Barry Law Review

Volume 22
Issue 2 *Spring 2017*

Article 3

5-27-2017

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ABSTRACT

Over the past few decades, civil disobedience has become one of the most widely studied subjects in jurisprudence. Scholars such as Rawls and Dworkin have offered their unique reflections on the subject. Whilst many have made great contributions to clarify its purposes and justifications,[1] they have neglected one of the most important and fundamental forms of political disobedience, namely revolutionary disobedience. Unlike an act of civil disobedience, which recognizes governmental authority and legitimacy,[2] revolutionary disobedience explicitly denies and challenges them. Manifested as a rupture between the constituent power (ruled/governed) and constituted power (ruler/governor) in a given state, it is designed to terminate the authority relationship between them, signifying a state of exception, which deviates from the juridical norm. Contrary to traditional civil disobedience, which reveals the unjust nature of a particular law or policy, thereby fostering constitutional changes if the government so allows,[3] in a case of revolutionary disobedience the people directly announce their presence to oust the government from office and even reshape the constitutional order as well as create a new state. It is an exertion of popular sovereignty, reengaging the people in the collective authorship of the sovereign will. Hence, an act of revolutionary disobedience is an exercise of self-determination and is inherently democratic.

In this Article, I construct a theory of revolutionary disobedience and analyze its correlation with the people (nation), the constitution, the state, and the democratic boundary problem. The theory is further developed with the highlight of two political disobedience movements: the Indian Independence Movement and the Umbrella Movement of Hong Kong. The study exposes the limits of conventional civil disobedience and showcases the ground-breaking role for revolutionary disobedience for constitutional creation. Defending that Hongkongers are a people, I suggest that they can invoke revolutionary disobedience as a direct course of action to engage themselves in the higher law-making of the land and forfeit the authority of the government. The final section offers a reply to the Hong Kong Bar

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1. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 320 (rev. ed. 1999).
2. *See id.* at 321.
3. *See id.*

Association, which has accused the last phase of the Umbrella Movement of damaging the rule of law. I make a rebuttal to such contention and further analyze how revolutionary disobedience is perfectly compatible with the rule of law.

"*Let the fist be broken, but let there be no surrender of salt.*"- Mahatma Gandhi

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INTRODUCTION

In quest of solving normative issues related to government, contemporary legal and political philosophers engage themselves with analyzing concepts such as legitimacy, authority, justice, and democracy in an attempt to offer a case of justification for the government, its right to rule, and the corresponding duty of its citizens to obey.[4] Civil disobedience has become one of the most widely discussed and popular topics of investigation in jurisprudence as it challenges the traditional concept of people's obligation to obey the law, the government's authority, and a citizen's duty and right against an unjust law, be the government legitimate or illegitimate.[5] It has almost been standardized by John Rawls' famous *A Theory of Justice* as "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government."[6] While this fits neatly within Rawls' liberalist political theory of justice, this is on no account a comprehensive definition of civil disobedience. In fact, Rawls admits that his theory only considers the role of civil disobedience in a legitimate, democratic, and nearly just regime.[7] Whilst scholars fervently offer accounts and defenses to political disobedience, they completely ignore one of the most vitally important categories of it, namely revolutionary disobedience.[8]

This Article is written with an aim of offering a theory of revolutionary disobedience, its features, nature, and theoretical implications. Revolutionary disobedience differs from other forms of political disobedience in a fundamental manner as it denies the authority of the government and possibly its legitimacy whilst ordinary civil disobedience recognizes them.[9] Unlike civil disobedience, revolutionary disobedience undermines or even demolishes the foundation of authority of a government, leading to its destruction and reconstruction. The pertinent state might also be involved and thereby reconstructed, by which a new state is produced. Moreover, in such a process, the people, or *demos*, of a polity may credibly ask themselves the questions central to their collective existence: Who are we and are we a people? The resort to revolutionary disobedience to affirm the collective identity of a *demos* after legal means are exhausted gives a *demos* a way out of the larger people or state which they may not have chosen to be part of in the first place or when they choose to void the constitutional contract with the larger *demos* that they no longer desire to be a part of. In this sense, revolutionary

4. *See, e.g.*, *id.* at 319–23; s*ee* JOSEPH RAZ, THE AUTHORITY OF LAW 18–19, 263–264 (2d ed. 2009).

5. *See, e.g.*, RAWLS, *supra* note 1, at 319–23; RAZ, THE AUTHORITY OF LAW, *supra* note 4, at 18–19, 263–264.

6. RAWLS, *supra* note 1, at 320.

7. *Id.* at 319.

8. Surprisingly and intriguingly, scholars have noticed such form of disobedience but have never given a full account of what it is as yet. Joseph Raz defines revolutionary disobedience as "a politically motivated breach of law designed to change or to contribute directly to a change of government or of the constitutional arrangements (the system of government)." RAZ, THE AUTHORITY OF LAW, *supra* note 4, at 263. This is indeed an illuminating point to commence with. Nonetheless, it is apparently underdeveloped. One may reasonably ask: Where does this definition come from? How do we examine its accuracy? How could it possibly be achieved? How is it justified? This article attempts to answer these questions and many more. For my full-fledged theory of revolutionary disobedience, see Part VII.

9. *See* RAWLS, *supra* note 1, at 321.

disobedience is potentially *demos-defining*. Given its nature, it has a far wider scope of issues to cope with than civil disobedience, including but not confined to the government, state, constitution, and the democratic boundary problem. It is justified by its inherently democratic nature, which renders it an exertion of self-determination by the people, be the government legitimate or illegitimate. Revolutionary disobedience is, in theory, a hybrid of political disobedience and revolution, an act that denies the authority of a regime by violating its law and that seeks to bring about a revolution.

Part I of this Article offers a theoretical comparison between political disobedience, civil resistance, and revolution, explicating why revolutionary disobedience is a sui generis political act that does not easily fall into any of these traditional categories. Part II explores the concepts of authority and legitimacy, which are the foundations of any functioning government and constitutional order, the forfeiture of which invalidates the government's role in representing the people, enabling the people as popular sovereign to directly assert their will to rewrite the constitution of the state. Part III analyzes the constitutional language of constituent power, which allows us to make sense of revolution and democracy, whereas Part IV studies what "the state" and "the constitution" are under which we find ourselves being cast as well as legally bound, separating one people from another. We must fully grasp these notions before a theoretical account of revolutionary disobedience is possible. Part V sketches the democratic boundary problem, which has been the center of debate of both political philosophy and jurisprudence. Solutions to the problem are propounded with the republican democratic theory, liberal nationalism theory, ontology, and revolutionary disobedience, which can potentially be employed to define a *demos* as well as separate it from others. I take the Hong Kong people as an instance and contend how they are an independent *demos* from the Chinese people. In Part VI, I take a quintessential case of political disobedience, namely the Indian Independence Movement, and argue how it is a paradigm of revolutionary disobedience instead of merely civil disobedience as most take it to be. Part VII advances a full theoretical discourse of revolutionary disobedience as well as its definition and nature. The Umbrella Movement has been taken as a case study for my argument that civil disobedience relies heavily on the reaction and response-ability of the subject to which it appeals, and where this fails an impasse arises. The only means that is left then seems to be violence. I contend that this is a false dichotomy as non-violent revolutionary disobedience could still be resorted to as the middle ground. In the last part of this Article, Part VIII, I reply to the Hong Kong Bar Association to argue that it has misunderstood the meaning of the rule of law. Offering a theoretical analysis of the concept, I argue that the Bar Association's misconception has served to stifle the Umbrella Movement and how adherence to its statements could suppress constitutional creativity. In addition, I contend that revolutionary disobedience is perfectly compatible with the rule of law.

I. POLITICAL DISOBEDIENCE, CIVIL RESISTANCE, AND REVOLUTION: HOW ARE THEY DIFFERENT?

Civil disobedience enjoys the definition of a public and politically motivated act in breach of law, which is carried out in demonstration of the wrongfulness or injustice of a law or policy of the government.[10] The act can be direct in breaching the unjust law itself or "indirect" as in violating another law or laws to protest against the wicked law.[11] The genesis of the term civil disobedience can be traced back to Thoreau, who argues that it is the duty of a citizen to disobey any unjust law of the state, hence giving the disobedience its civil character.[12] Later, John Rawls fits civil disobedience into his liberal theory of justice in order to analyze its role in a democratic and largely just state, as explained earlier.[13] The "civil disobedience" that Rawls defends is the exception to the "limits and qualifications" of the majority rule under democracy, which is grounded in the fundamental rights of people.[14] Hence, Markovits calls this theory "*liberal* disobedience": the civil disobedience model under liberalism that is brought out to defend the inalienable rights of people, the importance of which overrides even democracy.[15] Having diagnosed the theoretical blind spot of the conventional liberal disobedience paradigm, Markovits coined the term "*democratic* disobedience" to make room for the role of civil disobedience to enhance democracy.[16] Democratic disobedience, under his theory, makes possible the exposure of the democratic deficit of a law or policy by breaking the relevant law.[17] All these different forms of disobedience, given their political nature, can be framed into one single term, namely political disobedience: a disobedience of law that is politically motivated that may be justified under certain conditions.[18] But contrary to the traditional concept of civil disobedience, which constitutes the justifiable exception to the violation of law,[19] there is a sui generis type of political disobedience that denies the authority and/or legitimacy of the government and/or the state. This is "*revolutionary* disobedience." It is politically driven and thus falls under the umbrella of political disobedience, but it is different from the classic notion

10. This is a broad definition of civil disobedience. Rawls' formula, in contrast, is a narrow one. He emphasizes the distinction between civil disobedience and conscientious refusal, in that he defines the latter as non-compliance with law that offends one's conscience or personal integrity, which does not have to appeal to the majority's sense of justice as the former does, and it may not be based on political principles but religious or other reasons. RAWLS, *supra* note 1, at 321, 323–24. It is reasonable to say that under normal usage, conscientious refusal is a subdivision of civil disobedience. Another criterion that Rawls imposes on civil disobedience is the adherence to non-violence. *Id.* at 321. *Contra* Howard Zinn who defines civil disobedience broadly as "the deliberate violation of law for a vital social purpose," leaving open the question of *means*, which can be violent or non-violent. HOWARD ZINN, DISOBEDIENCE AND DEMOCRACY: NINE FALLACIES ON LAW AND ORDER 39–40 (Haymarket Books 2013) (1968).

11. *See* RAWLS, *supra* note 1, at 320.

12. *See* HENRY DAVID THOREAU, WALDEN AND CIVIL DISOBEDIENCE 389 (Penguin Books ed., 1986).

13. RAWLS, *supra* note 1, at 319.

14. Daniel Markovits, *Democratic Disobedience*, 114 YALE L.J. 1897, 1899 (2005).

15. *Id.*

16. *Id.* at 1902.

17. *Id.*

18. *See id.* at 1898, 1898 n.2.

19. *See* RAWLS, *supra* note 1, at 321.

of civil disobedience in its purpose to directly oust the office of government by its course of action and/or to reconstruct the constitution and the state.[20]

Traditionally, many scholars have confined the definition and focus of political disobedience to non-revolutionary acts that violate specific laws so as to appeal to the majority's sense of justice and manifest that the underlying principles of the society are not "respected."[21] Implicitly, the citizens only challenge the unjust law but acknowledge the democratic authority of the government or state because they recognize the "legitimacy of the constitution."[22] But even if the constitution or its legitimacy is recognized, government may act in contravention of its conferred power or commit other atrocities that breach the social contract, legitimizing the people's demand to oust the government.[23] It is perfectly possible for the constitution to be highly respected but that the government violates those principles, which may lead to a challenge of governmental authority and its legitimacy. In cases where the principles are not severely violated by the government, the legitimacy and authority of the government need not be denied. For instance, in the United States from 1955 to 1965 when Dr. Martin Luther King, Jr. engaged in a civil disobedience movement against racial segregation, he did not deny the legitimacy or authority of the U.S. government.[24] But given that those violations are sufficiently serious, it may lead to a challenge of the state authority, which undermines it or possibly destroys it. Not to mention, if the people deny the legitimacy of the constitution or aim to change it, it may lead to a complete destruction of the state authority. Before analyzing the sophisticated concept of authority and legitimacy, it is insightful for us to look at two such forms of challenge to state authority, namely civil resistance and revolution.

Civil resistance can be defined as a non-violent political action[25] that resists the authority of the state.[26] This may involve widespread activities by which people challenge a regime, including democratic ones.[27] There are many actions that fall under the category of civil resistance, as Gandhi suggests, such as non-cooperation and civil disobedience.[28] Whilst the latter breaks the law, the former does not necessarily do so, which includes actions such as "strike, walk-out, *hartal*,[29] and resignation of offices."[30] It should be noted that resistance to state authority does not entail a rejection of it.[31] In fact, David Bell suggests that resistance "is more extreme

20. The requirement of "direct" is vitally important here. This is because civil disobedience can also contribute, albeit indirectly, to a change of constitution, just as what happened in the process and as the aftermath of the American Civil Rights Movement. *See id.*

21. *Id.* at 320.

22. *Id.* at 319.

23. *Id.* at 321.

24. *See* ZINN, *supra* note 10, at 29.

25. Adam Roberts, *Introduction*, *in* CIVIL RESISTANCE AND POWER POLITICS 1 (Adam Roberts & Timothy Garton Ash eds., 2009).

26. DAVID V. J. BELL, RESISTANCE AND REVOLUTION 2 (1973).

27. *Id.*

28. JOAN V. BONDURANT, CONQUEST OF VIOLENCE: THE GANDHIAN PHILOSOPHY OF CONFLICT 36 (rev. ed. 1988).

29. *Id.* at 36 n.2 (meaning the "voluntary closing of shops and businesses").

30. *Id.* at 36.

31. *See* Judith Brown, *Gandhi and Civil Resistance in India, 1917–47: Key Issues*, *in* CIVIL RESISTANCE AND POWER POLITICS, *supra* note 25, at 43, 43–44. This point can be illustrated by the fact that Gandhi initiated a

than protest, which aims at the change of policy but does not reject the authority of the policy maker."[32] According to this logic, the line of difference between civil resistance and revolution can be drawn by the latter's rejection of authority of the government. But it is not always clear that civil resistance does not reject the authority of the government. Consider the case of Gandhi. Some scholars analyze his 1917–1947 movement, including his independence movement, as a case of civil resistance[33] whilst others name it a "revolution".[34] This sheds light on the ambivalence of the concepts. The concept of revolution is even more unclear. In *Resistance and Revolution*, David Bell defines it as "a form of internal war," which necessarily involves violence.[35] He sees it as the extreme case of resistance that aims at "changing the entire system," which is highly "organized, violent and widespread in participation."[36] This forces us to look back at the origin of "revolution," which originally implies the rotation of the wheel of change via a complete turn, and in politics it means "the cyclical view of history."[37] Some other scholars offer another definition of revolution, which does not include the concept of violence.[38] Revisiting the concept, Eugene Kamenka offers a seemingly more comprehensive definition:

> Revolution is a sharp, sudden change in the social location of political power, expressing itself in the radical transformation of the process of government, of the official foundations of sovereignty or legitimacy and of the conception of the social order. Such transformations, it has usually been believed, could not normally occur without violence, but if they did, they would still, though bloodless, be revolutions.[39]

These definitions would be invaluable to the following discussion. For now, the most vital question to be answered is: Why do we need a concept of revolutionary disobedience? While civil resistance is immensely important to the understanding of the authority relationship between citizens and the state, for it does not necessarily entail violations of the law, it is at best ancillary for the purpose of this Article. Nor is the concept "revolution" sufficient as it is intrinsically ambiguous. Any "sharp and sudden" change in the social location of political power or the foundations of sovereignty or legitimacy or the notion of the social order can be called a political revolution.[40] Hence, Bruce Ackerman names the American Civil Rights Movement

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number of resistance movements in India in 1917 and 1918. *Id.* at 43. Some argue that the early resistance movements were not conducted in rejection of the British ruling but to demonstrate local socio-economic issues. *Id.* at 44.

32. BELL, *supra* note 26, at 4.
33. BROWN, *supra* note 31, at 44.
34. *See, e.g.*, DEVI PRASAD, GANDHI AND REVOLUTION 31 (2012).
35. BELL, *supra* note 26, at 9–10.
36. *Id.* at 10.
37. *Id.* at 7.
38. *See, e.g.*, Eugene Kamenka, *The Concept of a Political Revolution*, *in* REVOLUTION 122, 124 (Carl J. Friedrich ed., 2007).
39. *Id.*
40. *Id.*

in the 1950s and 1960s the "Civil Rights Revolution."[41] But the "Revolution" that brought about the legal reform in abolishing discrimination against black Americans was mainly achieved by civil disobedience and resistance movements.[42] This is not an act of revolutionary disobedience under current definition, which requires a challenge to the authority and/or legitimacy of the government. Moreover, for a "revolution" to succeed, there are necessarily a wide range of acts which are designed to bring about the change, including rallies, petitions, hunger strikes, and appeals to international forums.[43] It is necessary to isolate revolutionary disobedience from other forms or strategies of revolutions to be studied in jurisprudence, which has its own legal dimension as well as theoretical issues and perplexities that are not bound up with the other issues in revolution that involve different tactics and power politics. Terminology is the poetic moment of thought that allows us to understand a phenomenon.[44] Whilst this holds true for the theory of revolutionary disobedience, the introduction of the term also arises out of practical necessity.

II. THE FOUNDATION OF GOVERNMENT: AUTHORITY AND LEGITIMACY

In order to comprehend the nature of revolutionary disobedience, it is absolutely crucial to analyze theories of authority as they tell us about the relationship between the government and the people. Authority is also inextricably linked to the notion of legitimacy as it derives its power from those who recognize its authority.[45] Also, "authority" connotes a legitimate right to impose sanctions and rests on its capacity in offering justifications of its actions,[46] which requires people's willingness to accept its commands.[47] This makes it distinguishable from other political forms such as "power" or mere "force." We will come back to the concept of legitimacy later. We shall now consider some theories of authority.

A. Flathman's Practice of Authority: Authority as a Relationship

What is authority? Many philosophers attempt to answer the question but fail to make a comprehensive set of arguments. Joseph Raz has famously given his theoretical account of "the authority of law," in which he identifies certain features of authority, which he deems to be essential.[48] A practical authority, as opposed to a theoretical authority, offers reasons for action and not merely to be believed.[49] More precisely, an authority offers a *reason for action* and simultaneously an exclusionary

41. *See* Bruce Ackerman, *De-Schooling Constitutional Law*, 123 YALE L.J. 3104, 3110 (2014).
42. *See id.* at 3116–19.
43. *See generally* Martha Minow, Symposium, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723, 736 (1991) (discussing social changes and revolutions).
44. Giorgio Agamben, *What is an Apparatus?*, *in* WHAT IS AN APPARATUS AND OTHER ESSAYS 12 (David Kishik & Stefan Pedatella trans., Stanford Univ. Press 2009) (2006).
45. BELL, *supra* note 26, at 43.
46. *Id.* at 41.
47. *Id.* at 43.
48. *See* RAZ, THE AUTHORITY OF LAW, *supra* note 4, at 19.
49. JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 195 (1994).

reason for disregarding (other) reasons against it.[50] He names this "protected reasons for an action."[51] This is the basis for his "pre-emptive thesis," which stipulates that an authoritative directive, which requires performance, is itself a reason for its performance, which should not be assessed with other reasons in deciding what one should do, and the directive should replace at least some of the original reasons.[52] This is because authorities exist for a purpose, due to their capacity to better arrive at the right reasons and decisions than their subjects.[53] This is his "normal justification thesis."[54] An authority is usually only legitimate when it is capable of being so.[55] Also, an authority's decisions should depend upon the reasons, which originally apply to its subjects.[56] This is the "dependence thesis."[57] Nonetheless, it is not clear at all why for an authority to be "authoritative," its utterances must be deemed to be "exclusionary reasons" and not merely very weighty reasons that are usually "overriding."[58] The pre-emptive thesis also creates some dilemmas for political disobedience, as we shall see in the final part. In any instance, Raz's thesis at best only identifies certain features of authority, but it does not answer the question of what authority is, leaving us with more perplexities than answers.

We can now turn to some other philosophers who genuinely attempt to answer the question. Hannah Arendt thinks that "authority" no longer exists in modern time due to the collapse of the Roman Empire and the Church in medieval Europe.[59] In her conception, "authority" necessarily entails beliefs to tradition and religion, as well as authoritarian and religious rulings of the ruling class.[60] As Flathman persuasively argues, this is a confusion of a specific kind of authority with a "necessary condition" of all forms of authority.[61]

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50. RAZ, THE AUTHORITY OF LAW, *supra* note 4, at 18.
51. *See id.*
52. RAZ, ETHICS IN THE PUBLIC DOMAIN, *supra* note 49, at 198.
53. *Id.* at 199.
54. *Id.* at 198.
55. *Id.* at 199.
56. *Id.* at 198.
57. *Id.*
58. Different jurists have attempted a variety of ways in rebutting Raz's pre-emptive thesis. One of such theories argue that

> to comply with an authoritative directive might involve treating it as strong evidence regarding the balance of content-dependent reasons and to act on the basis of it, as well as all of other available evidence. Authoritative directives would not pre-empt the reasons that they are meant to reflect- they would be additional reasons that lend their support to the pro-content side of the balance and would be considered alongside all of the other content-dependent reasons.

See Scott Shapiro, *Authority*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 382, 410 (Jules Coleman & Scott Shapiro eds., 2002). This is what Shapiro called the "simple model." *Id*. Other jurists contend differently, but they similarly do not see how authoritative directive must be "exclusionary" and "pre-emptive." *Id.* at 411–12.

