protestors sacked the Legislative Council building itself on 1 July.¹⁴⁸ But under the radical democratic definition, this would be considered acceptable.

Many protestors also stated the only reason they used violence was because, “violence is the thing that protects us...it is a warning to those, like the police, who think they can do anything to us”.¹⁴⁹ This goes to the justification that violence can be used as resistance against punishment.

However, the interpretation of the non-violence element does not completely cater to circumstances that usually happen in regard to civil disobedience in a less liberal society.

Advocates of this interpretation put quite a bit of emphasis on the fact violence should only be done toward property or toward oneself, rather than self-defence. This is because, “acts of violence do seize public attention but they also risk spiralling out of control and becoming counterproductive in persuading the public.”¹⁵⁰ This has truth to it, as I found the media on both sides only focused on the violence between the police and protestors rather than on the meaning of the protests.

However, this reasoning fails to consider the complexity of human nature, especially with someone so fed up under a less liberal regime. As stated in the last section, for many, it

¹⁴⁶ Celikates “Democratising Civil Disobedience”, above n 95, at 986.

¹⁴⁷ Celikates “Democratising Civil Disobedience”, above n 95, at 986.

¹⁴⁸ Robles, Long and Wong, above n 57.

¹⁴⁹ Tom Lasseter “Revolution 101: For hardened teens of the Hong Kong protests, violence is one way forward” (13 December 2019) Reuters <www.reuters.com>.

¹⁵⁰ Livingston, above n 121, at 255.

was no longer about persuading the public, the majority were already on the protestor's side in regard to the Anti-Extradition Bill. Also, the violence was not truly about persuading the public, but to show their frustration on the lack of dialogue throughout the years from the authorities. Instead, it was more about trying to show 'expressive defence'. This is the idea that "acts of violent resistance against oppression can serve an important expressive function for the oppressed even when they have little hope of promoting good faith deliberation or effectively leveraging disruption to directly secure outcomes."¹⁵¹ Thus, this expression of anger and frustration, that less liberal societies have, would probably not be so easily expressed through just damaging property, but would require protestors to fight back against those who are oppressing them.

What does help is the caveat that violence toward another is justified if in resistance to punishment. However, it is clear that a civil disobedient cannot go on the offensive in regard to violence. This does not consider the frustrations and the silent oppression that happens in less liberal societies, and there should be some justifications for civil disobedients to go on the offensive.

First, as stated before, Hong Kong was well known for peaceful protests; however, nothing had been changing, finally Hongkongers were fed up and needed a new tactic to get authorities and the world to listen.¹⁵² I do not condone violence, but when the tactic of non-violence does not work for 50 years, it is understandable that people feel forced to do something more drastic.

Second, the media only really picked up on the protests when they started to get violent. Some big news agencies even had live updates the moment the violence started.¹⁵³ How is peaceful protest supposed to help communicate if media outlets will not pick it up until it becomes violent? And protestors cannot just wait around for authorities to initiate the violence, for the communicative effect to start.

Lastly, in many less liberal societies like Hong Kong, there is subtle oppression happening. For Hong Kong, that subtle oppression can be shown by the threats and disappearances of people who defect from China's authority or even just the disappearance of anti-China

¹⁵¹ Livingston, above n 121, at 261.

¹⁵² Tsz-him, above n 66, at 78.

¹⁵³ Williams, above n 58; Gayle and Lyons, above n 54.

content from Hong Kong altogether.¹⁵⁴ Would this not mean protestors are justified to use violence to combat oppression that is already happening before the action of civil disobedience itself? It is assumed in liberal societies that the state is not oppressing its citizens in the same way, but usually with less liberal states there is more oppression and control handed down from the state. If less liberal governments are able to act in this way against their citizens, why do the citizens have to stay non-violent until a public act of violence by authorities happens?

So, even though radical democratic thought allows some violence, it still does not take into account the complexities that are distinct in less liberal societies compared to more liberal societies. I am not saying all violence should be allowed as part of civil disobedience. And some may argue that violence was justified in Hong Kong but that it still does not constitute civil disobedience. But civil disobedience holds a certain gravitas in people's minds, making the action feel morally better, and because Hong Kong's violence is justified, the civil disobedience label feels like a better fit. So rather, we need to stretch the limit to allow for these situations of justified violence in a civil disobedience definition.

There is one argument for a wider ambit that does cater to a less liberal society. This is the idea that, "when the state unjustly fails to protect some minorities from violence in the hands of others, members of these minorities are justified in resorting to force in order to protect themselves and other potential victims from such violence."¹⁵⁵ The Yuen Long attack on 21 July clearly proves that in less liberal societies, this type of situation can happen. The evidence of police taking 39 minutes to arrive when police had been in the area earlier in the day, and having made no arrests on the day, makes it seem like they were unjustly failing to protect Hong Kong citizens, as people injured were not only protestors.¹⁵⁶ The protests in retaliation on 27 July at the site of the Yuen Long attack, I argue were justified, to not only protect those who were involved in the protest but also to protect innocent bystanders from getting attacked for no reason. Protestors only attacked police, never innocent bystanders. Therefore, this argument for a wider ambit of the non-violence element does cater to less liberal societies.