59. HANNAH ARENDT, BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT 93, 98 (Penguin Books ed., 2006) (1954).
60. *Id.* at 98.
61. RICHARD E. FLATHMAN, THE PRACTICE OF POLITICAL AUTHORITY: AUTHORITY AND THE AUTHORITATIVE 75 (1980).

Flathman distinguishes two traditional categories of theories of authorities.[62] The first is substantive-purposive theories (S-P theories), which relate authority to specific features and telos.[63] Arendt's argument and Plato's *Republic* belong to this category.[64] The other type is formal-procedural theories (F-P theories), which theorize general or universal features of authority and set it apart from its purpose, where possible and necessary, of a particular community.[65] According to this categorization, theories of Michael Oakeshott and Richard Friedman belong to this latter type.[66] Oakeshott, for instance, distinguishes between "being *an* authority on some subject or activity" and being *in* authority "in some sort of association or organization,"[67] whilst the former offers reason for belief, and the latter provides reason for action.[68] An example of "an authority" is an advisor whose advice has to be believed by one's client, while legislators and judges are examples of "in authority" who occupy the governmental offices. Flathman's theory, namely the "practice of authority,"[69] builds upon but refines this concept. His theory deserves special attention not only due to its capacity to explain what authority is but also when it commences and ends. He argues that the "in-an distinction" is not categorical,[70] considering that it is possible for a person to be "*an* authority" whilst also occupying the office or position of authority such as a judge.[71] Hereafter, we refer to a person who occupies the office or position as "*in* authority," regardless of whether the person is or is not "an authority," as this is how Flathman uses the term.

But besides the account of "*in* and *an* authority," there are also criteria, including rules, by which we use to identify what power the authority is entitled thereunder. Flathman uses the Fox Native Americans to illustrate this point.[72] The Fox believed in equality between people and abhored any forms of hierarchy or command.[73] "[T]ribal decisions [were] made unanimously or not at all."[74] "Village chieftainships" were merely symbolic offices.[75] However, the Fox did have customs and conventions to which they adhered.[76] "When the Fox conformed to these arrangements they did so largely because they believed that the arrangements had a distinctive standing."[77] These "authoritative directives" or "arrangements" have the same functions or power as a person "*in* authority."[78] These, as Flathman calls it, are

62. *Id.* at 14–16.
63. *Id.*
64. *See id.* at 16.
65. *Id.* at 14–16.
66. *Id.* at 38.
67. FLATHMAN, THE PRACTICE OF POLITICAL AUTHORITY, *supra* note 61, at 16.
68. *Id.* at 16–17.
69. *See id.* at 32.
70. *See id.*
71. *Id.* A judge, when making a judgment, offers a reason for action and often a justification to be believed, even though the subject does not have to believe that it is justified.
72. *Id.* at 24–25.
73. FLATHMAN, THE PRACTICE OF POLITICAL AUTHORITY, *supra* note 61, at 24.
74. *Id.*
75. *Id.*
76. *Id.* at 25.
77. *Id.*
78. *Id.* at 26.

"the authoritative": "values, beliefs and arrangements" that are authoritative credentials for the members thereof.[79] In a modern state, the constitution is the most fundamental "*authoritative*" thereof. "The authoritative" are not part of "in authority" as they are not "persons" occupying the office or position but are authoritative propositions that people adhere to, which can also include credentials, the fulfilment of which validates one's claim to a position.[80] This implies that the underlying shared values and beliefs of the members of an association compose the fundamentals (or constitution) of the association: "the recognized locus of *in* authority."[81] An authority will lose its claim if people do not believe in it: "[T]here will not be any authority unless some substantial number of the participants believe that there ought to be rules of some sort and that *these* and not *those* putative or proposed rules ought in fact to be rules."[82] That is to say, when people do not believe the constitution to be true or "should continue to be true," the authority of "the *authoritative*" will disappear.[83] For the authority to stand, the majority do not have to think that the constitution or "the authoritative" are desirable, but it has to be at least acceptable to them.[84] Indeed, Flathman contends that there is little likelihood that a single set of "consciously held" and coherent values and beliefs will be accepted by all members of the modern states,[85] as F-P theories rightly argue, but the possibility or reality is that there is "a web of overlapping, sometimes conflicting, sometimes complementary and mutually reinforcing values and beliefs that inform, influence, and, to varying degrees in various situations, support *in* authority."[86]

Unlike Raz, who only identifies several features that he thinks are inalienable to (legitimate) authority,[87] Flathman's theory sets out a larger framework, which is capable of explicating the role of political disobedience and revolution in an authority relationship.[88] Because the property of authority lies in its capacity in providing reasons to its subjects to conform to, the failure of offering such reasons for acting symbolizes its disappearance.[89] In Flathman's words, "authority advances a *reason* why B *should* conform with it."[90] Indeed an "*in*-authority" may not provide justified or genuine reasons for its utterances, even though authority necessarily claims normative justifications for itself, such as its command being "legitimate" or its having "a right to rule."[91] Authority has its own conceptions of "right" and "wrong," "just" and "unjust," and it demands its subjects' obligations, which may not accord to the majority's conception of the concepts.[92] Strong and persistent

79. FLATHMAN, THE PRACTICE OF POLITICAL AUTHORITY, *supra* note 61, at 25–26.
80. *Id.* at 26.
81. *Id.* at 21.
82. *Id.*
83. *See id.*
84. *Id.* at 88–89.
85. FLATHMAN, THE PRACTICE OF POLITICAL AUTHORITY, *supra* note 61, at 88.
86. *Id.*
87. *See* RAZ, THE AUTHORITY OF LAW, *supra* note 4, at 19.
88. FLATHMAN, THE PRACTICE OF POLITICAL AUTHORITY, *supra* note 61, at 119.
89. *Id.* at 118–19.
90. *Id.* at 118.
91. JOSEPH RAZ, THE MORALITY OF FREEDOM 25–28 (1986).
92. FLATHMAN, THE PRACTICE OF POLITICAL AUTHORITY, *supra* note 61, at 118.

objection to "the *authoritative*" and "*in* authority" may mark an end of the authority relationship.[93] It would be inconceivable, contends Flathman, that the ruled object to every single utterance of the authority or find them unreasonable, and the authority could still stand.[94] Under such circumstances, the existing political system may still persist due to the power or force of tyranny, but this is not authority.[95] What is the difference between civil disobedience and revolution, then? Civil disobedients confine their actions within the authority relationship.[96] They reject certain utterances, rules or actions of the authority, but they do not attempt to bring the authority relationship to an end.[97] They manifest their adherence to the authority by accepting the fact that the authority is not deprived of attaching and enforcing legal sanctions against disobedience, and they are not justified in resisting or objecting to the application of sanctions against their disobedience.[98] In contrast, revolutionaries attempt to end the authority relationship.[99] In a successful revolution, it is most often and highly probable that the political authority loses its basis in the majority's eyes. In other words, the political authority loses its "standing as a reason on which associates recognize that they should ordinarily act."[100] A revolution aims at weakening or destroying the existing practice of authority, and if this happens to a case of political disobedience, the movement has failed as it crosses its confines.[101] In fact, civil disobedience is capable of protecting the existing practice of authority

93. *Id.*

94. *Id.*

95. A critical reader might ask here: How could we distinguish if there is an authority relationship between the people and government or whether it is a tyrannical relationship within a certain state? Does an authority relationship only exist or is most often seen in a largely democratic state? It may be helpful to introduce Kojeve's conception of authority to solve the puzzle. Authority itself entails the possibility of reaction against it. As Kojeve analyzes, all forms of authority share a common feature: "they make possible the exercise of an action that does not provoke a reaction, because those who could have reacted abstain from doing so consciously and voluntarily". ALEXANDRE KOJEVE, THE NOTION OF AUTHORITY 13 (François Terré ed., Hager Weslati trans., 2014). That said, "reaction remains *possible* and the renunciation is *conscious* and *voluntary*." *Id*. Therefore, in an authority relationship, the subject of authority makes its *submission* to the enforcer, who can always react and subvert such relationship. *See id*. at 14–16.

My central argument here is this: a tyrannical relationship also falls within the authority relationship paradigm. Kojeve classifies the types of authority into four categories: The authority of the father over child; the authority of master over slave; the authority of the leader; and lastly, the authority of the judge. *Id.* An authority, argues Kojeve, can possess one or a mix of these types. *Id*. What is relevant to my contention is the absolute authority owned by the master over slave: The slave "consciously and voluntarily renounces the opportunity he has of reacting against the action of the Master; he does so because he *knows* that this reaction puts his life at risk and because he does not *want* to accept this risk." *Id*. at 18. Likewise, the people under a tyranny remain possible to react against it, but may choose not to do so for the fear of the cost of non-submission: death. Hence, the relationship that exists between any people and government is one of authority, even the type of authority relationship that stands between a democratic government and its people would be different to one of tyranny: In the former, the raison d'être for the relationship is more or less sound and justified whilst in the latter, the relationship persists for the people's fear of death or oppression. Authority is the offering of reason for action. For a tyranny its authority stands only with its oppressive instruments and people's fear of risking their lives, the authority is immensely fragile.

96. FLATHMAN, THE PRACTICE OF POLITICAL AUTHORITY, *supra* note 61, at 120.

97. *See id.* at 120. ("It is for this reason that most proponents . . . have argued that the action must be . . . done with the expectation that arrest and punishment will properly ensue.").

98. *Id*. at 121 (concurring with John Rawls' argument that the civil disobedients have to willingly accept punishment for their actions, which sets their act within the constitutional confines).

99. *See id.* at 117.

100. *Id*. at 119.

101. *Id* at 120.

in acting against the demise of "the then authoritative" or "*in* authority," which may lead to its ultimate irreversible denial and destruction.[102]

With Flathman's theoretical framework in mind, we are able to offer an account of revolutionary disobedience's purpose, functions, and visions. But before so doing, we need to examine the twin concept of authority: legitimacy.

B. The Concept of Legitimacy

There are a great number of theories and definitions of legitimacy, and for the purpose of deciding when a revolutionary disobedience is justified, a definition of democratic and justice-based legitimacy shall be constructed.[103] More specifically, this section concerns the legitimacy of the government and not that of the "state."[104] Legitimacy can be defined semantically as a moral or political standard to be employed in the evaluation of the degree to which laws or institutions satisfy the minimum requirements that must be met.[105] "An entity has political legitimacy if and only if it is morally justified in exercising political power. The exercise of political power may be defined as the (credible) attempt to achieve supremacy in the making, application, and enforcement of laws within a jurisdiction."[106] This is a value-neutral definition of the concept of legitimacy.[107] Philosophers give different meaning to the concept in order to theorize the minimum conditions that the government must satisfy, the failure of which will justify resistance.[108] In this sense, legitimacy is different from "justice," which is an ideal standard in which a state pursues but never fully obtains.[109]

We have considered Raz's arguments, for whom an authority is legitimate only if it satisfies his normal justification thesis.[110] For Rawls, the standard of legitimacy for legislation is that "the law actually voted is, so far as one can ascertain, within

102. *See* FLATHMAN, THE PRACTICE OF POLITICAL AUTHORITY, *supra* note 61, at 120.

103. It should be noted that "legitimacy" defined in this essay is a normative concept, which is in a sense universal in that any communities should impose such minimum standards on the state. It is different from definitions of legitimacy such as "recognitional legitimacy"—legitimacy of the state that is recognized by other states internationally. *See* JORDY ROCHELEAU, ENCYCLOPEDIA OF GLOBAL JUSTICE 935–36 (Deen K. Chatterjee ed., 2011).

104. For the present purpose, the "state" could be understood as a structure of institutions and the government merely an agent of it. Legitimacy is the minimum threshold that any ruling authorities of a polity must pass, the fulfilment of which justifies their authority over their subjects. (But this is not to say, given their legitimacy, the people are thereby unjustified to force them out of office.) "States" are at times understood as the monopoly of force in a community, in which sense it is synonymous with government. Under such definition, legitimacy can be a normative standard for both the government and the "state," i.e. the entity is justified in its domination to exercise political power and wield authority over the people. But this Weberian conception of the state fails to grasp its full implications, including its legal connotations. The state is best understood as a scheme of intelligibility and not the monopoly of power and violence. *See infra* section 4 for a full-fledged analysis. To avoid confusion, legitimacy in this section refers to government legitimacy and not state legitimacy.

105. ALLEN BUCHANAN, JUSTICE, LEGITIMACY AND SELF-DETERMINATION 233–34 (2012).

106. *Id*. at 233; *cf*. Richard E. Flathman, *Legitimacy*, *in* A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 678 (Robert E. Goodin et al. eds., 2012) (arguing that "[g]overnments that are legitimate have the 'right to rule'").

107. BUCHANAN, *supra* note 105, at 432.

108. *See* Fabienne Peter, Political Legitimacy (May 13, 2016), https://plato.stanford.edu/entries/legitimacy/.

109. BUCHANAN, *supra* note 105, at 432.

110. RAZ, THE MORALITY OF FREEDOM, *supra* note 91, at 53.

the range of those that could reasonably be favored by rational legislators conscientiously trying to follow the principles of justice."[111] A regime which systematically enacts legislation in defiance of principles of justice forfeits its legitimacy.[112] Legitimacy, according to the above definition, should not be reduced to "lawfulness," as what is legal in a country may be politically or morally unjust, judging from a normative standard. The concept of legitimacy pursued in the essay is normative, which is not to be confused with what is "believed" to be legitimate.

Here, the minimum thresholds that any government must pass are suggested. Firstly, the government must satisfy Raz's normal justification thesis.

> [T]he normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.[113]

This is actually axiomatic. If the government is not capable of fulfilling its tasks assigned by the governed, or at least "good enough" in managing its assignments, then there is no point in keeping the "*in*-authority." It follows from this that the government must not transgress the constitution so long as it aligns with the will of the popular sovereign,[114] unless it is empowered by the people to do so.

Secondly, the government must do a credible job in the protection of human rights. The state exists for a reason, in that it is a better mechanism in assigning duties and protecting rights than a state of nature, or at least it is believed or agreed to be so.[115] Philosophers commonly agree that human beings have certain inalienable

111. RAWLS, *supra* note 1, at 318.

112. *See* Alexander Kaufman, *Political Authority, Civil Disobedience, Revolution*, *in* A COMPANION TO RAWLS 219 (Jon Mandle & David A. Reidy eds., 2013).

113. RAZ, THE MORALITY OF FREEDOM, *supra* note 91, at 53.

114. The idea of popular sovereign (the people who exercise the sovereign power) or popular sovereignty (the sovereign power which the people exert) perplexes some as a theoretical oddity: It seems to be both a collection of mortal individuals and an enduring collective body. It only makes a rare fleeting appearance with a high turnout, an overwhelming majority and a clear message. How could we make sense of it? Sovereignty is best understood as the absolute authority of the autonomous public sphere of a state. MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 186 (2012). Where the people exercise this ultimate authority, they become the popular sovereign.
This conception of "popular sovereignty" accords with Espejo's usage of it. She stresses that the term is merely descriptive and does not necessarily carry normative weight. "To the extent that the people rules itself, it can be the highest source of power and authority in the state." PAULINA OCHOA. ESPEJO, THE TIME OF POPULAR SOVEREIGNTY 186 (2011). Hence, where the people have a final say over a political subject, they exercise popular sovereignty on that matter. In a representative democracy, since people cannot make a decision on every political matter, mostly they only exert popular sovereignty over subjects of constitutional significance: the practices of constituting, governing and changing a set of institutions which are the highest authority for all the individuals intensely affected by these institutions. Referendum is one of the most common procedures through which the people can voice their will, but popular sovereignty in such scenario can only be exerted when the government gives effect to the result.

115. *See* BUCHANAN, *supra* note 105, at 247 (contending that the coercive and monopolistic character of the state necessitates justifications for its existence, which is capable of producing harm, curtailing freedom, and creating inequalities).

rights, whether because they believe a basic dignity or moral worth is essential to human's rational capacity of choosing[116] or because rights are central to their autonomy and well-being.[117] This is not the venue to engage in the critical discussion of what "inalienable rights" are, but to point out at least that most theorists agree that certain rights, such as civil and political rights, which are also called negative rights, are the absolute basic living conditions that everyone deserves to enjoy.[118]

Thirdly, the government must be entrusted with its office and power by democratic authorization. If satisfied, the government under the state enjoys democratic legitimacy. Democracy, which some argue is an intrinsic part of justice, serves to recognize that people should have a stake in the making of their community, where their rights are recognized institutionally.[119] It also recognizes the principle of fair equality of opportunity between citizens to participate in governmental offices, in that at least they have an equal right to fight for the positions, which also serves as a mechanism to deter the abuse of offices.[120]

If we combine these different basic standards of legitimacy, a government is only legitimate so long as it does not transgress its assignment by the people and remains effective in expressing the people's will and re-presenting them. It must hold its office in conformity to the constitution as legitimized by the popular sovereign and must not overstep the constitutional contract between itself and the people. Furthermore, the government must protect human rights, the massive failure of which could forfeit it of its legitimacy. The government's power must also be democratically conferred to be endowed with democratic legitimacy. Legitimacy provides the minimum standard that a government must live up to, the failure of which would justify the initiation of revolutionary disobedience. But as we shall see, the lack of legitimacy is only one of the conditions that justifies the people's assertion of popular sovereignty, and it is ultimately left to the people to determine whether they still accept the government to be in office.

III. CONSTITUENT POWER, AUTHORITY, AND REVOLUTION

In the previous section, we have come to learn that authority is a relationship. But in order to understand the state/people relationship more deeply, with a view to fully appreciate how a legal or political order comes into being in the first place, we must ask more fundamental questions: How does the state gain its authority from the start and how do "the authoritative" (or constitution) gain its status? How does the state constitute itself and derive its power or authority? What is a constitution? How can it be established by revolution? Offering an answer to these questions is essential in getting to know what revolutionary disobedience really is. To do so, we need to understand the notion of constituent power.

116. RAYMOND PLANT, MODERN POLITICAL THOUGHT 263 (1991).
117. *Id*. at 266.
118. *See id.* at 263.
119. *See* ROBERT DAHL, DEMOCRACY AND ITS CRITICS, 113 (1989).
120. *See id.*

Constituent power is a concept in constitutional language that specifies the ultimate source of authority in the state.[121] During the Enlightenment in eighteenth century Europe, the concept was created in affirming that the ultimate source of political authority derives from "the people" and that the constitution is an expression of the constituent power of the people in making and remaking the "institutional arrangements through which they are governed."[122] The constitution is merely a "juridical instrument," which derives its authority from the people through the principle of self-determination.[123] In contrast to the constituent power, there is the "*constituted* power," the exercise of political power in an established form, which should receive its authorization from the people.[124] The government, which exercises delegated authority, is a type of constituted power.[125] The idea of constituent power is of significance in the study of constitutionalism and for this paper, as it is central to understanding the nature of revolution, constitution, authority, democracy, and self-constitution of a community (or state).

A. Three Schools on Constituent Power

Here, we will consider three streams of legal thoughts and their interpretation of constituent power so as to better understand its nature. First, normativism regards legal ordering as self-sufficient and thus constituent power redundant.[126] Normativists, such as John Austin, contend that law is defined entirely in non-normative terms and even constitutional law is just a type of political morality.[127] The second school, decisionism, is founded upon "law as will."[128] The most prominent decisionist, Carl Schmitt, claims that modern constitutions cannot guarantee their own existence and must be underwritten by a sovereign will: the constituent power.[129] For decisionists, constituent power is important as they attempt to answer the question of how legal authority is generated within the political sphere.[130] Constitutional legality is not self-generating: The practice of legality rests upon conditions outside itself, which it cannot guarantee.[131] Schmitt's answer to the question is that the constitution is a historical result of specific political decisions, which are given the jural form as the constituent power, hence decisionism.[132] At the base of the constitution is a decision,[133] one of the sovereign will, which involves an

121. It is both a normative and explanatory concept. Martin Loughlin, *The Concept of Constituent Power*, 13(2) EUR. J. POL. THEORY 218, 219–21 (2014); *see, e.g.*, Biancamaria Fontana, *Democracy and the French Revolution*, *in* DEMOCRACY THE UNFINISHED JOURNEY 107–09 (John Dunn ed., 1992).
122. Loughlin, *The Concept of Constituent Power*, *supra* note 121, at 219.
123. *Id.*
124. *Id.* at 220.
125. *See id.*
126. *See id.* at 219.
127. *Id.* at 221.
128. Loughlin, *The Concept of Constituent Power*, *supra* note 121, at 219.
129. *Id.*
130. *Id.* at 224.
131. *Id.* at 223.
132. *Id.* at 224.
133. *Id.*

exercise of constituent power.[134] Schmitt further defines the constituent power as "the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence."[135] It is a "concrete political being," which "determines the nature of the institutional arrangement of political unity."[136] "It establishes the constitution. And its continuing existence (as sovereign will) bolsters the authority of the constitution."[137] Despite its insight, Schmitt places great emphasis on the preservation of the "sovereign will" as the self-identity of "the people."[138] For him, in order to preserve political unity, political leaders need to make genuine decisions on behalf of "*the people*," which are a united will.[139] This creates the great danger of totalitarianism in attempting to realize "the people-as-one," which may regard any form of opposition as enemy.[140]

We now consider the third school, namely relationalism, which sees constituent power as a relationship of political right.[141] Whilst decisionism fails to identify who "the people" really are, turning it into what the dictatorial sovereign regards them as being, relationalism presents a better case. It addresses the paradox of constituent power, namely the tension between constituent power and constituted power, by referring to reflexive identity in the process of "self-constitution."[142] The foundational moment is the origin of the paradox, as in the founding process, "the people" who exercise the constituent power to establish a constitution must also claim to act as a constituted power.[143] In Hans Lindahl's words,

> [L]egislation, in its most powerful manifestation, is the exercise of constituent power, an act that creates the first constitution without being empowered to do so; but because the law can only think of power as legal power, an act can only initiate a legal order if it is retroactively interpreted as an empowered act—the exercise of constituted power.[144]

Lindahl contends that "although Schmitt is right to assert that the foundational act elicits a presence that interrupts representational practice, this rupture does not—and

134. Loughlin, *The Concept of Constituent Power*, *supra* note 121, at 219. Schmitt defines "constitution" in a fascinating manner. To him, constitution is not constitutional law, but a substantive concept, "the political existence of the state," with which one can find a "pre-established, unified will." *Id.* at 255; *see* CARL SCHMITT, CONSTITUTIONAL THEORY 65 (Duke Univ. Press ed., Jeffrey Seitzer trans., 2008); *see also infra* Part IV for a full-fledged explanation.

135. Loughlin, *The Concept of Constituent Power*, *supra* note 121, at 224.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 234.

141. Loughlin, *The Concept of Constituent Power*, *supra* note 121, at 219.

142. *Id.* at 229.

143. *Id.*

144. Hans Lindahl, *Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood*, *in* THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 11 (Martin Loughlin and Neil Walker eds., 2008).

cannot—reveal a people immediately present to itself as a collective subject."[145] This is because "the people" are an ambiguous and reflexive identity: with the "retrojection of an inaugural act into the past" and also "the projection of community into the future," which allows people to retroactively self-attribute or identify themselves with "the people" (a "we") as established in the constitution; for instance when they exercise their constitutional rights accordingly.[146] "Constituent power expresses the fact that unity is created from disunity, inclusion from exclusion. Constitutional ordering is dynamic, never static."[147] In other words, the "collective self" or "the people" is an ever-changing concept: "[T]he collective self exists in the modes of *questionability* and by way of its acts, of *responsiveness.*"[148] Solving the paradox, the relationalist approach also eases the danger of Schmitt's treatment of "identity as sameness."[149] Lindahl distinguishes between *idem*-identity (sameness) and *ipse*-identity (selfhood, implying ability to initiate), contending that selfhood cannot be collapsed into a mere "substance that functions as the bearer of a number of qualities and attributes."[150] The paradox of constituent power is immensely complex,[151] but it suffices here to sketch one of its basic problems and how relationalism contributes better to our understanding of constituent power.

With these in mind, we shall now proceed to the essence of the relationalist arguments. Constituent power implies equality between citizens.[152] "It founds constitutional rationality (normativity), but the association" between the ruler and the ruled evolves via action (decision).[153] This tension between "sovereignty" (as the general will of the people) and the sovereign (the agent granted with authority to enforce decisions in the name of the general will) shows that constituent power is not merely an exercise of power (in the sense of force), but involves a dialectic of political right (*droit politique*), which constantly seeks "to irritate the institutionalized form of constituted authority."[154] Hence, constituent power cannot be totally "absorbed into the constituted order and [be] equated with some founding norm[s]" because "the tension that gives the political" sphere "its open and provisional quality would" disappear.[155] Constituent power is vested in the people, which exists only insofar as it resists to be institutionalized, and the people must persist "as an entity that is unorganised and unformed."[156] So far as political unity is concerned, under the relational approach, it is formed through and throughout the

145. Loughlin, *The Concept of Constituent Power*, *supra* note 121, at 229.
146. Lindahl, *supra* note 144, at 19–20.
147. Loughlin, *The Concept of Constituent Power*, *supra* note 121, at 229.
148. Lindahl, *supra* note 144, at 21.
149. *Id.* at 13.
150. *See id.* at 14–16.
151. Loughlin, *The Concept of Constituent Power*, *supra* note 121, at 233 ("The paradoxical nature of the foundation rests on the fact that it both constitutes a unity (a state) and establishes a hierarchy (a governing relationship).").
152. *See id.* at 229.
153. *See id.*
154. *See id.*
155. *Id.* at 232.
156. SCHMITT, CONSTITUTIONAL THEORY, *supra* note 134, at 271.

process in which *droit politique* operates to frame the constitution of the state.[157] "Constituent power exists only when that multitude can project itself not just as the expression of the many (a majority) but – in some senses at least – of the all (unity). Without this dimension of symbolic representation, there is no constituent power."[158]

B. Constituent Power, Revolution, and Democracy

With this fundamental understanding of the nature of constituent power, we can proceed to consider how it contributes to a better understanding of revolution and democracy. To commence with, as constituent power or the constituent sovereign who exercises that power is the origin of any constitutional order and rests outside of its established and institutionalized form, it is the creator of constitutions.[159] Because it exists before the constituting of the legal system, it must be located outside the juridical norm.[160] Emmanuel J. Sieyes famously states that

> the constituent power can do everything in relationship to constitutional making. It is not subordinated to a previous constitution. The nation that exercises the greatest, the most important of its powers, must be, while carrying out this function, free from all constraints, from any form, except the one that it deems better to adopt.[161]

Likewise, Schmitt contends that in moments of genuine constitutional creations, the constituent power is an "absolute beginning" and a beginning that springs out from a disorder and "normative nothingness."[162] Hence, theories of constituent power recognize that the fundamental norms and rules, as well as institutions, have no other ground than groundless instituting sovereign act.[163] Here, *sovereign* could be understood as "the one who determines the constitutional form, the juridical and political identity, and the governmental structure of a community in its entirety."[164] Sovereign could be both the people or rulers, or the government in the modern context, so long as it exercises that supreme authority.

There are several significant features of constituent power to be drawn here. Firstly, the constituent power signifies exception.[165] It is the genesis of the constitution and legal order, and hence, it is also the ultimate limit of any politics, which can survive "the dissolution of governments, the disruption of legal systems,

157. *See* Loughlin, *The Concept of Constituent Power*, *supra* note 121, at 230.
158. *Id.* at 231–32.
159. *See* Andreas Kalyvas, *Popular Sovereignty, Democracy, and the Constituent Power*, 12 CONSTELLATIONS 223, 231 (2005).
160. *See id.* at 227.
161. *Id.*
162. *Id.*
163. *Id.* at 228.
164. *Id.* at 226.
165. This shall constitute my thesis of revolutionary disobedience as "a state of exception." *See infra* Part VII for the entire explication.

and the collapse of instituted powers."[166] This very feature signifies its eternal ability to create another constitution or order. Andreas Kalyvas depicts vividly the process of creation and re-creation of a constitutional order:

> From the perspective of the constituent power, sovereignty becomes visible only during exceptional circumstances, when a constitution is destroyed and another is not yet born. During the moment of original constitutional making, there is a rupture, a dislocation, which makes possible there-activation of the constituent power. For this reason it is often portrayed as emerging *ex nihilo*, and described as extra-legal or pre-juridical rather than illegal.[167]

Secondly, constitution-making is always related to crisis, a state of exception or the failure of a previous regime, and the exercise of the constituent power necessarily aims at resolving a problem, or else its exercise would be meaningless.[168] Thirdly, the exercise of the constituent power in constitution-making entails establishing the "higher law," namely the fundamentals of a legal order.[169] The constitution constitutes the essentials of a legal order, and it must enjoy a higher status than other ordinary laws or else it would be easily eroded or eliminated entirely and fall prey to selfish party politics or an impoverished or monist majoritarian concept of democracy.[170] To enjoy that "higher status," the constitution must assume constituent power at its basis.[171] Fourthly, under the modern setting of the Westphalian statehood, a state is established as a form of self-institution.[172] The employment of constituent power in establishing the constitution is an attempt of "a people" to freely and consciously constitute the political form of collective existence, rather than resorting to a mythical lawgiver or divine will.[173] An example would be the founding of the United States of America, which was to improve upon "the ancient mode of preparing and establishing regular plans of government," and "to bring about a revolution by the intervention of a deliberative body of citizens."[174]

The next vital question is how is the exercise of constituent power democratic? The employment of constituent power in making the constitution gives it democratic legitimacy.[175] In a democracy, "the legitimacy of the fundamental norms and institutions" hinges upon "how inclusive the participation of the citizens is during the extraordinary and exceptional moment of constitution-making."[176] Constituent politics entitles *the people* of a regime to exercise collective autonomy and political

166. Kalyvas, *supra* note 159, at 227.
167. *Id.* at 228.
168. *Id.* at 229.
169. *Id.*
170. *See id.* This also resonates with Ackerman's argument. *See also infra* Part VIII.
171. *Id.*
172. Kalyvas, *supra* note 159, at 229.
173. *Id.*
174. THE FEDERALIST NO. 38, at 282–83 (James Madison) (Filiquarian Publ'g ed., 2007).
175. *See* Kalyvas, *supra* note 159, at 237.
176. *Id.*

freedom in its constitution, whereby its members are called jointly to be the authors of their constitutional identity and to decide the higher rules and procedures that will regulate their social and political lives.[177] Such democratic founding of a state justifies the higher status enjoyed by the higher "regulative principles" and central institutions as they are products of a collective practice based upon conscious political will-formation.[178] The people are said to enjoy "political freedom" as they are living under their own law and the constitution of the popular sovereignty.[179] The regime continues to be democratic so long as it responds to the will of the people, who can continue to exercise collective autonomy and popular mobilization in changing the constitutional order and affecting governmental policies.[180] It continues to enjoy democratic legitimacy when "the people is the subject of the constituent power and gives itself its own constitution."[181] In a word, "[t]his constituent power demands that *those who are subject to a constitutional order co-institute it.*"[182] The constitution is binding and valid if, and only if, it complies with the principles of participation and inclusion.[183] If a sovereign establishes a legal order or norms in the exclusion of most or a substantive amount of its subjects, it would not be a "constitution" or constituting act but an act of imposition, imposing the will of the sovereign (as a ruling minority) on the people, without a genuine reflection of the sovereign will of the people (the popular sovereignty).[184] This forfeits its democratic legitimacy, which will be in contravention to the constituent power.

IV. DIFFERENCE BETWEEN GOVERNMENT, STATE, AND CONSTITUTION

An act of revolutionary disobedience is designed to demolish the existing "*in*-authority" by calling a halt to the authority relationship between the constituent and constituted power, but it does and could revolutionize the constitution and fracture the state: The constitution of the state could be fundamentally reconstructed as in the American Revolution, and the state could split up into different states or units as in the Indian Independence Movement.[185] Questions arise as to how the state and constitution are affected by such an act: Are the state and constitution necessarily affected in the process of revolutionary disobedience, or is such effect merely marginal and accidental? What do we mean by concepts such as the "constitution" and the "state"? Does my emphasis on the distinction between government on the one hand and the state on the other stand?

177. *Id.*
178. *Id.* at 238.
179. *Id.*
180. *See id.*
181. Kalyvas, *supra* note 159, at 238.
182. *Id.*
183. *Id.* at 238–39.
184. *Id.* at 239.
185. *See* A. U. SIDDIQUI, INDIAN FREEDOM MOVEMENT IN PRINCELY STATES OF VINDHYA PRADESH xiii (2004).

A. What Is "the State"?

The state is an intrinsically complex and ambivalent concept. But most scholars could point out that the government and state are two effectively distinct concepts, both practically and theoretically, even though they disagree on the precise definition of the state.[186] Political scientists point out that the state and government run with different logic.[187] The conventional Weberian definition of the state as "a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory" comprises indivisible elements such as monopoly, territory, legitimacy, and force,[188] which are all constitutive of a state but are dispensable for the government.[189] A government, in the first place, is "a process of regulating social behaviour."[190] From a historical and anthropological perspective, it does function within a certain territory, but it does not necessarily claim the monopoly of power.[191] John Hoffman contends that the essence of government is discussion, persuasion, and negotiation in order to preserve the fabric of the society but not physical force.[192] But the confusion does not melt away: Is the modern government not claiming monopoly of legitimate physical force within the wider state structure? Certainly the state is the territory that it occupies and the government is only the office in that territory under the Weberian formula.[193] In that sense they are different, but is the government not claiming to speak on behalf of the state? Are the two concepts truly distinguishable in the modern context? Is it meaningful to make such distinction?

We need the juristic perspective to see a wholly different facet of the connotation of the state. Revolutionary disobedience does not only occur in a case where the people deny the authority of the particular government in power but also when they approve the institutions and state structure. It occurs frequently with an aim of rewriting the constitution or structure of the government or even that of the state. We need to make sense of what it means by denying the authority of the government instead of the state.

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186. J.P Nettl, *The State as a Conceptual Variable*, *in* THE STATE: CRITICAL CONCEPTS 11 (John A. Hall ed., 1994) (arguing that the state is "a collectivity that summates a set of functions and structures in order to generalize their applicability" which must not be confused with "government": The former lies in the structure and institutionalization of power, whereas the latter is about political personal power); LAWRENCE KRADER, FORMATION OF THE STATE 15–17, 22–28 (1968) (proposing from an anthropological perspective that there are societies with governments but without the state, thus distinguishing the two); YALE H. FERGUSON & RICHARD W. MANSBACH, THE State, CONCEPTUAL CHAOS, AND THE FUTURE OF INTERNATIONAL RELATIONS THEORY 42, 57, 60–65 (1989) (explicating the manifold meanings of the state: A normative order "for a particular society" and the norms and beliefs that bind its people together, "a bureaucratic apparatus and institutionalized legal order in its totality," a sovereign amongst other sovereigns on the international forum etc., all qualities that allow us to distinguish it from "the government").

187. JOHN HOFFMAN, BEYOND THE STATE 43 (1995).

188. Max Weber, *Legitimacy, Politics and the State*, *in* LEGITIMACY AND THE STATE 32, 33–34 (William Connolly ed., 1984).

189. HOFFMAN, *supra* note 187, at 42–43.

190. *Id.* at 42.

191. *Id.* at 43.

192. *See id.* at 43–44.

193. *See* Weber, *supra* note 188, at 33.

As Martin Loughlin argues, the state is essentially a juristic concept.[194] In traditional German scholarship, the concept *Staatslehre* signifies three constituent aspects of the state:

> territory, ruling authority, and people.[195] In the modern sense, the state must also consist of a well-defined and independent territory, ruling institutions, and subjects or citizens within that territory.[196] Moreover, the state, as a juridical concept, signifies "the autonomy of the political sphere" in which absolute authority lies.[197] The absolute authority, or sovereignty, is vested neither in the government nor in the people but in the relationship itself.[198] This authority makes the state the sole source of law.[199] The juristic aspect of the state informs us that the state is "an abstract entity above and distinct from both government and governed," a self-sufficient political sphere.[200] The government can be and is bound by law, but no fundamental law can bind the state, as it possesses the ultimate authority to change all law.[201]

However, the previously mentioned juristic conception of the state does not grant us full access to understanding its existence in political reality. For this reason, an ontological and metaphysical notion of the state is required. Instead of reading features into the state here and there, the state itself is best understood as a scheme of intelligibility.[202] This means that the state can be reduced to a sum of propositions.[203] Conceiving all institutions as essentially ideas, Steinberger contends that the state is an idea or a composite of ideas.[204] It is the institution of institutions, a structure of metaphysical commitment.[205] A state can be reduced to such an "intelligible core," which constitutes its essence and has a certain ontological priority to all other properties, such as its physical outlook.[206] It is apparent that under such understanding the government is only one instrumentality of the state, a part of the larger structure.[207] Steinberger adopts an analogy to expand on this, by looking at an institution such as Harvard University.[208] It is composed of students and staff members, buildings and grounds, collections of documents, laboratory equipment,

194. LOUGHLIN, FOUNDATIONS OF PUBLIC LAW, *supra* note 114, at 196.
195. *Id.* at 192.
196. *Id.*
197. *Id.* at 195.
198. *See id.* at 186 (discussing a sophisticated analysis of the concept of sovereignty); MARTIN LOUGHLIN, THE IDEA OF PUBLIC LAW 83 (2003).
199. LOUGHLIN, THE IDEA OF PUBLIC LAW, *supra* note 198, at 83.
200. J. H. SHENNAN, THE ORIGINS OF THE MODERN EUROPEAN STATE 1450–1725, at 114 (1974).
201. *See* HOFFMAN, *supra* note 187.
202. PETER J. STEINBERGER, THE IDEA OF THE STATE 13 (2005).
203. *Id.*
204. *Id.* at 14.
205. *Id.*
206. *Id.* at 16.
207. *Id.* at 15–16.
208. STEINBERGER, *supra* note 202, at 17.

and other things.[209] It is currently located in Cambridge, Massachusetts, but if it moved to somewhere else, we would not say that Harvard no longer exists but that it simply moved.[210] This suggests that those buildings and the place where they sit are not essential. Harvard is essentially an idea, which confers meaning to its component parts. Even though the state is constituted by ideas, however, it cannot be reduced to that set of ideas, but it must be worked through "embodiment" by which the ideas are set to work in the real world.[211] There is no state- there are no institutions- without embodiments.[212] In fact, embodiment and ideas coexist in a dialectical relationship: The embodiment realizes the idea and ultimately reshapes it.[213] After this intellectual exploration of the idea, we should come to understand that we must specify what we mean by changing the state, given the complexity of the concept. The state cannot be boiled down to any of its components: territory, governing institutions, and the people.[214] It is essentially a set of ideas and its embodiment, and if so, the constitution of the state, composed of both norms and practices, could be its constitutive ideas.[215] It may make up the "intelligible core" of the state.[216]

B. What Is "the Constitution"?

Constitutions are different from constitutional law as is the constitution of the state different from the constitution of government. The formal constitution, or the written constitution, strives to codify the fundamentals of the constitution of the state, which can at best be incomplete. In contrast, the *substantive* constitution, which is an absolute concept of the constitution, connotes the fundamental constituents of the state. Therefore, understanding the "constitution" as constitutional law or the written constitution is erroneous. The word *constitution* hereinafter, if without specification, refers to the constitution of the state. The existential concept of constitution refers to the foundations of the political unit, which must be distinguished from the "constitution" of the office of government, which are basically particularities regulating the governing institutions.[217]

Two polar conceptions of "constitution" are compared here. In Kelsen's ideal normativist conception, the constitution is a "unified, closed system of higher and ultimate norms."[218] The theory reduces the state into a formal legal order, a system

209. *Id.*
210. *Id.* at 17–18.
211. LOUGHLIN, FOUNDATIONS OF PUBLIC LAW, *supra* note 114, at 207. Loughlin criticizes that Steinberger's argument does not capture "the whole truth" as embodiment is also necessary to substantiate the ideas that the institution embodies. But in fact Steinberger himself acknowledges that such embodiments are indispensable: "ideas are governed by a 'principle of necessary embodiment.'" *See* STEINBERGER, *supra* note 202, at 26.
212. *See* CHARLES TAYLOR, HEGEL 82–83 (1975).
213. *See* STEINBERGER, *supra* note 202, at 26–27.
214. *See id.* at 27.
215. *Id.* at 16.
216. *Id.*
217. LOUGHLIN, FOUNDATIONS OF PUBLIC LAW, *supra* note 114, at 214.
218. SCHMITT, CONSTITUTIONAL THEORY, *supra* note 134, at 62.

of norms that can be traced back to a basic norm, which underlies the system.[219] Refusing the claim that the state, being entirely legalistic and constituting itself with nothing else but norm, Schmitt argues that no closed constitutional system of norms can create itself unless this unity derives from a "[pre-established], unified will."[220] Schmitt's contention stresses that "the constitution originates from an act of will."[221]

There are three facets of meaning of the constitution according to Schmitt.[222] First, the constitution signifies "*the concrete, collective condition* of political unity and social order of a particular state."[223] The state "does not *have* a constitution, which forms itself and functions 'according to' a state will," but rather "the state *is* constitution, in other words, an actually present condition, a *status* of unity and order."[224] The second meaning of the constitution regards it as an expression of a concrete form of ordering, namely the relation of supremacy and subordination in the state.[225] Thereby, the constitution is a state form, and "the state *is* a constitution. It *is* a monarchy, aristocracy, democracy, council republic, and does not *have* merely a monarchical or other type of constitution."[226] Third, the constitution is observed as an active process wherein the people exert influence over it.[227] The state is not just a static existence but "simultaneously an entity that is always emerging."[228] This account asserts "the principle of the *dynamic emergence* of political unity, of the process of constantly renewed *formation* and *emergence* of this unity from a fundamental or ultimately effective *power* and *energy*."[229] The constitution of the state in this sense expresses "the *free formation* of the state will," which incorporates the people into the living body of state organism and "recognizes itself as the personal unity of the will of all free personalities that is determined through self-mastery."[230]

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219. LOUGHLIN, FOUNDATIONS OF PUBLIC LAW, *supra* note 114, at 211.

220. SCHMITT, CONSTITUTIONAL THEORY, *supra* note 134, at 65.

221. LOUGHLIN, FOUNDATIONS OF PUBLIC LAW, *supra* note 114, at 212.

222. *See* SCHMITT, CONSTITUTIONAL THEORY, *supra* note 134, at 59–61.

223. *Id.* at 59.