¹⁵⁴ "Missing Hong Kong protestor Alexandra Wong 'was held in mainland China' (17 October 2020) BBC <www.bbc.com>; Shui-yin Sharon Yam "Hong Kong: A City of Disappearances" (1 September 2020) <hkprotesting.com>.

¹⁵⁵ Candice Delmas "(In)Civility" in William E Scheuerman (ed) *The Cambridge Companion to Civil Disobedience* (online ed, Cambridge University Press, Cambridge, 2021) 203 at 218.

¹⁵⁶ Kuo, above n 76.

3 *Non-Violence Element Conclusion*

Overall the standard liberal account of having absolutely no violence for civil disobedience clearly does not cater toward the circumstances that arise in less liberal societies. It has too much faith in the authorities and humanity, to not realise the practical injustices that flow throughout the world.

Whereas those that advocate for a wider ambit of the element are better at catering to situations that happen in less liberal societies. These advocates are not stating violence is fine, they still wish for no violence at all, but in some circumstances violence by civil disobedients can be justifiable. However, the justifications can be quite limited and do not consider the complicated situations which can arise under less liberal societies.

Overall the element of non-violence does not cater to less liberal societies.

C *Publicity*

1 Theory

Publicity for civil disobedience for the majority of theorists means that the actions of the civil disobedients must be open for everyone in the community to see rather than doing things against the law that nobody actually sees.

The main argument for the need of publicity is that acts of civil disobedience need to be public in order to have a communicative effect. Standard liberal theorists state a communicative effect is needed because civil disobedience is for the betterment of the community, therefore the community needs to know.¹⁵⁷ Deliberative democratic definitions add that civil disobedience is “a way of engaging in dialogue,” and for this dialogue to occur the action needs to be public.¹⁵⁸

Rawls also contends that there is a specific gloss to the element too. This being authorities must be forewarned before the act is to take place.¹⁵⁹ This is backed up by Cohen, but he

¹⁵⁷ Cohen, above n 96, at [2.12]; Rawls, above n 94, at 248.

¹⁵⁸ Smith “Deliberative Democratic Disobedience”, above n 97, at 105.

¹⁵⁹ Rawls, above n 94, at 248.

states it is not a strict requirement.¹⁶⁰ However, there is disagreement on this point, as many types of civil disobedience actually depend on not giving advanced notice.¹⁶¹

However, other definitions do not actually define publicity as a key element, and actually changes the idea altogether. In Celikates definition, he does not highlight an element of publicity, but there is an element of ‘collectiveness’.¹⁶² Hannah Arendt argues that publicity is not so much about the community as a whole seeing the action, but actually about a collective group being involved in the action.¹⁶³ This is quite a different spin on the idea of publicity compared to the interpretation above.

2 *Publicity in Less Liberal Societies*

Publicity was key in the Anti-Extradition Bill Protests. Many protestors talked to media under pseudonyms, and used social media to attract more attention and participation.¹⁶⁴ For many protestors, talking to the media and posting about the protests on social media was so there was a communicative effect, not only to tell the government to get rid of the Bill but also for the wider world to see what they considered to be injustices in Hong Kong.¹⁶⁵ Not only did they talk to mainstream media, but graffitied slogans around Hong Kong providing another source of communication to bystanders.¹⁶⁶

However, there is the problem over wanting to do anonymous acts instead. In less liberal societies with harsher punishments, many people may fear being known to have done something against the authorities. This problem is not new, one key example often used is with the hiding and aiding of Jewish people’s from Nazi Germany in World War II; these were individual acts and people could not communicate openly about doing said acts.¹⁶⁷ Despite anonymity not being an issue in the Anti-Extradition Bill Protests as even though protestors did wear protective gear to hide their identities they were still on the streets

¹⁶⁰ Cohen, above n 96, at [2.12].

¹⁶¹ Robin Celikates, “Radical Democratic Disobedience” in William E Scheuerman (ed) *The Cambridge Companion to Civil Disobedience* (online ed, Cambridge University Press, Cambridge, 2021) 128 at 133.

¹⁶² Celikates “Democratising Civil Disobedience”, above n 95, at 985.

¹⁶³ Hannah Arendt “Civil Disobedience” in *Crises of the Republic* (Harvest Books, 1972) 55 at 76.

¹⁶⁴ Some examples, Lasseter, above n 149; Kuhn, above n 65.

¹⁶⁵ Lasseter, above n 149.

¹⁶⁶ Lasseter, above n 149.

¹⁶⁷ Yagil Limore “Rescue of Jews: Between History and Memory” (2004) 28 *Humboldt Journal of Social Relations* 105 at 126.

publicly communicating their cause. I contend that the non-public acts like those seen in World War II can still and often happen in less liberal societies and should be considered civil disobedience even if they cannot publicly communicate these actions while doing them. Civil disobedience as mentioned previously holds a certain standard to it which anonymous acts like this should be included in. However, since it is not seen so clearly in the Anti-Extradition Bill Protests, this argument will not be delved into further.

One problem however with needing publicity for the communicative effect that was seen in the Anti-Extradition Bill Protests, is with how the protests are perceived once violence erupted. The protests only started to get the proper worldwide attention and daily coverage the moment the protestors started to use violent acts.¹⁶⁸ However, a lot of this coverage focused on the violent acts rather than the actual problem at hand. From most of the articles I read and watched, the coverage would mention why the protestors were protesting, but it was usually brief background information and then the focus would be on violent actions (rather than the peaceful actions) of the protestors and police. This takes away from the main messaging of the protesters and did not help the cause very much. The problem becomes whether publicity actually does more harm than good in regard to acts of civil disobedience in less liberal societies, as it gives more power to the ruling authority to justify not listening to the protestors. This can be seen with Chinese state media labelling the protestors as “rioters” and “radicals” to undermine their actions.¹⁶⁹ So either something needs to change in how we report on these forms of protests, or we consider the idea not to rely so much on having to have publicity for this practical effect.

The other big problem for less liberal societies is reflected in Rawls’ contention that the authorities must be notified before any act of civil disobedience takes place. This creates major problems, as it allows the state to shut down the protest before it even starts. As Celikates states:¹⁷⁰

“It is not difficult to see that the exercise and effectiveness of well-established forms of civil disobedience such as blocking a busy intersection, occupying a university building, or obstructing the deportation of so-called illegal immigrants depends on not giving the authorities fair notice in advance.”

¹⁶⁸ Gayle and Lyons, above n 54; Williams, above n 58.

¹⁶⁹ Lasseter, above n 149.

¹⁷⁰ Celikates “Democratising Civil Disobedience”, above n 95, at 983.

The first few protests of the Anti-Extradition Bill Protests did notify the authorities, and the authorities did allow for these peaceful protests. However, as tensions grew, especially after the 9 June clashes, there was a mix of approved and unapproved marches.¹⁷¹ For the most part Hong Kong authorities still approved many planned protests, so notifying the authorities of planned protests did still happen throughout. However, it did mean that police were on guard and more prepared when violence broke out. From 12 June (the next protest after 9 June), riot police were in attendance for all subsequent days of protests. They were not able to stop protests due to the sheer number and pockets of protests around Hong Kong, but they definitely came ready to do the best they could in limiting what the protestors could do. Also, the sacking of the Legislative Council Building on 1 July would not have happened if protestors had notified the police of their intentions. The protestors actually left once the police found out and warned them to get out of the building.¹⁷² Clearly this gloss by Rawls would not work in less liberal societies. Hong Kong's soft authoritarianism allowed some leeway to protest, but in even less liberal societies authorities would most likely stop many protests before they start.

So what about if we look at the other interpretation of publicity, where it is not about the communication but about the collectivism of the protest. Many protests in less liberal societies are collective, but this is not to say protests cannot be carried out by individuals. However, with a less liberal society of the type focused upon in this paper, the control is usually by a few, while the majority are those that are protesting or angry with the system. Clearly the Anti-Extradition Bill Protests were collective. This can be seen with the wide range of people being involved, not only from the young university students, but the senior citizens that marched on 17 July and the mothers in the "mothers' sit-in" on 12 June.¹⁷³ All came together as a collective throughout the protests with the same "common opinion" of getting rid of the Anti-Extradition Bill and protesting Hong Kong's autonomy.¹⁷⁴

However, should we think of publicity in this way? This ties into my argument above, with the idea that in less liberal societies it could be less safe to come together as a collective and protest. Arendt says that it is the "common opinion" that gives credence to civil disobedience, but what of situations like in World War II where there is no possibility of

¹⁷¹ See Robles, Long and Wong, above n 57, for clear indications on when protests were approved and not approved.

¹⁷² Robles, Long and Wong, above n 57.

¹⁷³ Robles, Long and Wong, above n 57; "Hong Kong: 'Silver protest' as elderly march in support of youths", above n 130.

¹⁷⁴ Arendt, above n 163, at 56.

coming together for fear of the state. This is actually why it took so long for Hong Kong protests throughout its history to have the numbers seen in the Anti-Extradition Bill Protests. The fear of government retaliation is what kept many from becoming a part of these collective protests, until it finally became too much.

Also, this element would be better labelled as ‘collectivism’ instead of under the umbrella of ‘publicity’. The word ‘publicity’ means public exposure or notoriety, how collectivism comes into this is a bit unclear.¹⁷⁵ Especially in a less liberal society, if protestors are wanting significant change to government policy, there does need to be an element of collectivism as well as an element of publicity, in order to better get change from the controlling group, as it is harder for them to ignore or put down a situation that has more people and is more widely known. Looking at Hong Kong, if the protests did not garner the amount of people supporting the movement and worldwide attention, the Hong Kong Government probably would have pushed through the legislation pretty quickly instead of having to withdraw it altogether. Collectivism and publicity should be considered as two distinct elements that work alongside each other, especially in situations that often happen in less liberal societies. I am not saying all situations in less liberal societies need publicity or collectivism. But they both are usually present in less liberal societies’ actions of civil disobedience and are clearly two distinct things.