224. Here I place the stress of words of Schmitt's quote as Loughlin did in his work. *See* LOUGHLIN, FOUNDATIONS OF PUBLIC LAW, *supra* note 114, at 212. The term "order" here could be understood as "an actual hierarchy of normative propositions of obligation" which endures as "a matter of fact." Such "order" exists as a result of practice. Herman Heller, *The Nature and Structure of the State*, 18 CARDOZO L. REV. 1139, 1169–70. The "order" could "ground the potential unit of the organization, its constancy as an effective unit of action in a succession of all participants" and as such "the unit of the objectified order creates the structure of transmission across time, even when all participants change over," producing "the certainty of the persistence of the fabric of conduct." *Id*. at 1169.

A political rupture can be regarded as either the government acting in contravention of this political order of the state and resulting in the people going against it or the constitution of the state does not live up to the present expectations and will of the people wherein the government fails to line up the two as a mediator. In either case the government is devoid of its function and the people have the right to legitimately forfeit its authorization.

225. SCHMITT, CONSTITUTIONAL THEORY, *supra* note 134, at 60.

226. *Id.*

227. *Id.* at 61.

228. LOUGHLIN, FOUNDATIONS OF PUBLIC LAW, *supra* note 114, at 213.

229. *Id.* Unlike the two previous meanings, this third meaning of the constitution is more of a description of how the state functions as well as its nature rather than a definition of what constitutes the state. It informs us of *how the state is* instead of *what the state is*.

230. SCHMITT, CONSTITUTIONAL THEORY, *supra* note 134, at 62. Schmitt's work, Constitutional Theory, is a huge breakthrough from his earlier work, Political Theology, and therefore it is not necessary to read his earlier concept of the "sovereign dictator" into the will-formation process here. As Heller puts it, "The unification of wills,

Schmitt indeed offers us an immensely unique conception of the constitution of the state. It primarily captures three aspects of its nature: the constitution as the political unity of the state, the constitution as the state form, and the constitution as an active will-formation process which is constantly renewing.[231] What exactly makes up the substantive constitution may be contestable, but the state must be constitutive of such intelligible core: the constitution.[232] Such "penumbra of doubt," as Steinberger contends, is relatively clear at the core but increasingly blurred at the periphery.[233] This could be discerned in the dispute over whether the federal structure belongs to the most fundamental law of the German constitution of 1919.[234] But in fact the core of the constitution is relatively determinable.[235] What does it inform us about the nature of revolutionary disobedience? The act denies the authority of the office of government, as the in-authority can no longer accord with the will of the people.[236]They can simply request and order a change of the persons in office if their only concerns are with the particular individuals in office and not the "constitution" of the government or the state constitution. But if the latter are the main reasons for the bringing down of the government, then the state is definitely involved. Even the constitution of the office of government includes institutional reforms and may touch at the intelligible core of the state.

Revolutionary disobedience is capable of revolutionizing the state. Invoking Schmitt's first existential meaning of the state,[237] revolutionary disobedience can fundamentally change the state by breaking its political unity and order, especially if fundamentally different and incompatible ideas are introduced into its substantive constitution: [238] for instance, by turning a non-religious state into a Christian state or a wholly capitalist state into a social welfare state. In its second meaning, the state can be revolutionized by changing its form, for instance from a monarchy to a democracy.[239] In the third meaning,[240] the change of the state could not exist within but without the constituted order. If it could take place within the constituted order, it would not be revolutionary disobedience, but would fall into the broad definition of revolution.[241] The existing institutions and constituted order are incapable of accommodating and responding to the dynamic emergence of will in the political

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by which the individually effective common will is established, is accomplished above all as an intrasubjective process of integration and adjustment in each individual." Heller, *supra* note 224, at 1170. This will result in a "We-consciousness," even though it may take generations to accomplish. *Id.* However, this does not have to be a transcendent Rousseauian "general-will." *Id.* "There could never be an organization, and never a state, without an actual, even if in no way universal, community of wills." *Id.*

231. SCHMITT, CONSTITUTIONAL THEORY, *supra* note 134, at 59–62.

232. STEINBERGER, *supra* note 202, at 16.

233. *Id.* at 253.

234. SCHMITT, CONSTITUTIONAL THEORY, *supra* note 134, at 20 (contending that the federal structure is the most fundamental law of the German constitution of 1919 but failed to be codified as positive law).

235. Heller, *supra* note 224, at 1213–15 (explaining the core of the Weimar Constitution is rather clear but blurs out at the margin over interpretation).

236. *See id.* at 1216.

237. *See* SCHMITT, CONSTITUTIONAL THEORY, *supra* note 134, at 59.

238. *See id.* at 60.

239. *Id.*

240. *See id.* at 61.

241. *See id.* at 62.

unit at present, and such failures force the people to suspend the instituted order in order to reengage in the authorship of the fundamentals of the state.[242]

C. The Conditions of the State Under Revolutionary Disobedience: Further Arguments

Revolutionary disobedience is capable of changing the constitutive principles of the government and the constitution of the state. The territory and the institutions of the state could be radically changed in the process, to the extent that the state discontinues itself and becomes a new state.[243] But since the state is a complex composite, it could not be reduced to simply one of its components, and how far the state changes must be judged on a case-by-case basis.

Having understood the nature of the state, even if the office of government is brought down, the state still exists given the political order and unity are present, unless the constitution of the state has been fundamentally and successfully rewritten.[244] As such, the state and the people find themselves in a "state of exception," a time when no distinction could be made between "legal" and "illegal," and otherwise "illegal" acts are extra-legal or supra-legal at this stage.[245] There is an emasculation and abnegation of the office of government, but dissolution of the state need not take place.[246] The state may have undergone a revolution and become a new state, but its ancillary territory and people may remain intact.[247] In a revolutionary action, what matters the most is the change in the essence or constitution of the state and its governing institutions, which signifies a fundamental departure from its former logic of functionality and normativity, since the state is an idea.[248] As shall be discerned in the following sections, whether the constitution of the state has experienced a fundamental change, and thus the birth of a new state has to be compared with its former conditions, and ambiguity and contestability of marginal cases are inevitable. A successful *locus classicus* of revolutionary disobedience, namely the Indian Independence Movement will be the subject of study, where the dissolution of the old state and the formation of the new one could be observed.

V. SOLVING THE DEMOCRATIC BOUNDARY PROBLEM: DEFINING THE *DEMOS*

Democracy literally means rule by the *demos*: the word for "the *people*" in Greek.[249] But the question of who should be deemed to make up the relevant *demos*

242. *Id.* at 61.
243. *See infra* note 669.
244. There is a largely unfounded fear that when the office of government is dissolved, the state also ceases to exist and anarchy dawns. This is here proven to be wrong, and the government could easily be rebuilt under the reformed constitution.
245. *See* SCHMITT, CONSTITUTIONAL THEORY, *supra* note 134, at 80.
246. *See* Kalyvas, *supra* note 159, at 227.
247. *See* Weber, *supra* note 188, at 33.
248. STEINBERGER, *supra* note, 202, at 14.
249. Josiah Ober, *The Original Meaning of "Democracy": Capacity to Do Things, Not Majority Rule* 2 (Princeton/Stanford Working Papers in Classics, Version 1, 2007).

or unit of people continues to perplex academics and becomes the center of debate.[250] This is known to be the democratic boundary problem, drawing the line of where a people rests as to be distinguished from other peoples.[251] The ideas of constituent power and popular sovereignty have been examined in previous sections, but they inform us nothing about the proper unit of people. But the democratic boundary problem is of profound importance as unless we can define who constitutes an independent, distinguishable people, "the people" that we attempt to label could potentially be an unbounded unit, taken to be, for instance, the people of the globe. Arash Abizadeh's thesis best illustrates this point, by submitting that the demos is in principle unbounded and that "all those subjected to the exercise of political power" should be included in the demos.[252] Also, some scholars contend that democracy itself stipulates nothing about the relevant unit but only serves as a political procedure.[253] In Hong Kong ("H.K."), scholars are contesting how to define "Hongkongers."[254] Sharing the *pro tanto* conviction that Hongkongers are *a people*, the nationalist school of thought argues it to be a nation whilst the realist school regards it as the citizens of the H.K. city-state.[255] Given that the nation-state is widely accepted, must we define a people as a nation? Are there any alternatives? Sir Ivor Jennings has made the classic contention that "the people cannot decide until someone decides who are the people" and that the definition of a people is necessarily arbitrary.[256] Is this an accurate assessment?

250. Most academics can identify the democratic problems and criticize the shortcomings of theories in the field, but few of them could offer insightful solutions, leaving readers more perplexed than inspired. *See* Frederick G. Whelan, *Prologue: Democratic Theory and the Boundary Problem*, *in* LIBERAL DEMOCRACY: NOMOS XXV 13, 16–42 (James R. Pennock et al. eds., 1983). His critical analysis serves as an excellent starting point to understand the confusion that accompanies the democratic boundary problem, in which he offers a brief review to some of the most common solutions that attempt to solve the problem: The all-affected principle, territorial states, consent theory, nationalist theory, geographical features, etc. However, it opens questions without offering any answers.
The "all-affected" principle, proposing by democratic theorists such as Shapiro, stipulates that anyone whose interest is affected by a decision should have a stake in its making. It is a failed attempt to solve the democratic problem. *See* Sarah Song, *The Boundary Problem in Democratic Theory*, 4:1 INT'L THEORY 39, 40–42, 48–50 (2012) (pointing out the excessively inclusionary character of "all-affected" principle and impossibility to decide whose interests exactly are "affected," instead arguing that the demos must be bounded by the state).

251. *See* Song, *supra* note 250, at 48–50.

252. *See* Arash Abizadeh, *On the Demos and Its: Kin Nationalism, Democracy, and the Boundary Problem*, 106 POL. SCI. REV., 867, 878 (2012). Abizadeh's "unbounded demos" thesis or "all-subjected" principle is based on the premise of state coercion: A person should have a right of say over political decisions when he is coerced by the state, such as "direct physical force, invigilation via agents authorized to use physical force, and threats of punitive harm—or to coercively undergirded symbolic processes of socialization and identity formation." David Miller offers an illuminating rebuttal. *See* David Miller, *Democracy's Domain*, 37 PHIL. & PUB. AFF., 201, 218–25 (2009) (contending that being subjected to coercion does not automatically grant one a democratic say in the matter, let alone being included in the demos).

253. *See* Robert A. Dahl, *Federalism and the Democratic Process*, *in* DEMOCRATIC COMMUNITY 95, 103–104 (John W. Chapman et al. eds., 1993).

254. *See* BRIAN LEUNG (梁繼平) et al., XIANGGANG MINZU LUN (香港民族論) [HONG KONG NATIONAL THEORY]; CHAN WIN (陳雲), XIANGGANG CHENGBANG LUN (香港城邦論) [HONG KONG CITY-STATE THEORY] 67, 79–85; Tim Hamlet, *Could Hong Kong Ever Become A Nation State?*, HONG KONG FREE PRESS (Aug. 29, 2016, 10:41 AM), https://www.hongkongfp.com/2016/08/29/could-hong-kong-ever-become-a-nation-state/; Suzzane Sataline, *Meet the Man Who Wants to Make Hong Kong a City-State*, FOREIGN POLICY (May 18, 2015), http://foreignpolicy.com/2015/05/18/hong-kong-china-protests-democracy-nativism/.

255. *See* LUN, *supra* note 254.

256. IVOR JENNINGS, THE APPROACH TO SELF-GOVERNMENT 56 (Cup Rev. ed., 2011).

A. The Republican Theory of Democracy

In the above section, democracy is defined in accordance with the republican theory as the collective authorship of the sovereign will.[257] The value of self-determination and autonomy is central to democracy, which allows the relevant *demos* to determine the laws that apply to themselves.[258] As Kelsen puts it, people could be said to enjoy "political freedom" if and only if they can participate in the creation of the social order that regulates them, a process by which the individual will of a person could be harmonized with the "collective will" via dialogue and contestation.[259] There must be a continual reconciliation and mediation between the individual self-determination of particular citizens and collective self-determination.[260] "If democracy requires that citizens experience their government as their own, as representing them, they must experience the state as in some way responsive to their own values and ideas."[261] Does such republican discourse of democracy shed any light on the appropriate composition of the democratic unit itself?

For the republican theory, a unit of people should possess the right sort of qualities and attributes to make up a self-determining *demos*.[262] If the relevant demos lacks in solidarity owing to physical distance of the unit or cultural diversity, it may fail to function.[263] The Union of Soviet Socialist Republics (USSR) could elucidate this point where Russia, as the dominant nation, often oppressed other smaller nations which were unable to reconcile with the Russian-led policies, ultimately leading to its dissolution.[264]

David Miller proposed four criteria that a demos should possess to be qualified as a self-standing unit.[265] The first criterion is sympathetic identification or mutual identification.[266] "Those who belong to the would-be demos must identify sufficiently closely with the remainder of the group that they are motivated to try to accommodate their interests and their convictions."[267] Even if they may not share the same beliefs and interests on a specific issue, the people would be willing to attain an agreement that everyone can accept to the possible extent.[268] Such accommodation goes beyond the recognition of human rights to reconciling one another's differences and needs.[269] The second criterion is an underlying agreement on moral principles, without which democratic deliberation would be impossible as

257. *See* Robert C. Post, *Democracy and Equality*, YALE LAW SCHOOL FACULTY SCHOLARSHIP SERIES 24, 27–28, Paper 177 (2005).
258. *Id.* at 25–26.
259. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 286 (Anders Wedberg trans., 1961).
260. Post, *supra* note 257, at 27.
261. *Id.*
262. *See* STEPHEN TIERNEY, CONSTITUTIONAL REFERENDUMS: THE THEORY AND PRACTICE OF REPUBLICAN DELIBERATION 59 (2012).
263. *See id.*
264. *See id.* at 68–72.
265. *See* Miller, *supra* note 252, at 208.
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*

people would not accept nor respond to others' arguments.[270] The people must share some basic convictions that the political community recognizes, which can resolve disputes and spawn a fabric of consensus that brings the people together as a unit.[271] The third requirement is interpersonal trust.[272] This essentially means that the people will have to abide by the rules of democracy, no matter winning or losing, without which the democratic order will simply collapse.[273] Finally, "the *demos* must be a stable group whose members come together repeatedly over time to decide upon a range of different issues.[274] Stability is important because of its connection with sincerity and trust."[275] Also, such decisions can serve as references in future deliberation, and the people involved can be anticipated to act consistently.[276]

I contend that this final criterion could be important as the people then share a common history under which agreement and consensus can be reached, without which self-governance is impossible. For stability, it requires that the constituting members of the *demos* remain largely the same over time and only change slowly, which allows them to make concessions to one another and think in the long-run. The desirable political unit must not be too small or too big, as a small village would impend political deliberation due to familiarity and an empire would be unable to accommodate politically and legally the difference in culture, beliefs, and other traits as well as needs. Indeed, the nation-states, or alternatively, the city-states endorsed by philosophers such as Rousseau and Montesquieu are possibly two ideal units of *demoi*, which best align the individual and collective will-formation.[277] The initial establishment of a community, people, or even a state can be "arbitrary," as Abizadeh accuses it.[278] But smaller political units can emerge within the larger entity over time in the same manner as smaller units merge into larger ones.[279] We need to determine the suitable democratic unit on a case-by-case basis, judging with standards such as "citizen effectiveness" ("citizens' ability to control collectively the decisions of their political system") and "system capacity" ("the political system's ability to implement those decisions").[280] The people may have a clearly distinguishable will different from the larger people, such as the Catalonian from the Spanish, constituting a collective-self.[281] A well-functioning, unified *demos* may be a prima-facie reason not to change it whilst a fracturing one could legitimize the separation of the relevant *demoi*. Democracy as well shows us how to draw one *demos* from

270. *Id.*
271. Miller, *supra* note 252, at 208–10.
272. *Id.* at 208.
273. *Id.* at 209.
274. *Id.*
275. *Id.*
276. *Id.*
277. *See* EMILE DURKHEIM, MONTESQUIEU AND ROUSSEAU: FORERUNNERS OF SOCIOLOGY (Ralph Manheim trans., Univ. of Michigan Press, 1960) (1953).
278. Abizadeh, *supra* note 252, at 877.
279. *See* ROBERT A. DAHL & EDWARD R. TUFTE, SIZE AND DEMOCRACY 110 (1973).
280. *Id.*
281. *Id.*

another and requires the state to respond to its demands, the failure of which may justify remedies such as further devolution or unilateral secession.[282]

B. Defining the Nation

In the modern era, with the wide acceptance of the nation-state, nations are the predominant form of peoplehood and a nation is a people, even though a people need not be a nation.[283] Many philosophers see the dividing line between peoples as one between nations, and accordingly we can draw the democratic boundary in line with nationality.[284] Theorists have provided an extensive number of justifications to national self-determination.[285] The purpose of this section, instead of repeating them or offering new justifications, is to provide a definition for the nation so as to analyze whether it could serve as the basis of a democratic unit.

First, there are objective criteria that define a nation and separate it from other groups.[286] The people as a nation embrace common features such as a shared history, language, religion, and societal institutions, some or all of which combine in different ways in each nation.[287] A national society is necessarily imbedded with a

282. This Article concerns the *ways* of drawing the democratic boundary but leaves open the question of the *forms* that the demos accommodates itself institutionally: the arrangement(s) of the state. Common forms of the state include the unitary state, federal state, confederation, and an independent state (secession). Theoretically and in practice, all of these state arrangements can accommodate for different demoi or nations, depending upon the fairness of the division of power to the peoples and how reflective is the state in accommodating the wills of the different demoi. To see how devolution within a unitary state can satisfy a sub-state people, see Stephen Tierney, *Federalism in a Unitary State: a Paradox too Far?*, 19(2) REG'L & FED. STUD. 237, 245–249 (2009). The federal state and confederation could also achieve such purpose. *See* Will Kymlicka, *Is Federalism a Viable Alternative to Secession*, *in* THEORIES OF SECESSION 111, 112, 120, 124–127, 130–131 (Percy B. Lehning ed., 2005). Secession is the ultimate form of state arrangement for a given people to exercise its collective right to self-determination. The right can only be claimed when the demos have over time developed a *legitimate right* over the territory since secession is not only a democratic arrangement for self-determination, but also a claim over territory. *See* Amandine Catala, *Secession and Annexation: The Case of Crimea*, 16(3) GERMAN L. J. 582, 587–88, 598–99 (2005).

283. STEPHEN TIERNEY, CONSTITUTIONAL LAW AND NATIONAL PLURALISM 35 (2006).

284. *See id.*

285. *See* Simon Caney, *National Self-Determination and National Secession*, *in* THEORIES OF SECESSION 151, 163–175 (Percy B. Lehning ed., rev. ed., 2005). Caney's essay conveniently summarizes some major arguments and writings that attempt to justify national self-determination and contributes his own line of reasoning. (P1) "Political institutions that further people's well-being are *pro tanto* valuable"; (P2) "An individual's membership of a nation furthers his or her well-being"; and (P3) "A nation-state can best further a nation's practices and culture," therefore (C) "National self-determination is, *ceteris paribus*, valuable." *See, e.g.*, Daniel Philpott, *In Defense of Self-Determination*, 105(2) ETHICS 352, 366 (1995). Note that self-determination, albeit justified, itself does not prescribe the *form* that it takes, which could be devolution, federalism, secession, etc. *Compare* Avishai Margalit & Joseph Raz, *National Self-Determination*, J. PHIL. 439, 449 (1999) arguing that national self-determination is only instrumentally justified and should be a qualified right), *with* Daniel Philpott, *Self-Determination in Practice*, *in* NATIONAL SELF-DETERMINATION AND SECESSION 81 (Margaret Moore ed., 1998) (contending that self-determination is intrinsically valuable for the promotion of autonomy, which furthers self-government and identity-preservation). Moreover, given the purpose that it serves, note that the right to self-determination under Philpott's conception is not limited to nations but to any groups which share a common identity, ethnic, linguistic, cultural, or otherwise, and determine to shape their fate together. Nations are only but one of the groups that enjoy such entitlement.

286. TIERNEY, CONSTITUTIONAL LAW AND NATIONAL PLURALISM, *supra* note 283, at 34–35.

287. *Id.* It is worth stressing here that the above criteria that define the nation based on common political values falls in the category of civic nationalism, which must be distinguished from ethnic nationalism that defines the nation with biological characteristics such as race, colour, and ethnicity. The latter is exclusivist and a dangerous ideology. *See* BELL, *supra* note 26, at 7.