Overall, publicity as an element of civil disobedience does seem to cater to less liberal societies as well as more liberal societies. But there are definitely situations that often crop up in less liberal societies where letting the authorities and the wider world know of your actions would be an unwise idea due to personal safety issues. The wider ambit definitions that use collectivism to get around the issue are also not the right way to go, as these are clearly two distinct terms, and even the idea of collectivism has problems in regard to how it will apply to situations that often crop up in less liberal societies.

D Accepting Punishment

1 Theory

The idea that to be a civil disobedient you must be subject to punishment also threads throughout theories of civil disobedience. A civil disobedient intends to actually accept the

¹⁷⁵ *The New Zealand Oxford Dictionary* (2005, online ed) “Publicity”.

punishment they receive as a consequence of their actions.¹⁷⁶ This element goes hand in hand with the element of committing an unlawful act, as for most societies if an unlawful act is committed there is usually written in law a punishment for doing said act. The civil disobedient understands there are consequences and accepts these consequences as these “manifest... a respect for legal procedures”.¹⁷⁷

Besides from showing to the wider public that you are not above the law, accepting punishment is also an act of sacrifice to have a better communicative effect.¹⁷⁸ Being punished helps the civil disobedient better “impress... upon an audience both the intensity of their beliefs and the urgency of their cause” as the audience sees how burdensome the act is for the civil disobedient compared to lawful advocacy.¹⁷⁹

However, more radical theories have dropped the element entirely. Some theorists have problems with the element because there could be doubt over whether the penalty is just, and because there is usually less opportunity of getting a fair trial.¹⁸⁰ Others have argued that punishing a civil disobedient is actually often unjustified for several reasons, such as whether the government has the authority to punish, or the duty to obey the law can be trumped by the moral duties often driving the civil disobedience.¹⁸¹

2 *Having the Element in the Definition*

One of the major problems with the punishment element that the wider ambit definitions pull out, is the fact it’s advocates assume the system is just. For less liberal societies, it is even more likely that the system will have unjust punishments.

In Hong Kong, the punishments do seem out of proportion for some of the acts that can occur in civil disobedience. In the Public Order Ordinance if someone displays a flag, banner or any other emblem against a prohibition order they could end up with a two year

¹⁷⁶ Cohen, above n 96, at [5.2].

¹⁷⁷ Rawls, above n 94, at 248.

¹⁷⁸ Cohen, above n 96, at [5.2].

¹⁷⁹ Smith “Deliberative Democratic Disobedience”, above n 97, at 116.

¹⁸⁰ Celikates “Democratising Civil Disobedience”, above n 95, at 985.

¹⁸¹ Christopher Bennett and Kimberly Brownlee “Punishment and Civil Disobedience” in William E Scheuerman (ed) *The Cambridge Companion to Civil Disobedience* (online ed, Cambridge University Press, Cambridge, 2021) 280 at 283–287, 292, 303.

sentence of imprisonment or a \$5,000 HKD fine.¹⁸² People that stray of the designated protest path could be subject to twelve months imprisonment or up to \$10,000 HKD in fines. There are many similar punishments like this.

In regard to the punishment of protestors from the Anti-Extradition Bill Protests themselves, over 10,000 people have now been charged in relation to the protests.¹⁸³ Many of these cases have moved from traditionally being heard in the Magistrate's Courts up to the District or High Court which come with much heavier sentences.¹⁸⁴ Statistics show that for being convicted of unlawful assembly the average sentence was 5.8 months of imprisonment and three quarters of those charged were convicted of the offence.¹⁸⁵ Eighty percent of those charged with possession of offensive weapon/s were convicted with the average punishment of eight months imprisonment.¹⁸⁶ These weapons consisted of laser pointers (this making up over half), petrol bombs, retractable batons, knives, slingshots and trekking poles. For those who were convicted of rioting (which protestors argued was an incorrect term for the police to ever call any of the protestors), they were handed down an average of three and a half years imprisonment.¹⁸⁷

Because of this fear of unjust punishments, many people would disguise themselves. The radical group were often called the 'hard hats'. This is because they wore protective gear like hard hats, goggles and masks due to the violence but also due to fear of recognition by authorities.¹⁸⁸ Many more people would most likely have been arrested later on through looking at CCTV footage if they had not done so.

On top of this, there were accusations from Hong Kong lawyers that the justice system had been tainted with selective prosecutions and police being able to fast track prosecutions.¹⁸⁹ There is evidence supporting this claim. In regard to the Yuen Long attack, people sensed the criminal justice system was not fair and just, as it took police one month after the attack

¹⁸² Cap. 245 Public Order Ordinance, s 3; Cap. 221 Criminal Procedure Ordinance, sch 8.

¹⁸³ Erin Hale "What's going on in Hong Kong's courts?" (13 August 2022) Al Jazeera <www.aljazeera.com>.

¹⁸⁴ Hale "What's going on in Hong Kong's courts?", above n 183.

¹⁸⁵ Kong Tsung-gan "Arrests and trials of Hong Kong protestors and opposition leaders" (17 February 2022) <www.kongtsunggan.medium.com>, the statistics as shown are from June 9 2019 to November 18 2021.

¹⁸⁶ Tsung-gan, above n 185.

¹⁸⁷ Tsung-gan, above n 185.

¹⁸⁸ Tsz-him, above n 66, at 79; Sharon Welch "The Power of Nonviolent Direct Action" in Kwok Pui Lan and Francis Ching-Wah Yip (eds) *The Hong Kong Protests and Political Theology* (Rowman & Littlefield, London, 2021) 217 at 227.

¹⁸⁹ Robles, Long and Wong, above n 57.

to arrest around thirty attackers out of around one hundred, and only four ever faced criminal trials.¹⁹⁰ This all seems to cast doubt on whether the Hong Kong criminal justice system is fair and just. This will also be the case in many less liberal societies.

However, *prima facie* the argument that sacrificing yourself helps the cause as it has a better communicative effect does seem like a sound argument. It has definitely worked in civil disobedience movements around the world. For example, those in the civil rights movement in the United States used imprisonment to their advantage to communicate to a wider audience.¹⁹¹ However, that was in a liberal society.

In a less liberal society like Hong Kong, there is more sympathy and understanding from people on why protestors do not want to be punished. As with what has been said above, the Hong Kong people clearly knew protestors were not going to get fair and just punishments for their actions. In a study done by the Hong Kong Public Opinion Research Institute in August 2020 it was found that nearly fifty percent of people believed there should be amnesty for the arrested protestors.¹⁹² At a glance, half of the population supporting an amnesty does not seem to prove my point, but in the same study around seventy percent of people also believed there should be an independent commission of inquiry into the police conduct.¹⁹³ This does highlight the fact that people did believe there were unjust punishments and violence from Hong Kong authorities.

This all seems to show that there was no real need for punishment to contribute to the communicative effect. Even though half of those surveyed believed that those arrested should be punished according to the law, the knowledge of the police brutality and injustices show there was more sympathy and understanding for those who avoided arrest and punishment.

3 Getting Rid of the Element in the Definition

Is it better to get rid of the punishment element altogether, in order to fit less liberal societies into a civil disobedience definition?

¹⁹⁰ Tsz-him, above n 66, at 81.

¹⁹¹ Celikates “Democratising Civil Disobedience”, above n 95, at 985.

¹⁹² Chung and others, above n 125, at 5.

¹⁹³ Chung and others, above n 125, at 5.

On the face of it, it does look like this element considers situations of less liberal societies due to the arguments made above. By getting rid of the punishment element altogether it means that we no longer have to worry about the issues of unfair punishment.

But there are two issues with getting rid of the element. First, how do you differentiate between a civil disobedient and any other law breaker? Thankfully, there has been discussion on this exact problem. Christopher Bennett and Kimberly Brownlee contend there are a few options to this. First, the criminal justice system has “layers of oversight of decision-making and the possibility of appeal by affected parties...[which] allow[s] prosecutors, judges, and juries the right to reduce or to dismiss charges where...the case is one of civil disobedience”.¹⁹⁴ Or the law could implement defences that recognise civil disobedience, such as “necessity or demands of conviction”, or in sentencing acknowledge “conscientious motivation” as a mitigating factor.¹⁹⁵ However, they highlight the problem that all of these involve some level of discretion, meaning you need ‘enlightened officials’.¹⁹⁶

In a less liberal society, there is a bigger risk of not having enlightened officials. It is all well and good to have checks and balances in place, but you need officials that can identify civil disobedience. In less liberal societies, political motivations means the identifying of civil disobedience would not always work. Throughout the Anti-Extradition Bill Protests, there were claims of selective and fast tracking prosecutions, showing the officials’ discretion was tainted.¹⁹⁷ Also, officials in line with the Chinese government often labelled the protestors as “rioters”, and one even went as far as saying they “approached an early stage of “terrorism”.”¹⁹⁸ It is clear that much of the criminal justice process was following Beijing’s hardline on making people conform rather than allowing for people to express themselves through civil disobedience even if that was what Beijing said they were allowing.¹⁹⁹ So, these ideas from Bennett and Brownlee would not work for those in less liberal societies.

¹⁹⁴ Bennett and Brownlee, above n 181, at 304–305.

¹⁹⁵ Bennett and Brownlee, above n 181, at 305.

¹⁹⁶ Bennett and Brownlee, above n 181, at 303.

¹⁹⁷ Robles, Long and Wong, above n 57.