"societal culture . . . which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres."[288] This also contributes to members of the nation a common societal identity, which they use in part to define themselves.[289] Second, there are subjective features of a nation that define it as a distinct collective entity.[290] For the nation to exist, its members must feel a subjective sense of belonging, which makes them desire to preserve the group's distinctiveness and to seek better political and legal accommodation of it.[291] "Defining a political entity as a national community is only justified if a substantial majority of its citizens has consented to this definition," as Yael Tamir powerfully contends.[292] The existence of a national consciousness is the only factor that "is *necessary*, although not *sufficient* for a group to be defined as a nation."[293] Tamir's discourse bears resemblance to Benedict Anderson's concept of "imagine communities," which argues the nation is a community dependent on its members' capacity to "imagine the nation."[294] Most people would not have met the vast majority of their nationals, and the nation could only survive upon the belief of its members that they all share national characteristics.[295] But such subjective sense of common identity, albeit significant, must be built on the objective traits that the nation shares.[296] In fact, the objective and subjective elements of national identity are entangled and mutually dependent: The objective characteristics are themselves shaped and re-shaped through the group's self-consciousness.[297] As some may find surprising, there is no definitive one-size-fits-all classification of a nation under civic nationalism theories, and theoretically any group of people with a set of common objective traits can become a nation so long as they regard themselves as one.[298] This indeed allows room for nation-building where a sufficient amount of a territorially-concentrated people see themselves as a distinct collective identity and opt for separating from the larger people.[299] Due to the indeterminate nature of the concept "nation," it could be employed just as the republican democratic theory to establish the democratic boundary, where for instance the people as a collective have suffered historical injustice or find their will systematically incompatible with the larger unit or simply ignored.[300]

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288. WILL KYMLICKA, MULTICULTURAL CITIZENSHIP 76 (1995).
289. *See* TIERNEY, CONSTITUTIONAL LAW AND NATIONAL PLURALISM, *supra* note 283.
290. *See id.*
291. *Id.* at 40–41.
292. YAEL TAMIR, LIBERAL NATIONALISM 158 (1993).
293. *Id.* at 65.
294. TIERNEY, CONSTITUTIONAL LAW AND NATIONAL PLURALISM, *supra* note 283, at 42–43.
295. *Id.* at 43.
296. *Id.* at 42.
297. *Id.*
298. *See id.*
299. A consequent worry from this is that there may be an endless trend of creation of nations, which academics call the "infinite regression problem." But as Kymlicka forcefully argues, "I do not think that we will see a never-ending procession of groups declaring themselves to be 'nations.'" Will Kymlicka & Ruth Rubio. Marin, *Liberalism and Minority Rights: An Interview*, 12(2) RATIO JURIS 133, 141 (1999). "It is important to remember that there are costs, as well as benefits, to adopting a nationalist stance." *Id*.
300. *See* TIERNEY, CONSTITUTIONAL LAW AND NATIONAL PLURALISM, *supra* note 283.

But for a nation to be autonomous, two extra criteria should be fulfilled, namely territorial concentration and the potential for self-government.[301] It would be a virtual impossibility for a dispersed nation over different territories to practice self-rule if and when it becomes a minority in those segregated locations instead of being the majority or the whole over one spot.[302] The Londoners, as the absolute or qualified majority in London, can be self-governing, but it turns impossible when they are scattered across Southampton, Manchester, and Edinburgh, where they become the minority in each of those districts.[303] Territorial scatter also renders a common national identity highly improbable, which is likely to produce a loose bonding as common language and culture requires territorial proximity.[304] As to the potential for self-government, it is practically important as it signifies the capacity of a group to pursue its own agenda. For Stephen Tierney, such criterion is important since *potentially* self-governing sub-state nations within plurinational states, as fully functioning *demoi*, could make a compelling case to require an equal status with the host state.[305] But it should be noted that the potential of self-government for a nation can be highly contestable, which is empirical and not normative.[306] The potential of self-governance should be an extra force, but not a dominating one, in a nation's claim for self-determination.[307] The real significance of such potential, I argue, lies in the fact that if a nation's self-government, however limited in extent, has been institutionalized, legally or constitutionally, it easily serves as a springboard for complete self-rule. These self-standing institutions, as will be contended below, can serve to define who the people are and disrupt the constitutional order between the sub-state nations and the larger state. A sub-state national society which embraces a territorially concentrated and historically settled population with "an elaborate set of social, cultural and, in some cases, governmental networks and institutions" makes not only self-government possible, as Tierney argues, but also independence and secession.[308]

C. "The People" as Process: An Ontological Grounding

The democratic boundary can be drawn according to a self-perceived *demos*, a nation, and even potentially any territorially concentrated groups when constitutional accommodation fails them. Accordingly, we might say that any of these units constitute a people, in the sense of a people within the purported boundary. But the

301. Territorial concentration is in fact a precondition of any units to exercise self-determination and for secession to be possible, a premise that also holds true for the republican democratic theory to draw the line of a demos.
302. *See id.*
303. *Id.*
304. AZAR GAT, NATIONS: THE LONG HISTORY AND DEEP ROOTS OF POLITICAL ETHNICITY AND NATIONALISM 24–25 (2012).
305. TIERNEY, CONSTITUTIONAL LAW AND NATIONAL PLURALISM, *supra* note 283, at 38.
306. *See id.*
307. *See id.*
308. *Id.* at 33.

perplexity runs deeper.[309] Is the people, then, a collection of individuals? Are they capable of having the Rousseauian sense of a unified will? And how do we know or how could we ascertain whether the people have "spoken" or decided on a specific question?

Constitutional jurist Bruce Ackerman developed his dualist democratic theory in an attempt to answer this question, by which he seeks to ascertain what decisions the people have made at a specific time in the American history.[310] His theory sees the people as a process instead of an aggregate of individuals, which allows us to see its true nature as the people could not have a "unified will" fixed in time, either in the past or future, because there are always dissenters.[311] It also avoids the requirement of a unified consent at any given time, the lack of which may disqualify the legitimacy of the people if a theory hinges upon the image of a unified people, and as such any withdrawal of consent makes the people no more than those who consented.[312] In Ackerman's discourse, the people is "an extended process of interaction between political elites and ordinary citizens."[313] The people exercises popular sovereignty to authorize higher law-making, and the government responds through institutional actions and judicial decisions to consolidate the higher status of the popular will.[314] Because the people is a process, there can be a range of constitutional moments without the need of a unified will at any given time.[315] But in Ackerman's theory, the people is a closed process, one "that finishes after it speaks."[316] It consists of distinct periods of mobilization, each of which requires closure to be able to determine what the people has said.[317] This closure necessitates the need for a decisive sovereign will, a sovereign decision that is responsive to the unified voice of the people, which comes with clear beginnings and ends.[318] Ackerman's theory is only value when the people's voice is registered as the sovereign will, with the institutions being successfully transformed by their actions.[319] For revolutionary disobedience, a successful instance necessarily registers

309. The question of who "the people" is and the contemporary debate is introduced by Margaret Canovan, *The People*, *in* THE OXFORD HANDBOOK OF POLITICAL THEORY 349, 353–57 (John S. Dryzek et al. eds., 2008). The doubt and the mystification of "the people" have also been extensively addressed in her other work. *See* MARGARET CANOVAN, THE PEOPLE (2005).

310. Ackerman's theory of dualism will be more extensively addressed in Part VII.

311. *See* ESPEJO, *supra* note 114, at 119, 136.

312. *See e.g.*, Sofia Nasstrom, *The Legitimacy of the People*, 35(5) POL. THEORY 624, 625–26, 628–30 (2007).

313. 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATION 187 (1998).

314. A successful constitutional moment contains four phases: Signaling, proposing, deliberating and consolidating. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 266–67 (1993).

315. *See* ESPEJO, *supra* note 114, at 127.

316. *See id.*

317. *Id.* at 127, 132–33.

318. *Id.* at 132.

319. Paulina Espejo criticizes dualist democracy discourse as not fully embracive of process, as we can learn how the people rule without the need for their consensus at a given moment as Ackerman idealizes. *See id.* at 132, 134. What Ackerman narrates and theorizes is in fact a fragment of a larger picture: Whilst he requires that the people "have one voice at a given time," he ignores the fact that it is more about the will of the interpreter, be it the government or judiciary, or that of the scholar. *Id.* But it is more accurately depicted as the registered will of the people or the constitutional decision of that time. We cannot ignore the fact that there are other people who voice their disagreement during these times and arbitrarily take them out of the concept of the people, however small in number.

the relevant political actions as the people's will, which also defines who the people is.[320]

Nonetheless, Ackerman's people as procedural process is not encompassing enough, as it could at most only ascertain what the people has spoken when its voice is registered institutionally. Here, Paulina Espejo's fully-fledged processual theory is introduced.[321] She contends that a people as process should be understood as "an unfolding series of events *coordinated* by the practices of constituting, governing, and changing a set of institutions. These institutions are the highest authority for all those individuals intensely affected by these events and these institutions."[322] Where there is government or the state, there are authoritative institutions.[323] These institutions define who the people as a collective is, and changing them redefines the people.[324] The people is constituted by events rather than individuals, but not any events.[325] Only political events or "people events" are constitutive of a people, which are events "coordinated by the practices of constituting, governing, or changing the institutions… [that] are the *highest* authority for all those individuals intensely affected…by these institutions..."[326] With reference to this view, for instance, the cession of Hong Kong to the British Empire in 1842 (changing the sovereign), a fully-elected Legislative Council introduced by Governor Chris Pattern in 1990s, and later China's replacement of the fully elected legislature with a half elected mechanism are all political events that make up the Hong Kong people.[327]

This theory also allows us to distinguish different peoples. Espejo specifies three conditions to achieve this, none of which alone is sufficient to individuate a people.[328] Those include: (1) "the time and place in which the process occurs," (2) "the *character* of the practices that constitute, govern, or change a particular set of supremely authoritative institutions," and (3) "whether the individuals who are under the authority of the process's authoritative institutions conceive of themselves as part of different peoples."[329] The first condition allows us to distinguish a people from others with its peculiar spatio-temporal expanse.[330] By way of illustration, the modern Hong Kong people refers to the population spreading across the Hong Kong Island, Kowloon Peninsula, and the New Territories from the 19th century.[331] For the second criterion, a people is developed through repeated events which form a

320. *See* ESPEJO, *supra* note 114, at 132, 134.
321. *Id.* at 137.
322. *Id.* at 134. The word "coordination" here is used to describe how the people as a process operate. A people event manifests itself when it is directly related to the constituting, governing, or changing of the highest institutions concerned, such as an election. But before the actual voting with a ballot box or the counting of votes, a person watching presidential candidates' debates and co-workers exchanging political opinions in the office, where relevant, *coordinate* to form part of the process. So the people as a process are *coordinated* by political events.
323. *Id.*
324. *See id.*
325. *See id.*
326. ESPEJO, *supra* note 114, at 157–58, 168–69.
327. *See id.*
328. *Id.* at 162.
329. *Id.*
330. *Id.* at 163.
331. *See id.*

character to the series of occurrences.[332] There are various –forms of manifestation of such character; for instance, both 20th century Britain and 19th century Japan practiced traditions of enthroning the monarch, but the English monarch is anointed by the Archbishop of Canterbury and vested in a garb of alb, dalmatic, and stole whilst the ancient Japanese "ceremony of ascending the throne and announcing the succession to the gods of heaven and earth, to the spirits of the imperial ancestors."[333] Both practices are apparently distinguishable. Hence, the repetition of characteristic practices allows us to differentiate peoples by their traits, which is partly determined by past events and partly self-creative.[334] "A people's governing practices have a causal history, which partially determines what the people will do in the future."[335] They condition the way a people will change. Despite this, there is still room for indeterminacy in such a process, where self-creation is possible for the people to determine its character. The final criterion explicates how a people's self-perception plays a role in its self-definition.[336] When the individuals who engage in people events regard themselves as a particular people, they may preserve its characteristics to maintain the status quo, or join a larger people if they share the same traits, or segregate themselves from the existing unit and create a new one.[337] "In this manner different peoples can fuse into one if individuals partaking of different peoples believe they have merged and choose to harmonize their practices of constituting, governing, and changing authoritative institutions. The converse occurs in cases of independence, secession, and partition."[338]

In spite of the ability of the above theories to solve the democratic boundary problems, a word of caution should be noted. Indeed, we can distinguish one people from another with reasonable judgment in most cases based on the bulk of the people's character, but the distinction of peoples may get blurred in the border areas, which leads to the indeterminacy problem of drawing a fine line of separation between territories. Where this occurs, the implementation of self-determination mechanisms within a unitary state, a federal state, or even confederation may be better and more agreeable than secession. As noted by Espejo, if we treat people as a process, peoples are defined by different major events in specific territories and can accordingly be individuated.[339] For instance, the American people can be distinguished from the Mexican people, especially at the heart of the two countries, such as Washington, D.C. and Mexico City, where there are significant cultural, political, and institutional differences.[340] Also, in these areas, the people events of the two are entirely separated.[341] But the two peoples are harder to disentangle at the U.S.-Mexico border area where political mechanisms bear resemblance.[342] This just

332. ESPEJO, *supra* note 114, at 163.
333. *Id.*
334. *Id.* at 164.
335. *Id.*
336. *Id.* at 165.
337. *Id.*
338. ESPEJO, *supra* note 114, at 165.
339. *See id.* at 162.
340. *Id.* at 166–67.
341. *Id.* at 166.
342. *Id.*

illustrates the difficulty in separating borders and the indeterminacy that occurrences between peoples may overlap at the periphery. It does not warrant the conclusion, however, that the two peoples have thus merged, because the bulk of them is still markedly distinguishable and different.

D. Drawing the Democratic Boundary in Practice: Are Hongkongers a People? A Case Study

With the theoretical analysis above, it would make a strong case to contend that the Hongkongers are a distinct people, sharply distinguishable from the "Chinese people," i.e., the citizens or inhabitants of China.[343] The conviction that Hongkongers are a people is vitally important to justify its self-determination and to understand the appeal of the Umbrella Movement, which is the subject of Part VIII.[344] Employing the republican democratic theory, Hong Kong as a geographical space and its political institutions best allow the Hongkongers to engage in political participation in expressing their individual wills and the determination of their sovereign will, as the people have been co-existing peacefully across the H.K. Island, Kowloon, and the New Territories since 1842, and they have developed a sui generis sense of belonging and identity to H.K.[345] Institutionally speaking, H.K.'s political and legal institutions, albeit undemocratic and imperfect, are by far the better option as compared to being absorbed into and engulfed by the Chinese Constitution, which is categorically incapable of accommodating regional and national differences, with the authorities failing to protect the constitutional rights of the Chinese people and systematically violating their human rights, such as the freedom of expression, which is the absolutely irreducible core of democracy and the formation of people's will.[346] Applying the nationalist thesis in a similar manner defines Hong Kong as a self-

343. Chinese could be defined as an ethnicity or the "native or inhabitant of China." *See* OXFORD UNIV. PRESS, OXFORD DICTIONARY OF ENGLISH (Angus Stevenson, 3d ed. 2015). "Chinese people" should follow the latter definition if we take it to mean a nation instead of a race, adopting civic nationalism over ethnic nationalism.

344. The task of this paragraph is to distinguish the Hongkongers from the "Chinese people" or the so-called "Chinese mainlanders," which are two entities that are most often mingled or confused to be one people, due to the legal sovereignty that China is exercising over Hong Kong.

345. The latest poll pertaining identity conducted by the University of Hong Kong presents that an overwhelming 40.2% of Hong Kong people regard themselves as "Hongkonger(s)" whilst only 18.1% consider themselves "Chinese." Some people, on the other hand, see themselves with a mixed identity, with 27.4% seeing themselves as "Hongkongers in China" and 13.0% regarding themselves as "Chinese in Hong Kong." It is reasonable to say that the majority of Hongkongers see themselves as a distinct entity from other Chinese people. *See* UNIV. H.K., *Table*, PUBLIC OPINION PROGRAMME, https://www.hkupop.hku.hk/english/popexpress/ethnic/eidentity/poll/datatables.html (last visited Apr. 22, 2017).

346. China's oppression of freedom of expression and suppression of cultural difference against sub-state nations such as Tibet and Xinjiang are blatant, which do not enjoy constitutional protection such as that of H.K. under the "one-country, two-systems" guarantee. *See* Barry Sautman, *"Cultural Genocide" and Tibet*, 38 TEX. INT'L L.J. 173, 219–25 (2003); *see also* Matthew Moneyhon, *Controlling Xinjiang: Autonomy on China's "New Frontier"*, 3(1) ASIAN-PAC. L. & POL'Y J. 120, 129–34 (2002).

sufficient unit. Given a shared history, language,[347] and societal institutions,[348] as well as other cultural forms and attributes,[349] Hongkongers are a distinct people, who are clearly separable from their Chinese neighbor. Due to these unique features that the Hong Kong people share, Hong Kong is potentially a candidate for becoming a nation, even though it is too soon at this stage to conclude that it *is* already a nation owing to the lack of such self-consciousness.[350] For Hong Kong to truly become a nation, a process of nation-building is required but is currently missing.[351]

If we are to apply the processual theory of people, Hongkongers as a distinct people are even more obvious, being markedly distinguishable from other peoples including their geographical neighbors, the "Chinese mainlanders."[352] First, the spatio-temporal expanse that Hongkongers find themselves in is markedly different than that of the Chinese mainlanders.[353] Not only do Hongkongers and Chinese mainlanders occupy different geographical spaces, with the former in H.K. and the latter in China, they are also defined by discrete historical timelines.[354]

The modern Hong Kong city-state is defined by moments, such as the British occupation of Hong Kong Island in 1842,[355] the cession of Kowloon Peninsula in 1860,[356] and a ninety-nine year lease of the New Territories in 1898.[357] In contrast, the People's Republic of China was established in 1949 as a country.[358] The timeline of political events that make up the H.K. and Chinese people are clearly different. Even in 1997, the legal sovereignty over H.K. was transferred from Britain to China with the promulgation of the Hong Kong Basic Law.[359] H.K. was "an inalienable part of the People's Republic of China," and the Standing Committee of National People's Congress of China ("NPCSC") had ultimate authority over the amendment

347. Hongkongers commonly use Cantonese as their first language, in contrast to the Chinese people who commonly use Putonghua. Also, the H.K. Basic Law stipulates H.K.'s official languages to be both Chinese and English, whereas in China the official language is only Chinese. *See* XIANGGANG JIBEN FA, art. 9 (H.K.) [hereinafter Basic Law]. Moreover, traditional Chinese characters are commonly employed and used officially whereas simplified Chinese enjoys widespread usage and is used officially in China.

348. For instance, under Article 106 of the Basic Law, H.K. "shall have independent finances" and the Chinese government does not levy tax in H.K.; under Article 111, H.K. has its own currency; and Articles 17, 43 and 82 entitle H.K. to have its own legislature, executive, and judiciary respectively, which constitute the highest authorities in the region.

349. H.K.'s cultural distinctiveness is most commonly delineated as the hybrid of Chinese and Western culture. It is a bilingual society, and its unique mixed culture is most typically reflected in its food such as H.K. style milk tea, egg tarts, and egg waffles. It has its distinct film and music culture, which are reflected in Bruce Lee's Kung-Fu movies and Canto-pop. *See also* Cao Xiaonuo (曹曉諾), *Xianggang Ren de Beihou Shi Zhengge Wenhua Tixi* ("香港人"的背後是整個文化體系), UNDERGRAD (學苑), Feb. 2014, at 31–33; *see generally* XU CHENGEN (徐承恩), YUZAO DE CHENGBANG (鬱躁的城邦: 香港民族源流史) [The City-state of Distress and Anguish: A History of the Hong Kong Nation] (2014).

350. *See* HONG KONG JOURNAL, http://www.hkjournal.org/timeline/index.html.

351. *See id.*

352. *See id.*

353. *Id.*

354. *See id.*

355. *Id.*

356. HONG KONG JOURNAL, *supra* note 350.

357. *Id.*

358. *The Chinese Revolution of 1949*, OFFICE OF THE HISTORIAN, https://history.state.gov/milestones/1945-1952/chinese-rev.

359. Basic Law, *supra* note 347, at 1.

and interpretation of the Basic Law itself.[360] It could be said that one of the "people's events" of both H.K. and China had merged and the edge of difference between the two peoples became slightly blurred.[361] Due to the "one country, two systems" legal entrenchment, the timeline between the two could still be markedly distinguished.[362] The highest institutions of the two places are also entirely separable, with H.K. having its own executive authorities, legislature, and independent judiciary being the highest institutions of the land.[363] Second, institutionally speaking, "the *character*[s] of the practices that constitute, govern, or change a particular set of supremely authoritative institutions" of Hong Kong and China are entirely different.[364] The authoritative constitutional instrument in Hong Kong is the Hong Kong Basic Law, whilst in China it is the Constitution of the People's Republic of China.[365] The former institutionalized the separation of powers between the executive, legislature, and judiciary,[366] which ensures judicial independence and the rule of law;[367] the latter does not practice such separation of powers and is not bound by the rule of law.[368] The former practices a quasi-democratic system and free market capitalist system;[369] the latter practices the absolute rule of the Chinese Communist Party, which is

360. *Id.* art. 2.

361. *See* HONG KONG JOURNAL, *supra* note 350.

362. *See id.*

363. *See* Basic Law, *supra* note 347, art. 2 (H.K.). One may argue that the National People's Congressional power of interpretation and amendment of the Basic Law as well as the Chief Executive of H.K. being held accountable to the Central People's Government, apart from the H.K. Special Administrative Region, blurred the difference between the H.K. and Chinese people. But I contend that the timeline of political events of the two overlapped in 1997 and thereafter, but such intersection is not overwhelming enough to overcome the past timeline of the two entities nor to blur their institutional differences and distinguishable characters. The European Court of Justice has overriding legal authority on European Union Law over both the U.K. and Germany, but this does not make the two people and countries indistinguishable from each other. Likewise, the Chinese authority's supreme power over certain issues such as the interpretation of the Basic Law does not make the two people indistinguishable.

364. ESPEJO, *supra* note 114, at 162; *see generally* Basic Law, *supra* note 347 (outlining Hong Kong laws as a territory of China).

365. *Constitution*, THE NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA, http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm; *see generally* Basic Law, supra note 347 (outlining Hong Kong laws as a territory of China).

366. DANNY GITTINGS, INTRODUCTION TO THE HONG KONG BASIC LAW 103–06 (2013).

367. Basic Law, *supra* note 347, art. 85 (H.K.).

368. RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 13–14 (2002) (criticizing the Chinese courts' lack of independence and authority due to the Communist Party's power of approval of senior judges, judicial corruption, and the practice of judges meeting ex parte with litigants and lawyers, which undermines fairness and impartiality).