¹⁹⁸ Sonny Shiu-Hing, Steven Chung-Fun Hung and Jeff Hai-Chi Loo *The Dynamics of Peaceful and Violent Protests in Hong Kong* (Springer Nature, Singapore, 2021) at 84, 190–191.

¹⁹⁹ Shiu-Hing, Hung and Loo, above n 198, at 181-194; Jessie Pang “Hong Kong activists jailed for illegal assembly in 2019 protests” (1 September 2021) Reuters <www.reuters.com>; “Hong Kong’s reluctant police officer: ‘It’s not for us to deliver punishment’” (29 October 2019) *The Guardian* <www.theguardian.com>.

It will thus be difficult to differentiate between a civil disobedient and a law breaker when the governing power is not in a place to want to listen to demands from people that are acting disobediently.

Second, which is my biggest concern with getting rid of the element of punishment altogether, is how hypocritical it would be. Even though the key concern for those involved in the Anti-Extradition Bill Protests was to persuade the Hong Kong Government to withdraw the Anti Extradition Bill, this was not the only drive behind the protests. Since the 1997 Handover, the majority of the protests have involved the underlying demands for democracy, upholding their rights that are stated in the Basic Law, and overall freedom or conformity from China on the “one country, two systems” principle.²⁰⁰ The Anti-Extradition Bill Protests were no different.

However, how can protestors champion having democracy, fairness and justice in the law while defying the law without any consequences? It actually looks detrimental to a cause in doing so. The wider public would most likely question what real integrity and conviction the protestors have in protesting. This especially would not be good in a less liberal society as then it would give the power back to the ruling group to find ways to shut down the protests a lot quicker. This can be seen with Carrie Lam saying “nothing is more important than the rule of law in Hong Kong” in response to the storming of the Legislative Council building on 1 July.²⁰¹ The rule of law (as a universal value held by Hong Kong and by many liberal societies around the world²⁰²) was consistently used by the Hong Kong government to undermine the values the protestors were championing. And in my opinion it did undermine the whole Anti-Extradition Bill Protests because of this hypocriticalness.

4 To Have Punishment or Not Have Punishment as an Element?

This whole discussion becomes a catch-22 situation. Having punishment as a requirement in a less liberal society can lead to unfair punishments by the ruling authority, which does

²⁰⁰ Chan and Chan, above n 17, at 531–532; Emile Kok-Kheng Yeoh ““Glory to Hong Kong”: Exploring Hong Kong’s Anti-Extradition Law Amendment Bill 2019 (Anti-ELAB) Protests and Their Implications” (2020) 6 Contemporary Chinese Political Economy and Strategic Relations: An International Journal 819 at 824.

²⁰¹ Shiu-Hing, Hung and Loo, above n 198, at 103.

²⁰² Shiu-Hing, Hung and Loo, above n 198, at 175.

not help protestors. But by getting rid of the punishment element protestors then look hypocritical and a different type of detriment to the cause takes place.

I do not know what the right answer is, maybe it is best to have the element in but have certain qualifiers to consider the situation of less liberal societies, or maybe another option is to just leave it out of definitions and hope in practice many people look over the hypocritical nature.

Either way, it is clear that current definitions of civil disobedience do not consider the types of situations seen in the Anti-Extradition Bill Protests and less liberal societies in general.

E Accepting Legitimacy of the State

1 Theory

“The law is sacred, rising above all causes, and no violation of it is excusable, none.”²⁰³ This is the usual starting point for the idea of needing to accept the legitimacy of the state for a civil disobedient. Therefore, a civil disobedient is confined to only being able to protest against a law or policy rather than have campaigns that “would “cripple [the] day-to-day operations” of formal institutions”.²⁰⁴ Otherwise, if an entire institution came under attack, it would be considered revolution.

The idea is that a disobedient should accept the overall system as ideally that system would be just.²⁰⁵ Rawls states that he means ‘just’ in the sense that “in a viable democratic regime there is a common conception of justice by reference to which its citizens regulate their political affairs and interpret the constitution.”²⁰⁶ Civil disobedience here is considered as a ‘defensive mechanism’ which is “safeguarding principles of justice that are already accepted in the community”.²⁰⁷ Meaning there is no reason for the civil disobedient to put themselves “above the law, or outside its jurisdiction.”²⁰⁸

²⁰³ Alexander Bickel “Civil Disobedience, Revolution, and the Legal Order” in *The Morality of Consent* (Yale University Press, 1975) 89 at 91.

²⁰⁴ Smith “Deliberative Democratic Disobedience”, above n 97, at 110.

²⁰⁵ Rawls, above n 94, at 247.

²⁰⁶ Rawls, above n 94, at 247–248.

²⁰⁷ Smith “Deliberative Democratic Disobedience”, above n 97, at 108.

²⁰⁸ Cohen, above n 96, at [3.2].