369. Basic Law, *supra* note 347, Annex II Instrument 4 (H.K.) (stipulating that for H.K.'s legislature, half of its members are directly elected according to geographical constituencies composed of all H.K. citizens whilst the other half are elected by functional constituencies made up of a small group of eligible voters). Basic Law, *supra* note 347, art. 5 (H.K.) (ensuring that "[t]he socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.").

undemocratic,[370] and the Constitution prescribes it to be a socialist state.[371] Finally, beside these institutional differences, the majority of Hong Kong people regards itself as a distinct entity different from the Chinese people.[372] It is fair to conclude that, in light of the three criteria of the people as process, Hongkongers are an independent *demos*, a people.

VI. THE LOCUS CLASSICUS OF REVOLUTIONARY DISOBEDIENCE: THE INDIAN INDEPENDENCE MOVEMENT

In this Part, the revolutionary nature of the Indian Independence Movement ("Movement") will be examined. The Movement led India to obtain power of self-determination and democracy gradually, or *swaraj* (self-ruling), and ultimately led to India's complete independence from the British Crown.[373] Indeed, the Movement owes its success to many forms of political revolt, such as civil resistance, civil disobedience, non-cooperation, strike, fast, walk-out, *hartal*, etc.[374] But these are only fragmented forms of political actions that see the bits and pieces of the Movement without seeing the larger whole and the fundament, namely its revolutionary disobedient character. The Indian Independence Movement, which strove for autonomy and self-rule for India, generally ran from 1919 to 1947.[375] But our focus on the Movement will be broken down into three phases, that of 1919 to 1922, 1927 to 1932, and 1939 to 1942. The first two phases made up what I shall name the inchoate or rudimentary stage of the revolutionary disobedience, and the last phase composes its final and conclusive stage, which needs to be analyzed separately.

A. The Movement in Its First and Second Phases: From 1919 to 1932

The Gandhian political wave unveiled upon the return of Mahatma Gandhi to India in 1915.[376] But not until 1919 did Gandhi launch his first act of political

370. *See* MINXIN PEI, CHINA'S TRAPPED TRANSITION: THE LIMITS OF DEVELOPMENTAL AUTOCRACY 15–17, 19–21 (1st ed. 2006). Despite Article 1 of the Constitution that prescribes China to be "a people's democratic state," this is far from the truth. The Chinese Community Party (CCP) is de facto inseparable from the state and voice on behalf of the state. Notwithstanding that the National People's Congress (NPC) is the highest legislative authority, it rarely imposes restrictions on CCP's policies or deters them from being passed into law, incapacitating its constitutional oversight power over the CCP. Most notably, members of both the NPC and the Local People's Congress, the highest authority in a sub-state region, are not directly elected via competitive elections. Also, the CCP's suppression of freedom of expression on politics further stifles deliberation, the very foundation of democracy.

371. *See* XIANFA art. 4 (2004) (China) (noting that China sets "the building of a socialist society" its objective and makes it a constitutional entrenchment).

372. Annalisa Merelli, *These Illustrations Show How Different Hong Kong Thinks It Is from Mainland China*, QUARTZ (July 1, 2015), https://qz.com/442887/how-hong-kong-is-different-from-china-in-a-series-of-offensive-stereotype-based-posters/.

373. Lester R. Kurtz, *The Indian Independence Struggle (1930–1931)*, INTERNATIONAL CENTER ON NONVIOLENT CONFLICT 1 (2009).

374. BONDURANT, *supra* note 28, at 36 (stating that Hartal means "[v]oluntary closing of shops and businesses").

375. Kurtz, *supra* note 373, at 3.

376. *See* ANTONY COPLEY, GANDHI AGAINST THE TIDE 29 (1987).

disobedience against the Rowlatt Bills, which gave the British Raj power of arbitrary arrest and detention without trial.[377] In the eyes of Gandhi, such acts of disobedience were only part of his larger political theory, namely *satyagraha*, which literally means "holding fast to truth" by taking different forms of political actions such as civil disobedience and resistance.[378] The gathering in Jallianwalla Bagh against the Bills led to the infamous killing of 379 and wounding of 1,200 of the crowd by the British troops.[379] The incident led Gandhi to launch his nationwide *swaraj* movement in 1920 in order to obtain self-rule, to "maintain our separate existence without the presence of the English," given the undemocratic constitutional arrangements.[380] "[*S*]*waraj* in one year," Gandhi promised his followers.[381] He asked Indians to withdraw support from the Raj at multi-levels: the civil service, the law courts, government schools, and the newly established legislative councils.[382] The impact of the call on the civil service was the most insignificant with only a few civil servants resigning, but people from other sectors favorably responded with many lawyers ceasing to practice law and many students striking against government schools.[383] During the same year in 1921, the Prince of Wales arrived in India for his state visit, but the Indian National Congress launched a national *hartal* and called for boycott of all ceremonies that the Prince would attend.[384] Riots had eventuated with the *satyagrahis* outlawed.[385] However, "[n]one of the accused defended themselves in court, because a defence would have implied acknowledging the court's jurisdiction."[386] By 1922, Gandhi launched a mass civil disobedience movement, breaking the law by declining to pay tax in Bardoli.[387] "Mass civil disobedience is like an earthquake," stressed Gandhi.[388] "Where the reign of mass civil disobedience begins, there the subsisting Government ceases to function. . . . The police stations, the court offices, etc., all shall cease to be the Government property and shall be taken charge of by the people."[389] Gandhi was eventually imprisoned in 1922, which could be seen as marking the end of the first phase of his disobedient movement, but the new Government of India Act that was implemented in 1921 introduced more democratic elements into the central legislature.[390]

377. *Id.* at 42.
378. Maya Chadda, *Satyagraha: Gandhi's Approach to Peacemaking*, BOMBAY SARVODAYA MANDAL & GANDHI RES. FOUND., http://www.mkgandhi.org/articles/satyagraha1.htm (last visited Apr. 12, 2017).
379. COPLEY, *supra* note 376, at 42. ("On 13 April 1919 some 10,000 . . . unarmed Indians had gathered in Amritsar in an enclosed space, known as the Jallianwalla Bagh.").
380. STANLEY WOLPERT, A NEW HISTORY OF INDIA 304 (2d ed. 1982).
381. *Id.*
382. COPLEY, *supra* note 376, at 43–44.
383. *Id.* at 44.
384. WOLPERT, *supra* note 380, at 305.
385. *Id.* at 306.
386. GEOFFREY ASHE, GANDHI: A STUDY IN REVOLUTION 226 (1968).
387. WOLPERT, *supra* note 380, at 306.
388. *Id.*
389. *Id.*
390. *See id.* at 307–08 (demonstrating the new democratic elements introduced to the Central Legislative Council).

But due to the insufficient democratic nature of the legislatures, self-rule was still severely restricted with widespread poverty problems facing Indians.[391] The Round Table Conference failed to reach a democratic pact for India.[392] Upon rejection of the dominion status of India in 1929, the Indians' demand had been transformed from *swaraj* as self-rule to *purna swaraj* as complete independence.[393] The Congress passed an independence resolution and in 1930, Gandhi proclaimed January 26 as "Independence Day."[394] "The object of our non-violent movement is complete independence for India," which "means nothing more or less than getting out of alien control," remarked Gandhi.[395] As the inauguration of the second wave of *satyagraha*, Gandhi launched his famous salt march.[396] The onerous salt tax imposed by the British Raj posed an extremely heavy burden on the lives of the Indian masses, and therefore, Gandhi chose it as a measure to challenge and deprive the authority of the British.[397] Gandhi led his chosen *satyagrahis* to the Dandi sea-shore to breach the Salt Acts by picking up salt themselves.[398] He urged all Indians to manufacture salt and take the natural salt found at the seashore by themselves.[399] The *satyagraha* was widely echoed across India by the public with countless peasants breaking the Salt Laws.[400] At least 60,000 Indians were imprisoned accordingly.[401] A paralyzing effect dawned on the government with the Congress Committee extending the scope of movement to include the violation of forest laws, the refusal of tax payment in *ryotwari* areas, and the boycott of foreign cloth, banks, shipping, and insurance companies.[402] The whole idea of the Salt *Satyagraha* was, in Gandhi's words, "nothing less than to cause a complete paralysis of the administrative machinery."[403] Gandhi was eventually arrested on May 4, 1930.[404] Upon Gandhi's release in 1931, the Viceroy Irwin offered another Round Table Conference ("Conference") to Gandhi and other members of Congress, during which Irwin made concessions such as allowing salt collection for domestic purposes.[405] The idea of dialogue is central to Gandhi's *satyagraha*, but the Conference failed to be a progressive dialogue for India's democratic reform.[406] The Government of India Act of 1935, produced by the Raj, bore little resemblance to the conclusions made at the Conference, under which the Raj reserved many important powers for itself.[407]

391. *Id.* at 314.
392. *Id.*
393. WOLPERT, *supra* note 380, at 314; *see also* B. R. NANDA, MAHATMA GANDHI: A BIOGRAPHY 288 (1958).
394. NANDA, *supra* note 393, at 290.
395. COPLEY, *supra* note 376, at 31.
396. Salt March, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/event/Salt-March (last visited Mar. 8, 2017).
397. COPLEY, *supra* note 376, at 46.
398. Salt March, *supra* note 396.
399. *Id.*
400. *Id.*
401. *Id.*
402. BONDURANT, *supra* note 28, at 96, 101.
403. *Id.* at 89.
404. COPLEY, *supra* note 376, at 47 ("[Gandhi's] decision to invade a salt works on 24 April led to his arrest on the night of 4/5 May 1930.").
405. *Id.* at 47–48.
406. *Id.* at 47.
407. WOLPERT, *supra* note 380, at 322.

Despite the fact that only less than half of the provincial legislative seats across India were open to nationwide elections, members of Congress won all of them.[408] Moreover, Congress candidates had won other electorate contests, which gave them 70% of the total popular vote.[409] This symbolized that the Congress was projecting the voice of the Indian people and that the Indians demanded complete independence from the British.

B. The Movement in Its Final Phase: The "Quit India" Movement

Due to the failure to democratize India, the Independence Movement had moved from the demand for self-rule under the Raj in the first phase to independence in the second, whilst possibly retaining some form of political attachment to Britain, to the final phase where secession was opted for.[410] With the exhaustion of constitutionalism and after the symbolic "Independence Day" gesture, this time the Congress turned to unconstitutional means.[411] In 1942, the All-India Congress Committee ("AICC") passed the "Quit India" resolution, announcing a revolutionary *satyagraha* movement against the Raj.[412]

> The A.I.C.C., therefore, repeats with all emphasis the demand for the withdrawal of the British power from India. On the declaration of India's independence, a provisional Government will be formed and free India will become an ally of the United Nations, sharing with them in the trials and tribulations of the joint enterprise of the struggle for freedom. The provisional Government can only be formed by the co-operation of the principal parties and groups in the country. It will thus be a composite Government, representative of all important sections of the people of India.[413]

Gandhi was made the leader.[414]

"Quit India" took the whole country by storm, only this time the Movement moved from the denial of the authority relationship between the Indian people and the Raj to its termination by an active attempt to suspend the juridical order in its entirety.[415] The Congress urged a nation-wide strike to end British rule in two months.[416] However, Gandhi and the major leaders were arrested swiftly following the commencement of the Movement, which made it highly dependent on popular participation.[417] In fact, Gandhi had foreseen this:

408. *Id.* at 323.
409. *Id.*
410. *Id.* at 335.
411. *See id.*
412. *Id.*
413. THE EVOLUTION OF INDIA AND PAKISTAN 1858 TO 1947 SELECT DOCUMENTS 342 (C. H. Philips et al. eds., 1962).
414. *Id.*
415. WOLPERT, *supra* note 380, at 335.
416. FRANCIS G. HUTCHINS, INDIA'S REVOLUTION 220 (1973).
417. *Id.* at 218.

> A time may come when it may not be possible to issue instructions or for instructions to reach our people, and when no Congress Committee can function. When this happens, every man and woman who is participating in this movement must function for himself or herself within the four corners of the general instructions issued. Every Indian who desires freedom and strives for it must be his own guide.[418]

In one of its instructions, the AICC issued the following: "Establish a panchayat in your village. The panchayat will be your Government . . . . Wherever you are well-organised, take peaceful possession of the Thanas, courts, and other Government buildings in your area."[419] The Movement was strikingly echoed throughout India with almost everyone contributing.[420] Underground activists included members of Congress and other political leaders, students and teachers, strikers and unemployed workers from factories, workers from social welfare institutions, the Sadhus and Fakirs, etc.[421] The Congress's call for "a gradual escalation through peaceful picketing to active obstruction of roads and the cutting of telegraph wires" was followed everywhere.[422] Such measures were meant to interrupt and demolish the British instruments for repression, since most railways, roads, communications, and government buildings were built only for the British officials and troops and not the masses.[423] Scholars, such as Professor Radhe Shyam Sharma and Dr. Kaushalya Gairola, revolted on campus, closing the gates and declaring the Benares Hindu University free Indian soil.[424] They further declared the university military training corps "the army of free India."[425] Francis Hutchins forcefully remarked that "[t]he implicit purpose of the movement was to destroy the structure of British India."[426] Revolutionary governments were established as an attempt to replace the Raj at different parts of the country, even though they were "extraordinary arrangements for extraordinary circumstances."[427] Panchayat Raj (village self-government) was established in different regions with popular participation in its decision-makings.[428] Police stations were taken over and arrangements for tax collection and law courts were improvised, even though they lasted only for a few weeks.[429] In the subsequent underground phase of the Movement, certain areas were controlled by the Indians for night governing, which the British were only nominally in charge of during

418. *Id.* at 219.
419. *Id.* at 223.
420. *Id.* at 245.
421. *Id.*
422. HUTCHINS, *supra* note 416, at 221.
423. *See* British Raj, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/British_Raj (last visited Mar. 8, 2017).
424. HUTCHINS, *supra* note 416, at 241.
425. *Id.*
426. *Id.* at 224.
427. *Id.* at 250.
428. *Id.*
429. *Id.*

daytime.[430] Even the upper-class approved the Movement, with the Bar attempting to trick the Chief Justice to close the courts.[431] Sir C. P. Ramaswamy Aiyar resigned from the Executive Council of the viceroy and expressed his wish to meet Gandhi; Indian servants high in government were explicitly and constructively cooperating with terrorists.[432] "Almost everyone contributed": Villagers refused to send their grains to the cities and markets for the British; unarmed masses defeated troops and took control of trains; owners and foremen led strikes, which were joined by sweepers and apprentices; "[t]ribes took up their bows and arrows" against the British; and "[c]rowds attacked prisons" whilst "prisoners attacked their guards."[433] The British ran out of sources of information for its police and C.I.D. due to the Indians' non-cooperation, and the government felt powerless and could not trust anyone.[434]

Despite Gandhi's preference of nonviolence, the role violence played in the Movement cannot be ignored. Students and villagers launched organized armed attacks in different rural areas against the police and district officers on a large scale.[435] Bomb explosions became daily occurrences in regions such as Bombay.[436] Activists from the political underground led by Jayaprakash Narayan conducted guerrilla warfare against the government.[437] Therefore, the Movement owes its success to both Gandhians who insisted on non-violent struggles, which disallows pre-meditated forms of violence,[438] excluding spontaneous violence, such as self-defense and destruction of property, and the non-Gandhians who employed organized violence against the British.[439] The Movement succeeded in expressing the will of the Indian people, that they "wanted British rule to end now."[440] "An acknowledgment that in openly defying the law India's most important political organization was supported by general public opinion would be in effect an acknowledgment that the government could no longer govern."[441] The British acknowledged this by recognizing that the Movement was of "the people," which due to its massive support resulted in the breakdown of the law and order.[442] Hutchins made a remark that "[i]n 1942, British rule was apparently impregnable," but the Movement achieved its remarkable feat by "pulling British authority down by a spontaneous uprising[,] . . . a feat accomplished entirely without the aid of regular

430. HUTCHINS, *supra* note 416, at 250.
431. *Id.* at 245.
432. *Id.*
433. *Id.* at 226.
434. *Id.* at 226, 245.
435. *Id.* at 229.
436. HUTCHINS, *supra* note 416, at 230–31 (noting that the number of non-fatal casualties suffered by the police across different provinces, excluding that of the central government, total 2012 cases whilst fatal cases had been 63. Non-fatal attacks suffered by other government servants accumulated for 364 cases. Bomb explosions amounted to 664 cases.).
437. COPLEY, *supra* note 376, at 92.
438. *Id.*; HUTCHINS, *supra* note 416, at 280. Both Hutchins and Copley contend that Gandhi is only against premeditated violence but not the employment of violence itself if done spontaneously.
439. HUTCHINS, *supra* note 416, at 279–80.
440. *Id.* at 268.
441. *Id.*
442. *See id.* at 268–69.

military forces."[443] The success of the revolutionary Movement lies in its disobedient character by denying the authority of the British government and overturning the sovereign-subject relations. "You are our sovereign, our Government, only so long as we consider ourselves your subjects. When we are not subjects, you are not the sovereign either."[444] "India declared herself to be already independent, and in India's will to act independently the revolution had triumphed."[445] Ultimately, the British did act on Gandhi's demand to unilaterally "quit India" in 1947.[446]

During the Independence Movement, the division between the Hindu and Muslim people was deepened, which led to their irreconcilable separation.[447] The "Quit India" Movement was participated in by the widespread Hindu population, but strikingly, the Muslims did not take part in it, even though they did not confront the Hindus nor assist the British.[448] Feelings of unrepresentation by the Congress during the Movement, reinforced the Muslims' collective identity as a "we" against the Hindus as "they."[449] During the first phase of the Movement, the Congress successfully obtained support from Muslims, until the second phase where the Hindu-Muslim fracture began to intensify.[450] The Congress in the 1938 election still won a majority nationwide, including a majority for the 482 separate Muslim seats.[451] By contrast, the Muslim League ("League"), which claimed to be the party that represents the Muslims, by then had only gained 109 seats out of the 482.[452] But under Muhammad Ali Jinnah's leadership of the League, it started to gain momentum by criticizing the Congress for being unrepresentative of Muslims.[453] By the time of the 1945 to 1946 election, which was after "Quit India," the League captured all thirty seats reserved in the Central Assembly for Muslims as well as won 439 out of 494 Muslim seats in the provincial election.[454] This entitled the League to claim itself speaking for the Muslim-dominated regions and to form its coalition ministries in Bengal and Sind.[455] Consistently demanding a separate sovereign state for Muslims with the failure of the Congress and the League to reach a consensus, the League resorted to violence and the "Great Killing" to strive for an independent state.[456] Massive murders were conducted by Muslims towards Hindus, leading to a situation in which "Muslims predominated, more Hindus were murdered" and *vice versa*.[457] Jawaharlal Nehru finally made a concession to allow the League to establish

443. *Id.* at 282.
444. MAHATMA GANDHI: THE ESSENTIAL WRITINGS 313 (Judith M. Brown ed., 2008).
445. HUTCHINS, *supra* note 416, at 283.
446. *Id.*
447. *Id.* at 237.
448. *Id.*
449. *Id.* at 239–40.
450. *See id.* at 240.
451. WOLPERT, *supra* note 380, at 323.
452. *Id.*
453. *Id.* at 325–26.
454. *Id.* at 340.
455. *Id.*
456. *Id.* at 344.
457. WOLPERT, *supra* note 380, at 344.

the Muslims' own state of Pakistan, and in 1947 upon Britain's leaving of India, sovereignty was transferred to two successor regimes, namely India and Pakistan.[458]

VII. REVOLUTIONARY DISOBEDIENCE: A THEORETICAL DISCOURSE

A. Revolution and Revolutionary Disobedience: A Definition

We must first refresh our memories of Flathman's theory of authority and the concept of constituent power discussed in Parts II and III. With those theoretical conceptions, we can put together a concise definition of revolution: A revolution occurs in a state of political rupture between the constituent and constituted power, either where there is a serious dissonance between them over the authority of the constituted power, over the terms of the constitution, or both.[459] Revolution is the process of change wherein the people assert their popular sovereignty to oust the office of government ("*in* authority") or facilitate the fundamental change of the constitution ("the authoritative"), whether constitutionally or unconstitutionally.[460] The change could be completed through non-violent means, even though violent means are most commonplace.[461] Revolutionary disobedience is a form of political disobedience that aims to bring about a revolution. It is a revolutionary endeavor not just to break some unjust laws to appeal to the sense of justice of the majority in the traditional Rawlsian formula or make a strong political conviction against the government, but to void the social contract by putting an end to the authority relationship between the people themselves and the government, and may further attempt to change the constitution of the state and nullify the constitutional contract.

Revolutionary disobedience signifies an exception to the juridical norm and must be accomplished via unconstitutionality and extra-legality, which makes its scope narrower than the concept of revolution. It is also possible that revolutionary disobedience could be initiated with one "*in*-authority" in a territory trying to untie its political and juridical knot with another "*in*-authority," which occupies another area of land; for instance, with the Quebec Government terminating its authority relationship with the Government of Canada (which has not happened, as of yet).[462]

After constructing a precise definition of revolutionary disobedience, we can now proceed to offering a comprehensive discourse of it, including its theoretical as well as practical implications in the real world context.

B. Revolutionary Disobedience as a "State of Exception"

The implications we can draw from the Indian Independence Movement are profound as the Indians had denied the authority and legitimacy of the British Raj

458. *Id.* at 347.
459. Kalyvas, *supra* note 159, at 228.
460. *See* FLATHMAN, THE PRACTICE OF POLITICAL AUTHORITY, *supra* note 61, at 117.
461. *See id.*
462. *See* Michael B. Stein, *Separatism in Canada*, HISTORICA CANADA (Feb. 7, 2006), http://www.thecanadianencyclopedia.ca/en/article/separatism/.

throughout and consistently attempted to suspend the juridical order and put an end to their authority relationship, which is most obvious during the Quit India Movement.[463] As an act of revolutionary disobedience, it signifies a "state of exception," wherein the people decide to deviate from the juridical norms and the normal situation.[464] Under the normal situation, the laws of a legal system are to be obeyed even if some of them are unjust, and civil disobedience is only activated as a measure of protest and appeal; but the exception indicates the people's will to void the legal order in its entirety, such as the passing of the "Quit India" resolution in 1942.[465] "Sovereign is he who decides on the exception."[466] Such state of exception clearly signifies that the legal norms fail to bind anymore, a state wherein the extra- or anti-juridical actions and occurrences "pass over into law" and "juridical norms blur with mere fact."[467] Revolutionary disobedience is anti-juridical, as it goes against the established law and legal order of the state, but it is organized by its own "law."[468] It resorts to the supra-legal right of the people to abolish the government or constitution as they constitute the ultimate source of the legal order.

> The ultimate ground of the exception here is . . . the principle according to which "every law is ordained for the common well-being of men, and only for this does it have the force and reason of law [vim et rationem legis]; if it fails in this regard, it has no capacity to bind [virtutem obligandi non habet]."[469]

As Schmitt famously puts it, "the legal system itself can anticipate the exception and can 'suspend itself.'"[470] "The exception reveals most clearly the essence of the state's authority. The decision parts here from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not be based on law."[471] The sovereign ruler can directly suspend the juridical order by its power against the executive, legislature, and judiciary, but the popular sovereign only undertakes to

463. *See* HUTCHINS, *supra* note 416, at 282.

464. My argument here, that revolutionary disobedience institutes a state of exception, should be carefully distinguished from Agamben's "state of exception" as a paradigm of government, even though they both share similarities. *See generally* GIORGIO AGAMBEN, STATE OF EXCEPTION (Kevin Attell trans., The Univ. of Chi. Press, 2005) (2003). Both of them, for instance, find oneself in an "ambiguous, uncertain, borderline fringe, at the intersection of the legal and political." *Id.* at 1. "The state of exception is not a special kind of law (like the law of war); rather, insofar as it is a suspension of the juridical order itself, it defines law's threshold or limit concept." *Id.* at 4. For Agamben's concern, the initiation and normalization of the state of exception opens Pandora's box as the government can suspend the legal order and the constitution as it deems fit, or suspend the application of law to particular subjects such as the Guantanamo Bay detainees, stripping off their entitlements as legal persons. *Id.* at 3, 5. But the activation of a state of exception by popular sovereignty would not fall into the abyss of absolutism. *Id.* at 5. My concern is not a state of exception within the juridical order, but one that is instituted by the people to suspend the legal order.

465. *See* HUTCHINS, *supra* note 416, at 283.

466. CARL SCHMITT, POLITICAL THEOLOGY 5 (George Schwab trans., The Univ. Chi. Press, 2005) (1922).

467. AGAMBEN, STATE OF EXCEPTION, *supra* note 464, at 29.

468. Romano depicts the paradox of revolution to be this: "[R]evolution is violence, but it is juridically organized violence." *Id.*

469. *Id.* at 25.

470. SCHMITT, POLITICAL THEOLOGY, *supra* note 466, at 14.

471. *Id.* at 13.

suspend the legal order by anti-juridical actions that paralyze it, which leaves its sign of assertion of popular sovereignty, making the juridical order inoperative so as to force the "*in* authority" out of power.[472] The suspension of legal order for the popular sovereign is a protracted process.[473]

C. The Nature of Revolutionary Disobedience

Here, I will further identify and expand on two essential features of revolutionary disobedience so that we can have an even more comprehensive and sophisticated understanding of its nature, as well as to resonate with and support my above arguments.

1. First Feature: Illegality or Extra-Legality

Revolutionary disobedience creates a constitutional moment by first breaking into illegality, by means of which it defines the higher law of the land. A constitutional moment is, by definition, a break in constitutional continuality by which the constitution or the "higher law" of the land is defined.[474] Here, we shall consider Bruce Ackerman's theoretical discourse of American history. His contention is that a key component of the constitutional moment is illegality.[475] This could be seen in the founding of the United States: "[A]s the revolutionary years moved on, Americans insisted that the People could deliberate on constitutional matters only in special bodies whose very name –'convention'– denied that legal forms could ultimately substitute for the engaged participation of citizens."[476] One of the founding documents of the U.S. Constitution, Federalist No. 40, concedes its illegality, but argues that by so doing it "was not undermining the Convention's authority but, if anything, enhancing it–linking it to the institutional form that Publius's contemporaries associated most intimately with We the People."[477] Illegality as a core revolutionary element is also present in the Reconstruction Moments and arguably in the New Deal and Civil Rights Revolution.[478] The significant function that illegality serves is the provision of "the circumstance for the emergence of the popular sovereign, precisely because existing legal norms have receded and opened the door for the people to exercise their constitution-making power."[479] Under such circumstance, the people can exercise their "sovereign authority that legitimized . . . those otherwise illegal acts."[480] An act of revolutionary disobedience must first break into illegality in order to put the legal order into

472. *See id.* at 12.
473. *See id.* (explaining how placing a time limit on measures undertaken for suspension would cause sovereignty to be less significant, even if not eliminated).
474. Roman J. Hoyos, *Who are "the People?"*, 2015-15 SW. L. SCH. 1, 9 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2633349.
475. *Id.* at 10.
476. ACKERMAN, WE THE PEOPLE: FOUNDATIONS, *supra* note 314, at 175.
477. *Id.*
478. Hoyos, *supra* note 474, at 10 n.38.
479. *Id.* at 11–12.
480. *Id.* at 39.

suspension, bringing about the "super" or "extra-legal" state, as if they are voiding the constitutional contract.[481] The illegal nature of the act twists when the ruler-as-sovereign loses its authority and the general public regains the authority to decide as popular sovereign, turning the initial illegality into *extra-legality*.[482] This, nevertheless, should not be conceived as an easy and oft-occurring task. It is only possible where an "extraordinary number," as Ackerman puts it, of fellow citizens are convinced to engage in such disobedient movement with great seriousness that they do not accord to normal politics, which entitles it to the label of "higher-lawmaking."[483] The majority in the polity must accept the initiative after cautious deliberation, and the opponents of the proposal must be allowed to strike back with their ideas.[484]

2. Second Feature: The People as an Existence Outside and Above the Law

Carl Schmitt's *Three Moments of Democracy* could be referenced to clarify the question of why revolutionary disobedience must constitute a state of exception and cannot sit within the constitutional order of the state.[485] In the first moment, "the people exist outside and above the law."[486] Such is essentially a founding moment, "where the people exercise their sovereign authority to create a new constitution."[487] In the second, they exert their power via representation, receding from active engagement in politics.[488] A most commonplace instance of this is election. In the third, the people exist "next to" the constitutional order, whereby through acclamatory practice, the people exert their influence to alter legal norms within the constitutional system.[489] The nature of revolutionary disobedience is to challenge the authority and/or legitimacy of the government and/or that of the state, and therefore it is impossible for it to be classified as Schmitt's second moment of democracy, which is subsumed entirely into the constitutional order.[490] But is it possible to exist alongside with the constitutional order, capable of falling into the "third moment" of the model? I submit that it is not. Unlike the first moment of democracy, which is exception, and the second, which is norm, in the third moment "the people exist . . . both within and outside of the constituted order."[491] The people in such a case can exert their power to change the norms within the constituted order by "acclamation" or "public opinion," where they remain in an unorganized form to voice their will, exercising their constituent power without contravening the permitted constitutional

481. *See id.* at 11.
482. *See id.*
483. ACKERMAN, WE THE PEOPLE: FOUNDATIONS, *supra* note 314, at 6.
484. *See id.*
485. *See* Hoyos, *supra* note 474, at 23.
486. *Id.*
487. *Id.*
488. *Id.* at 23–24.
489. *Id.* at 24.
490. *See id.* at 33.
491. Hoyos, *supra* note 474, at 33.

forms.[492] In the second moment, the people are represented, whilst in the third they are present.[493]

By acclamation, the people directly announce their presence by acting publicly and refusing to be dominated by representation,[494] which renders their existence "next to" rather than within the constituted order.[495] The greatest problem is that it lacks in decisive force to effectuate fundamental changes, as the decision to adopt the new norm must be approved from above by legally-constituted and governing institutions and procedures, easily resulting in an impasse or simply rejection by the in-authority.[496] In stark contrast, by dint of revolutionary disobedience, the people directly reject the present "in-authority" so as to destroy it to rebuild a new one, possibly with a new constitution of the state. It refuses to be bound by the current constituted order. In other words, the people in such instance exist outside and above the law. In fact, an act of civil disobedience, such as that led by Dr. Martin Luther King, Jr., could be seen as an instance of acclamation. Despite being illegal, its aim and outcome are to create new norms within the constituted order without breaking the constitutional continuity of the polity,[497] which is apparently different from the case of revolutionary disobedience.

D. Preconditions of Revolutionary Disobedience

There are certain conditions that must be met before a recourse to revolutionary disobedience is possible. Previous theoretical studies from Part V inform us of such necessary conditions. First, it requires territorial concentration of the people. If a people are not a territorially concentrated group, it would be impossible for them to be the majority or the substantial bulk of people in the said region, and therefore impossible for them to disrupt the supremely authoritative institutions therein and to reconstruct them afterwards. Territorial dispersion effectively prevents revolutionary disobedience from happening from the start. Second, those authoritative institutions of the land should have the potential to be self-operative and self-sufficient. If this

492. *Id.* at 33–34.
493. *See id.* at 35–36.
494. *Id.* at 35.
495. *Id.*
496. There are other arguments claiming that acclamatory practices easily result in indecision and public opinion that is misread and misunderstood. Hoyos contends that the problem with it lies in the unlikelihood of the people to mobilize their sovereign authority but cease at the stage of proclaiming their opinion. *See id.* at 37. The manipulation of "public opinion" poses another issue. Hoyos, *supra* note 474, at 37. Schmitt himself argues that "[t]he weakness is that the people should decide on the basic questions of their political form and their organization without themselves being formed or organized. This means that their expression of will are easily mistaken, misinterpreted, or falsified." *Id.* He further stresses that public acclamation is "incomprehensible and resistant to organization." *Id.* at 36.
I respectfully disagree as acclamation does not need to result in these problems. The "genuinely assembled people," as opposed to the people institutionalized, can be organized even not institutionalized. They need not be indecisive and indecipherable in their substance. Civil disobedience and civil resistance do bite, even though not as powerful as revolutionary disobedience: they are capable in expressing a forceful message, which is easily readable, despite subject to interpretation. Consider the civil rights movement led by King in the United States that appeals to ending racial inequality. The true weakness of it, rather than the ones contended above, lies in requiring the "*in*-authority" to accept its plea, which can simply refuse it.
497. *See* ZINN, *supra* note 10, at 29.

condition is granted, the relevant *demos* can segregate and isolate itself from the larger unit. For instance, Hong Kong, Catalonia, and Scotland are autonomous units, which are potentially sovereign and separable from China, Spain, and the United Kingdom respectively.[498] A local government can act in defiance of the central government, or a sub-state society can act against the state, or a state can act against the confederation or federal government.[499] Potentially any territorially concentrated *demos* can become a newly independent people where a substantial amount of them consider themselves a people, and provided there is the presence of a unique spatio-temporal sphere, with its ability to construct a set of new supremely authoritative institutions and to destruct or reconstruct the existing set if there is any.[500] Espejo's theory of people as a process perfectly resonates with my theoretical account that a people can be ontologically individuated and differentiated given the presence of three unique conditions, namely: (1) "the time and place in which the process occurs"; (2) "the character of the practices that constitute, govern, or change a particular set of supremely authoritative institutions"; and (3) "whether the individuals who are under the authority of the process's authoritative institutions conceive of themselves as part of different peoples."[501]

The exercise of revolutionary disobedience, moreover, is inherently democratic. If Markovits' model of democratic disobedience is democracy-*enhancing*, which seeks to remedy the democratic deficit of a specific law or policy, [502] revolutionary disobedience is democratic in a more fundamental sense: the assertion of popular sovereignty. As explicated above, democracy is the collective authorship of the sovereign will, a process of self-determination wherein individual self-determination aligns with the collective self-determination through deliberation and contestation.[503] By assuming constituent power as its basis, a recourse to revolutionary disobedience is the exercise of self-determination by ousting the government through mass mobilization, which is a collective, deliberative action.[504] It could be an attempt of the popular sovereign to consciously form their political *will* to co-institute its constitution, which gives the constitution its legitimate normativity as the fundamental norm of the polity.[505] This is a process of fundamental norm and institutional creation through which the sovereign will is registered as the highest

498. Ho Wai Clarence Leong, *Hong Kong, Scotland and Catalonia, a Tale of Three Referenda*, COSMOPOLITA SCOTLAND (Jan. 23, 2015), http://cosmopolitascotland.org/en/hong-kong-scotland-and-catalonia-a-tale-of-three-referenda/.

499. *See, e.g.*, U.S. HISTORY, *The South Secedes*, http://www.ushistory.org/us/32e.asp (last visited Mar. 14, 2017).

500. *See* ESPEJO, *supra* note 114, at 163.

501. *Id.* at 162.

502. Markovits, *supra* note 14, at 1902.

503. Post, *supra* note 257, at 27.

504. An example of this is the Indian Independence Movement narrated above.

505. An example of this is the American Revolution so far as it is understood as a deliberative body of representatives trying to decide their own future as a collectivity (the "Americans"), as against being coerced by the will of others (the British Crown). But under a modern perspective, apparently we could criticize such a deliberate body to be under-inclusive, and its colonization of America as an infringement of the Native Americans' right of self-determination.

norm of the land, what Ackerman calls the "higher-lawmaking" and "constitutional moments."[506] We can further look into Ackerman's theory to elaborate on this point.

One of the most powerful republican theories is Bruce Ackerman's dualist conception of democracy.[507] In times of normal politics, the general will of the people may not be recognized correspondingly through constitutional *reason* (the established political or legal order).[508] For instance, in a representative democracy, the representatives, such as the senators, are elected by the people and claim that they are "representing" the people, but there is no guarantee that they act according to the general will. Because of the concentration of power in any government, despite democratic, it may still be an elected despotism.[509] Ackerman explicates this point by arguing that "we must systematically reject the idea that when Congress (or the President or the Court) speaks during periods of normal politics, we can hear the *genuine* voice of the American people."[510] Indeed the higher track of politics, the one that exhibits the real voice of the people, manifests itself only during the rare periods of constitutional politics when there is a heightened consciousness to define their collective identity and the fundamental principles that shall govern themselves, to engage in "higher lawmaking" through deliberation.[511] They ask fundamental questions, such as "who are we," and "what are the deepest inalienable commitments that should make up our community?" These are the so-called "constitutional moments," where private citizens attempt to hammer out considered judgments on matters of principle, which are usually reached after years of popular mobilization and profound debate.[512] This makes it different from normal politics, which are not concerned with constitutional principles but rather "lower lawmaking," which is usually more vulnerable to petty self-interest of people and party politics.[513] Ackerman's dualism powerfully explicates why democracy is about the alignment of the sovereign will and the general will of the people and that it is about the collective authorship of the sovereign will.[514] By destroying the illegitimate state authority, revolutionary disobedience allows the people to exhibit their general will by demonstrating that the constituted power (the government) does not genuinely represent their will. It also enables the mass population to directly engage in constitutional creation and authorship, to underwrite the fundamental principles of the community.

506. *See* Bruce Ackerman, *Storrs Lectures: Discovering the Constitution*, 93 YALE L. J. 1013, 1022, 1039 (1984).

507. It should be noted, nonetheless, that Ackerman's dualism is employed to analyze how in American politics a process of higher-lawmaking is achieved as acclamatory practice without surpassing constitutionalism, wherein the people's will and call are represented by the government in the process. *Id.* at 1039. But in contrast, revolutionary disobedience as a constitution-creation is a process of higher-lawmaking whereby the people exist above and outside the law.

508. *See id.* at 1026.

509. *See id.*

510. *Id.* at 1027.

511. *See id.* at 1039–40.

512. Ackerman, *Storrs Lectures*, *supra* note 506, at 1038.

513. *Id.* at 1035.

514. *See id.* at 1042.

> During these moments of profound rupture, citizens re-claim their delegated sovereignty through direct popular action. Because the constitutional provisions do not license these moments of creativity, the amendment that the constitutional moment carries is not, legally speaking, democratically licensed. Yet they are democratic in a more fundamental sense as exercises of political sovereignty.[515]

E. Conversation or Coercion?

Another intricate question arises. Under a state of profound rupture, does revolutionary disobedience lead to a dialogue between the constituent power and constituted power, or is it a mere coercion? I suggest that we can find the answer to this question by first studying a Gandhian political theory of *satyagraha*. Theorist Bhikhu Parekh contends that *satyagraha* is based on a non-rationalist spirit of rationality, which is capable of leading to a genuine dialogue.[516] Traditional rationalists consider *reason* to be essential to rationality, and, when reason as discussion fails, all that is left is violence.[517] Parekh accuses this as a false dichotomy of rationality and morality, and *satyagraha* reconceptualizes the locus of rationality: Discussion is not always rational, and rational dialogue implies that the relevant parties are prepared to propose and be influenced by argument.[518] The end of *satyagraha* is to facilitate a dialogue, by insisting on certain commitments in a truthful and sincere manner, to attempt to move and persuade the other party to reconsider its convictions with sympathy and wholeheartedness and not selfish interest.[519] Parekh argues that almost every *satyagraha* that Gandhi launched passed through three stages: "[A] clear and reasoned defence of its objectives, a popular agitation to convince the government of the intensity of popular feeling, and an ultimatum to give it the last chance for negotiation."[520] As analyzed above, the disobedient movements always led the British to reconsider their submissions and led to a dialogue and a renewal of dialogue.[521] But still, *satyagraha* is a form of coercion, even though it may not coerce its subject to make *specific* concessions but to reconsider its stance on the one hand, and the satyagrahis' proposals on the other, as well as engages in a reflective discussion.[522]

Likewise, the employment of revolutionary disobedience turns the state into an exception, which paralyzes the legal order, forcing the sovereign-as-ruler to reconsider its convictions. The first two phases of the Indian National Movement can be seen as such. The popular mobilization exhibits a rupture, but it could be discerned as a form of "action dialogue"—a constitutional conversation between the sovereign

515. SCOTT VEITCH ET AL., JURISPRUDENCE: THEMES AND CONCEPTS 69 (2d ed. 2012).
516. *See* BHIKHU PAREKH, GANDHI'S POLITICAL PHILOSOPHY 164 (1991).
517. *Id.* at 164–65.
518. *See id.* at 165.
519. *Id.* at 143–44.
520. *Id.* at 150.
521. *See, e.g.*, HUTCHINS, *supra* note 416, at 282–83.
522. *See* PAREKH, *supra* note 516, at 143–44.

and the people.[523] Ackerman illustrates this point in a fascinating manner. He argues that the people interact with the government in an intricate way.[524] For instance, during the Civil Rights Movement led by Dr. King, the people engaged in mass mobilization, such as civil disobedience in demonstration of their will.[525] Whilst the larger population may not have engaged in civil disobedience or campaign, they made a decision to choose President Johnson over Goldwater.[526] Meanwhile, the former endorsed the Civil Rights Act of 1964 while the latter condemned it, giving the voters a choice to define their constitutional identity.[527] Ackerman argues that the ordinary Americans, by choosing Johnson, amended the written constitution.[528] Besides, the Congress, the President, and the Supreme Court responded to the Movement in multiple ways, the most prominent of which is the decision of *Brown*.[529] Despite the political rupture, a dialogue is still possible between the constituted and constituent power through action and reaction.