The difference between civil disobedience and revolution is that “the civil disobedient accepts, while the revolutionary rejects, the frame of established authority and the general legitimacy of the system of laws.”²⁰⁹ A revolutionary “yields no allegiance to the legal order, assigns no value to its coherence and survival. [A revolutionary] is in rebellion against it and wishes to see it overthrown, regardless of the consequences.”²¹⁰ Whereas a civil disobedient is “under a duty to ration themselves, to assess occasions in terms of their relative as well as absolute importance,” because “freedom to disobey when it matters can exist only if at all other times perfect obedience is yielded”.²¹¹

The need for this distinction between civil disobedience and revolution comes down to the “justifiability of the conduct in question”.²¹² A civil disobedient does not hold the need to justify their actions compared to that of a revolutionary, which makes sense, as revolution often involves much more destruction and disruption of a community.²¹³

However, those championing wider definitions of civil disobedience have pointed out problems with this element. The common argument that comes up is around whether one can distinguish clearly between a civil disobedient and a revolutionary. In practice many movements do not just look at one specific law in the system, but protest against wider injustices and often do question the general legitimacy of their system. The common examples brought up with this argument are the movements spearheaded by Mohandas Gandhi and Martin Luther King Jr., who are both propped up as classic examples of civil disobedience.²¹⁴ It is unclear for both men whether their movements were “merely aiming at more or less local corrections of and within the existing system or whether their disobedience was an act of putting into question the general legitimacy of the system”.²¹⁵ Even King Jr. was quoted as saying “the thing to do is get rid of the system”.²¹⁶ So by the rigid distinctions of civil disobedience and revolution both Gandhi and King Jr. should be considered revolutionaries, yet they are held up as two of the most classic civil disobedients.

²⁰⁹ Cohen, above n 96, at [3.1].

²¹⁰ Bickel, above n 203, at 117.

²¹¹ Bickel, above n 203, at 119.

²¹² Cohen, above n 96, at [3.3].

²¹³ Cohen, above n 96, at [3.3].

²¹⁴ Celikates “Democratising Civil Disobedience”, above n 95, at 984–985; Arendt, above n 163, at 77.

²¹⁵ Celikates “Democratising Civil Disobedience”, above n 95, at 985.

²¹⁶ Celikates “Democratising Civil Disobedience”, above n 95, at 985.

Yet even though these problems have been raised, the definitions still add in the element that a civil disobedient must accept the legitimacy of the state, even if it is not in such clear terms. For example, Celikates was the one that brought up the argument above, yet in his definition he states a civil disobedient “pursue[s] the political aim of changing specific laws, policies, or institutions,” which to me suggests for the most part the civil disobedient must still accept the legitimacy of the state.²¹⁷

The deliberative democratic theory which prides itself on focusing more on the communicative aspects of civil disobedience also still includes this element, as it defines civil disobedience as “communicative protests... that people engage in to support a change in governmental or nongovernmental practises”.²¹⁸

Overall, even though there has been discussion on this element, and problems have been raised, at the end of the day most seem to still present accepting the legitimacy of the state as an element of civil disobedience. So does the element cater to actions in less liberal societies like the Anti-Extradition Bill Protests, or do the same problems or new problems arise?

2 Protestors Accepting the Legitimacy of Hong Kong’s Government

The Anti-Extradition Bill Protests had started out as simply protesting against the Bill, implying those involved in the protests did accept the legitimacy of the state. However, as time went on, the protests morphed into having the deeper meanings of demands for democracy, upholding their rights, and overall freedom or conformity from China to the “one country, two systems” principle that had been protested over the past two decades.²¹⁹ Thus, the question becomes were protestors still accepting legitimacy of the state? Had protestors gone from civil disobedience to revolution, or should there be leeway for this type of situation that often arises in less liberal societies?

First, a problem with this element in regard to less liberal societies is it assumes the system is just. Going off of Rawls definition of ‘just’ arguably Hong Kong’s system is not just, not because of the common conception of justice but because of the viable democratic regime part. I shall explain further. Written in the Basic Law is a common conception of justice,

²¹⁷ Celikates “Democratising Civil Disobedience”, above n 95, at 985.

²¹⁸ Smith “Deliberative Democratic Disobedience”, above n 97, at 106.

²¹⁹ Yeoh, above n 200, at 824.

as can be seen with the fundamental rights and duties enshrined in Chapter III.²²⁰ However, as explained, Hong Kong is not a democratic regime, even if the government tries to present itself as such. It clearly cannot be democratic when the citizens of Hong Kong are unable to vote in regard to the most powerful players in the region and China's National People's Congress can ultimately invalidate laws they believe go against the Basic Law or apply laws in regard to foreign affairs or defence, yet the National People's Congress are not voted in by the Hong Kong residents.²²¹ So if Hong Kong is not just, why should residents accept the legitimacy of the state?

If we were to define 'just' in a broader and more common sense, that being "acting or done in accordance with what is morally right or fair",²²² Hong Kong would still not be considered just. As has been explained throughout this paper, authorities in Hong Kong have markedly not been morally right or fair, if the allegations of selective prosecutions and fast tracking said prosecutions are to be believed,²²³ or the fact that after the Yuen Long attack it took police 39 minutes to respond and a month to see any charges laid against the attackers.²²⁴ From this evidence, Hong Kong citizens have a good argument to not accept the legitimacy of Hong Kong's Government.

However, this is brought back slightly in Hong Kong's context by the viewing of civil disobedience as a defensive mechanism. Since the rights are enshrined in Chapter III of the Basic Law, protestors were trying to safeguard the principles that in writing have been accepted by the community. But this does not change the fact overall the system is not just.

For other less liberal societies there would most likely be similar arguments or evidence to prove the society is unjust, which gives a reason for those in that society to reject the system they have.

The second major problem this element has in a less liberal society is what academics have already raised with the practicalities of defining civil disobedience and revolution. However, the problem is slightly different. Since the reasons behind Hong Kong's protests had morphed into these wider questions over the People's Republic of China's control over

²²⁰ Basic Law, above n 5, Chapter III.

²²¹ Basic Law, above n 5, art 15, 17, 18.

²²² *The New Zealand Oxford Dictionary* (2005, online ed) "Just".

²²³ Robles, Long and Wong, above n 57.

²²⁴ Kuo, above n 76; Tsz-him, above n 66 at 81.

Hong Kong's Government, the same problem that the examples of Gandhi and King Jr.'s campaigns seem to arise. The protests, in a strict sense, should be considered revolution, yet most media and scholarship on Hong Kong's protests post 1997 have had the civil disobedience label slapped on without question.²²⁵ However, there are still labels of revolution scattered throughout the literature on Hong Kong too.²²⁶

I contend that the protestors were not fully rejecting the system, but the problem with the Anti-Extradition Bill Protests is the fact it sits in a middle ground. Protestors are not totally wanting to get rid of Hong Kong's system, rather wanting to break away from the Chinese control that hovers over their ideally autonomous system and were just wanting their rights and liberties enshrined in the Basic Law adhered to properly. Also, protestors understood that, overall, their actions would be fruitless in ousting China's control of Hong Kong, but they could at least have their voices heard so smaller things like the Anti-Extradition Bill could be changed.²²⁷

There needs to be more leeway in the definitions of civil disobedience to allow for these all too often middle ground type problems. It is not as easy as just considering looking at the conduct, to say there could be a line drawn between what is considered revolutionary and civilly disobedient conduct due to the problems that are highlighted in the non-violence portion of this paper. Rather we should look at the whole situation in a more holistic way. For example, factoring in whether revolution will actually be a likely outcome or how the majority of people in the society perceive the relevant actions.

So to conclude this discussion on accepting legitimacy of the state, there is a problem with the conventional way of thinking about the element in regard to less liberal societies. In many protests now, it is too difficult to define the difference between civil disobedience and revolution, especially when less liberal societies like Hong Kong show more characteristics of revolution without ever having the ability to actually become a revolution.

²²⁵ See Shucheng Wang "Hong Kong's Civil Disobedience Under China's Authoritarianism" (2021) 35 *Emory Int'l L Rev* 21; Chan and Chan, above n 17; Hale "What's going on in Hong Kong's courts?", above n 183, as examples.

²²⁶ Lasseter, above n 149.

²²⁷ Lasseter, above n 149; however, the protests did mean more people voted and did their civic duty this way instead, to at least have some control over their region, see Tsz-him, above n 66, at 32, 43.

VII Conclusion

In conclusion, definitions of civil disobedience do not consider situations that often evolve in less liberal societies. Understandably making a definition that fits every kind of scenario is unlikely to ever happen. However, more could be done to at least consider situations that happen in less liberal societies in order for them to not be counted out.

Having used the Anti-Extradition Bill Protests in Hong Kong this paper has questioned five common elements found in civil disobedience definitions. First, whether there needs to be a gloss of deliberateness on the element of committing an unlawful act, or if the element is needed at all. Secondly, this paper looked at the role violence has within civil disobedience and contend there needs to be an even broader approach to the element. Next, the element of publicity was touched upon, which is probably the best element to cater to a less liberal society, but nevertheless still has slight problems. Fourth was the need for a punishment element, which is very problematic no matter whether you include the element in the definition or not. And lastly, this paper looked at the element of accepting legitimacy of the state which contends there needs to be a broadening of the conception between where the line is drawn on the spectrum between civil disobedience and revolution due to the complexities of what people are protesting against in less liberal societies.

This paper has found that the Anti-Extradition Bill Protests do not fit any of the conventional civil disobedience definitions explored in this paper. Ultimately, there is a gaping hole in conventional civil disobedience definitions for less liberal societies as this example of Hong Kong can allude to a multitude of other less liberal societies around the world.

This is of course only one missing narrative found in current definitions of civil disobedience. There are undoubtedly more missing narratives that also need to be explored in order to create a holistic definition.

Maybe the best option is to not have an overarching definition of civil disobedience at all. It may be best to consider having definitions that cater to different localities. Another option is to have key indicators like these five elements or others to help decide on a case-by-case basis if the action would be considered civil disobedience. However, this is a problem for another paper.

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