However, we must not romanticize the extent to which a dialogue is possible to achieve. Non-violent, dialogue-generating political disobedience can only go so far to subject its target into reflection and could only succeed if it sincerely does so. It all hinges upon the other party's response-ability: it would not yield to any results if the re-contemplation is superficial or the division in opinion between the parties is too deep-seated. This marks the limits of non-violent political disobedience, both civil and revolutionary, even though revolutionary disobedience is more forceful given its intensity and damage, albeit non-violent. In fact, the first two phases of the Indian Independence Movement's failure to secure the desired outcome were partly attributable to Gandhi's insistence on non-violence.[530] Non-violent political disobedience easily results in an impasse where the contenders both hold fast to their own convictions, or where concessions are made, the compromise reached is only another evil.[531] This ultimately leads to the role of violence,[532] which might be necessary or even morally obligatory to trump injustice.[533] The "Quit India"

523. *See* VEITCH ET AL., *supra* note 515, at 69.
524. *See* Ackerman, *De-Schooling Constitutional Law*, *supra* note 41, at 3116.
525. *See id.*
526. *Id.* at 3117, 3118.
527. *Id.* at 3118.
528. *See id.*
529. *See generally* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (ruling that the doctrine of separate but equal had no place in education).
530. WOLPERT, *supra* note 380, at 335.
531. See *id.*
532. In the modern era we start to abhor the idea of violence and its application of politics, but let us not forget that it may be necessary as the ultimate means to vanquish the greater evil. Craig Rosebraugh contends that the American Revolution is an armed struggle, Nelson Mandela had resorted to violence in the South African freedom struggle after exhausting peaceful means, and King's Civil Rights Movement owed its success partly to the Black Panther group's armed struggle. Given the sound reasoning and history of political violence, Rosebraugh argues that it enjoys legitimacy. *See* CRAIG ROSEBRAUGH, THE LOGIC OF POLITICAL VIOLENCE 247–61 (2004).
533. I do not wish to twist the meaning of "violence" to encompass concepts such as injustice, which is very often done by theorists that take its definition beyond recognition. Bufacchi offers a succinct definition of violence: it is a violation of the integrity (understood as wholeness) of a being, whether human or object, caused by an action or omission. Admittedly, violence is an evil because it is undesirable, but it may be justified for the sake of justice. Bufacchi proposes five principles that could justify violence: (1) the principle of self-defence; (2) the principle of reasonable success ("a reasonable probability of success"); (3) the principle of proportionality ("the use of violence must be proportional to the violence it encounters"); (4) the principle of last resort (violence is justified "only if all

Movement attained its triumph with both violent and non-violent tactics, and without violence it could not have caused as much destruction to incapacitate the British ruling.[534]

F. The Umbrella Movement: When Civil Disobedience and Dialogue Fail

Civil disobedience traditionally seeks to break the law in accordance with certain political principles to appeal to the majority and coerce its subject, whether the people or government, into reconsidering its convictions and beliefs.[535] But what if civil disobedience fails to achieve its desired aims? Would that lead to simply more acts of civil disobedience and civil resistance? And what if they fail too and the government is completely irresponsive? If we are to take direct actions, do we resort to violent actions in compliance with the principle of last resort and gradual progression *tout court*? In this section, I will set out such an example, namely the Umbrella Movement, which in stark contrast to the American Civil Rights Movement, did not obtain any genuine response from the government. I will argue that the dichotomy between non-violent civil disobedience and violent revolutionary attempt is a false one, and non-violent revolutionary disobedience can offer a third way out as a direct course of political action.

In January 2013, Mr. Benny Tai first proposed the idea of employing civil disobedience to strive for democracy in Hong Kong.[536] His idea was, as a last resort where other legal attempts failed, a civil disobedience movement, which can be initiated with at least 10,000 people blocking the main blocks and roads in Central, Hong Kong to "paraly[z]e" Hong Kong's political and economic capital, hence the name "Occupy Central."[537] Such action was carried out with an aim to force the Beijing government to change its stance and grant Hong Kong people "genuine election" over the chief executive and all members of H.K.'s Legislative Council.[538] Mr. Tai explicitly set out the reason behind the recourse to civil disobedience: Hongkongers have been fighting for democracy for over thirty years, but the H.K. election system is still immensely undemocratic.[539] More recently, Hongkongers are

peaceful alternatives have been exhausted"); and (5) the principle of gradual progression ("one has a duty to always start with the minimum amount of violence" and escalate gradually). VITTORIO BUFACCHI, VIOLENCE AND SOCIAL JUSTICE 90–91, 166–67, 178–85 (2007).

534. Despite having employed violent measures, it must be recognized that violence is not the only factor that led to the triumph of the Movement, but one of the contributing causes. The previous Indian revolt against the British in 1857, for instance, despite its recourse to violence to overthrow the British Raj, failed. *See* HUTCHINS, *supra* note 416, at 282–83.

535. CIVIL DISOBEDIENCE IN FOCUS 122 (Hugo A. Bedau, 1973).

536. Benny Tai (戴耀廷), *Gongmin Kangming de Zuida Shashangli Wuqi* (公民抗命的最大殺傷力武器) [Civil Disobedience as the Most "Destructive" Weapon], H.K. ECON. J., (Jan. 16, 2013); Grace Tsoi & Bethany Allen-Ebrahimian, *Hong Kong Protest Leaders: Who are the People Behind the Movement?*, STAR (Oct. 2, 2014), https://www.thestar.com/news/world/2014/10/02/hong_kong_protest_leaders_who_are_the_people_behind_the_movement.html.

537. BENNY TAI, ZHANGLING ZHONGHUAN, (佔領中環) [OCCUPY CENTRAL] 32–34 (3d ed., 2013).

538. *Id.* at 47. This, indeed, falls into the classic paradigm of liberal disobedience under Markovits's classification.

539. At present, only half of the members of the Legco are directly elected by the Hong Kong citizens, whilst the other half are elected only by eligible voters under the functional constituencies, which have fewer than 10,000

guaranteed the constitutional right under the Hong Kong Basic Law to elect the chief executives and the whole body of the legislature, but since 2003, all meaningful democratic reforms have been jettisoned by the H.K. government.[540] Legal attempts to facilitate discussion over democratic reform had been made in numerous manners but failed.[541] Tai's "Occupy Central" fit perfectly into the Rawlsian conception of civil disobedience, which stresses the non-violent, public, and political nature of the act.[542] Tai also lays emphasis on generating deliberation, having made three "deliberation days" for any people interested in participating for the sake of negotiating and discussing issues concerning H.K.'s democracy realization and the details and principles of an aspired election system.[543] Only after such extensive discussion would possible options be put forward by a professional committee of constitutional and political experts, which also need to receive "democratic authorization" of the H.K. people.[544] These proposals would then be submitted to the H.K. government and the Beijing government for their consideration.[545] If and only if the governments reject both the proposals and fail to bring out other acceptable options would "Occupy Central" be initiated.[546] Tai stresses time and again that those democratic reform proposals must conform to international standards[547] and not be fettered with "Chinese characteristics."[548]

registered voters since 2012. *See* GITTINGS, *supra* note 366, at 135. So far as the chief executive is concerned, its candidates are elected by the Election Committee composed of only 1,200 people from different sectors such as the financial industry. The members of the Committee are not elected nor authorized by the H.K. people. *Id.* at 95–99.

540. The H.K. government did propose undemocratic electoral system reform, however. In June 2014, the H.K. government began a public consultation on reform for the 2017 chief executive election mechanism. However, on August 31, the NPCSC announced to retain the past method of formation of the Election Committee but candidates would need above fifty percent of its members' endorsement for the candidacy. Only after such pre-screening could H.K. citizens vote for the candidates to be the chief executive. It is a blatantly undemocratic arrangement. *See* SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS, THE SIX-MONTHLY REPORT ON HONG KONG 1 JULY TO 31 DECEMBER 2014, 2015, at 2–3 (UK).

541. Legal attempts had been made in numerous ways: Protests including the traditional July 1 march that has been held every year since 2003, Legco members from the Pan-democracy camp consistently demanding for democratic reforms and for that reason, even resigning from Legco to stage a mini-referendum which earns its name the "Five Constituencies Referendum." *See* Stephan Ortmann, *The Umbrella Movement and Hong Kong's Protracted Democratiszation Process*, 46(1) ASIAN AFF. 32, 39–48.

542. Tania Branigan, *Occupy Central Gives Downtown Hong Kong a Taste of Disobedience* (Mar. 6, 2014 1:41 PM), https://www.theguardian.com/world/2014/mar/06/occupy-central-hong-kong-democracy-campaign.

543. TAI, OCCUPY CENTRAL, *supra* note 537, at 44–46; *see also* Kin-man Chan, *Occupying Hong Kong*, 12 SUR J. 1, 2 (2015).

544. Kin-man Chan, *supra* note 543.

545. *See id.* at 4.

546. *See id.*

547. TAI, OCCUPY CENTRAL, *supra* note 537, at 54, 56–57; *see* Luke Cooper, *Interview: Occupy Central Founder Benny Tai Yiu-Ting*, RED PEPPER (Sept. 11, 2014), http://www.redpepper.org.uk/the-spirit-of-civil-disobedience/; *see* HUMAN RIGHTS COMMITTEE, CONCLUDING OBSERVATIONS ON THE THIRD PERIODIC REPORT OF HONG KONG, CHINA, ADOPTED BY THE COMMITTEE AT ITS 107TH SESSION (11-28 MARCH 2013), ¶ 6, U.N. DOC. CCPR/C/CHN-HKG/CO/3 (Apr. 29 2013) [hereinafter *Concluding Observations*]. Conformity to international standards of democracy could be read against and guided by legal instruments such as the International Covenant on Civil and Political Rights. In fact, even the Human Rights Committee criticized the H.K. government for its lack of clear planning for promoting the people's right to universal suffrage and urged the government to "implement universal and equal suffrage in conformity with the Covenant as a matter of priority for all future elections." *Concluding Observations*, ¶ 6 U.N. Doc.

548. Cooper, *supra* note 547.

Tai's plans had been carried out, at large, accordingly.[549] The three Deliberation Days were carried through, and the leaders of the movement put in place a "civil referendum" from June 20-22, 2014, which allowed all H.K. citizens older than eighteen to vote in polling stations or on an online system over their preferred election mechanism for H.K.'s chief executive.[550] They were given three options: public nomination, a broadly representative nominating committee, and a mixed nominating system, which allows "nomination from the public, political parties, and the nominating committee."[551] Around 800,000 of H.K.'s seven million population had voted in the referendum, and the majority favored the mixed system.[552] Given 2014 was the year of consultation for the 2017 chief executive election reform, the referendum did not include voting for the election method for the LegCo members.[553] But soon after the referendum, the Standing Committee of the National People's Congress made the decision that the composition, arrangements, and number of members of the nomination committee for 2017 would remain identical as before: the same unrepresentative nomination committee composed of 1,200 members.[554] However this time, each candidate would need to be endorsed by 50% of its members instead of the 12% threshold for the previous election committee.[555] But this remained a proposal by the Standing Committee, which would need to be passed by the LegCo.[556]

This eventually led to the outbreak of the Umbrella Movement.[557] Following the NPCSC decision, around 13,000 university students participated in a boycott on September 22, and leaders of Scholarism and the Federation of Students jumped into the fenced Civic Square, which is attached to the H.K. government headquarters, as a sign of protest.[558] Due to the heavy police force employed, Tai and other Occupy leaders joined the protest and proclaimed the start of Occupy Central.[559] But as student leaders took the lead over the Movement, it did not go exactly the way as Tai planned.[560] Occupation took place across main roads in Admiralty instead of Central, and it spread to Causeway Bay, Mong Kok, and Tsim Sha Tsui.[561] As the police started to use pepper spray and tear gas against the protesters in Admiralty on September 27, more people joined the Movement.[562] The messages of the Movement were loud and sound: "'[W]e want genuine universal suffrage . . .' and 'self-

549. *See* Kin-man Chan, *supra* note 543, at 5.
550. *Id.* at 3.
551. *Id.* at 4.
552. *Hong Kong Democracy "Referendum" Draws Nearly 800,000*, BBC NEWS (June 30, 2014), http://www.bbc.com/news/world-asia-china-28076566.
553. *See* Kin-man Chan, *supra* note 543, at 1.
554. *Id.* at 4.
555. Johannes Chan, *Hong Kong's Umbrella Movement*, 103(6) ROUND TABLE 571, 576 (2014).
556. *Id.*
557. *Id.*
558. *School Students Join Week-Long HK Democracy Protests*, BBC NEWS (Sept. 26, 2014), http://www.bbc.com/news/world-asia-29373615.
559. Kin-man Chan, *supra* note 543, at 5.
560. See i*d.*
561. *Id.*
562. Johannes Chan, *supra* note 555.

determined destiny.'"[563] Despite its clear messages, neither the H.K. government nor the Beijing authority made any meaningful response.[564] The Movement did encourage the government to meet the students, where the student leaders of the Movement made clear to the government that they demanded the withdrawal of the NPCSC decision, the endorsement of public nomination for the chief executive election, the abolition of functional constituencies operating the LegCo election mechanism, and a clear timetable to reach these objectives.[565] That said, the H.K. government offered no real alternative reform options but only proposed to submit a report to the Beijing authority and undertake to enlarge the scope of representation of the nomination committee in the next round of consultation.[566] The student leaders accused such "offers" as too ambivalent and refused to accept them, hence returning to the occupied areas.[567] Throughout the Movement, police brutality was pervasive.[568] Police constables were video-recorded kicking and beating protesters, as well as deliberately permitting gangsters to batter and assault protesters.[569] After the injunctions were issued by the courts to disallow protesters to occupy the districts and the masses were dispersed by the police, the H.K. government refused to discuss any further the 2017 chief executive election reform.[570]

The Umbrella Movement failed to secure any outcome.[571] In this sense, even the first two phases of the Indian National Movement are comparatively more successful in securing democratic reforms fed by the British Raj in a piecemeal fashion. Given the irresponsive and insincere attitude of the H.K. government, there has not been any genuine dialogue, nor is there likely to be any.[572] The American Civil Rights Movement, analyzed above, which took place in a state where a democratic system is largely present and its practice secure, inherited what Ackerman called a dualist constitutional system, which is responsive and reflective, under which the constitution could change by the people's initiation with their proposal.[573] The essence of a democratic system is to enable a revolution to be brought about within the system without demolishing it[574] and the destructive consequences that usually accompany a revolutionary act. Nonetheless, it is highly improbable, if not

563. *See* Adrian P. Y. Chow, *The Umbrella Movement: The Bigger Picture Behind and Its Broader Imaginations*, 47 CULTURAL STUD. LINGNAN 1, 4. The overrunning theme and demand of the Movement is democracy and self-determination because it is a reaction against and opposition to the NPCSC's decision to forbid democratic reforms of the election system. Other messages that appeared in the Movement, such as the alleviation of economic inequality, are merely ancillary.

564. *See* Johannes Chan, *supra* note 555, at 577 ("The government at first agreed to hold talks with the students on 13 October 2014, but it unilaterally cancelled the talks at the last minute.").

565. *Id.*

566. *Id.*

567. *Id.*

568. *See, e.g.*, *Hong Kong Police Charged Over Protester Beating*, BBC NEWS (Oct. 15, 2015), http://www.bbc.com/news/world-asia-china-34536710.

569. *Id.*

570. *See, e.g.*, Chris Buckley, *Three Months of Protests End Quietly in Hong Kong*, N.Y. TIMES, Dec. 15, 2014, at A6.

571. *See id.*

572. *See* Kin-man Chan, *supra* note 543, at 6.

573. *See* ACKERMAN, WE THE PEOPLE: FOUNDATIONS, *supra* note 314, at 6.

574. *See* Jean Hampton, *Democracy and the Rule of Law*, *in* THE RULE OF LAW 13, 32–34 (Ian Shapiro ed., 1995).

impossible, to reconstruct the constitutional arrangements or to change the political system as the people wish where the constituted power is unresponsive and illegitimate.[575]

This is the deadlock in which H.K. finds itself. It is hardly possible for the H.K. people to secure fundamental political changes (as the Americans did) under a largely undemocratic system, where the chief executive and other executive members are unaccountable to the public. Moreover, the U.S. government can reasonably be called to possess legitimacy over its people, but, in contrast, the H.K. government is seriously deficient in legitimacy, if there is any.[576] Most markedly, it lacks in democratic legitimacy and the Razian sense of legitimacy: It is neither democratically authorized nor capable of performing its tasks under the service conception of authority. It has failed continuously even to grant Hongkongers their constitutional right to elect their chief executive and the LegCo members.[577] This could justify the Hongkongers to deny the legitimacy of their government and put an end to their authority relationship if they so choose.

Having analyzed in Part V that Hongkongers are themselves a people, they have the right and power as a single unit to exercise popular sovereignty to overthrow the government and rewrite the constitution. The Hongkongers as a *demos* satisfies the two essential conditions for revolutionary disobedience: (1) It is a territorially concentrated people spreading across the Hong Kong territory, which marks its land border at the north of the New Territories (H.K.) with Shenzhen, China; and (2) it has a potential for complete self-governance as it already has a local government with the executive, legislature, and judiciary in place, which wields the highest power in the respective domains, despite subject to the authority of the PRC over a limited range of issues.[578] Under this setting, the Hongkongers can cease the authority relationship between themselves and the Chinese government and attempt to forfeit the Hong Kong government's authority over themselves, authorizing a new government in the territory as well as engaging themselves in their higher law-making to define the constitution. This does not mean that they have to resort to violence immediately after civil disobedience has failed and if it continues to fail, but they could resort to non-violent revolutionary disobedience as another starting point, which is even more forceful, coercive, and pervasive. A reference point is the first two stages of the Indian Independence Movement delineated above, which are non-violent at large.[579]

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575. *See id.* at 34.

576. *See* discussion *supra* Section VII.D. As a side note, on the practical dimension, denying the legitimacy of the U.S. government and aiming to demolish its authority over African Americans may be counterproductive. As mentioned, the recourse to revolutionary disobedience requires a regionally-concentrated people, whereas African Americans are dispersed across the U.S. and therefore cannot make use of the revolutionary disobedience model formulated in this Article. *See id.* On the contrary, the Hong Kong people can resort to revolutionary disobedience, given the concentration of its population and clearly defined territory, which separates itself from China. *Id*

577. Kin-man Chan, *supra* note 543, at 4.

578. *See China's Special Administrative Regions (SAR)*, UNDERSTANDING CHINA, http://understand-china.com/special-administrative-region-sar/ (last visited Apr. 13, 2017); *see* Part V. D for further explication on the subject.

579. In these pages, I do not attempt to recommend the concrete specific methods and mechanisms by which Hongkongers can apply for a revolutionary disobedience movement, as this Article focuses on offering theoretical

VIII. POLITICAL DISOBEDIENCE AND THE RULE OF LAW DEMYSTIFIED: A REPLY TO THE HONG KONG BAR ASSOCIATION

In this Article, I have expounded a theory of revolutionary disobedience and the difference between it and civil disobedience. Some may be tempted, despite its empirical and theoretical tenability, to question its morality and justifiability. One of such questions may be: Is revolutionary disobedience compatible with the rule of law? Due to its jurisprudential significance, I devote a section to explicate the compatibility of revolutionary disobedience with the rule of law and answer the question of how the rule of law informs us differently on civil disobedience and revolutionary disobedience. Also, given the interesting arguments that the Hong Kong Bar Association ("HKBA") had advanced on the subject of the rule of law and civil disobedience, I attempt to offer a reply to them as well as an analysis on the subject in order to dispel the theoretical perplexities.

A. Objections from the Hong Kong Bar Association

In 2004, amidst the outbreak of the Umbrella Movement, court injunctions were granted on three occasions to clear the protest sites in Mong Kok, Admiralty, and Causeway Bay respectively.[580] The HKBA urged the protestors to comply with the injunctions and leave the sites, arguing that insubordination to the court rulings would be "a direct affront to the Rule of Law"[581] despite the admission that the protest itself can be justified as a case of civil disobedience.[582] However, the HKBA's statements are ambivalent, to say the least, on how the defiance of court injunctions is inimical to the rule of law but only ceaselessly repeat their objection to such course of action as well as resort to citations here and there.[583] The HKBA further alleges

assessments and discourse on it. See generally GENE SHARP, FROM DICTATORSHIP TO DEMOCRACY 79 (Albert Einstein Inst., 2010), for a practical application of non-violent political struggle. Appendix One of the book provides 198 exemplary methods of non-violent actions. *See id.* at 79–86. Most of its suggested methods of political intervention are seen in the Indian Independence Movement, such as "overloading of administrative systems," "seeking imprisonment," "civil disobedience of 'neutral' laws," building "dual sovereignty and parallel government," etc. *Id.* at 86.

580. Chris Buckley & Alan Wong, *Hong Kong Clears an Area of Pro-Democracy Protesters*, N.Y. TIMES, Nov. 17, 2014, at A8.

581. H.K. B. ASS'N, STATEMENT OF HONG KONG BAR ASSOCIATION IN RESPECT OF MASS DEFIANCE OF COURT ORDERS [hereinafter MASS DEFIANCE OF COURT ORDERS], ¶ 2 (2014).

582. H.K. B. ASS'N, STATEMENT OF THE HONG KONG BAR ASSOCIATION ON THE RULE OF LAW AND CIVIL DISOBEDIENCE [hereinafter THE RULE OF LAW AND CIVIL DISOBEDIENCE], ¶ 2 (2014).

583. The H.K. Bar Association made clear that the deliberate breach of court injunctions makes one legally liable to the criminal charge of contempt of court, but its contentions lack in solid theoretical grounding as to how is such defiance "unquestionably" erosive to the rule of law. *See id.* For instance, it cited a precedent of the H.K. High Court's ruling on civil disobedience wherein the defendant defied the court injunction:

> If it is shown that any of the defendants have acted in contempt of that injunction they will be held accountable. I say that because, unless the integrity of our judicial system is honoured, this court will be unable to afford the very protection that the defendants themselves have sought from it.

Sec'y for Justice v. Ocean Tech. Ltd. (t/a Citizens' Radio),

that "the inescapable fact is that any discussion of electoral progress must be conducted within the framework of what is constitutionally permitted."[584] It cites the Honourable Mr. Justice Kemal Bokhary's view that "any proposal of universal suffrage in Hong Kong must be pursued within the framework of the Basic Law," warning that "the HKBA views with considerable alarm the suggestion from some quarters, in the course of the continued political discourse, that any discussion of constitutional or legal principles is a form of 'trickery' or insistence on 'trivial technicalities.'"[585] We cannot help but ask: Is the Bar Association right in this instance on the rule of law and constitutionality? For political disobedience, does it come into irreconcilable conflict with the ideal of the rule of law, and if so, which should prevail? If we are reminded of Raz, the bewilderment only deepens.[586] Before arguing on those issues, we must come clean about what the rule of law is and how the HKBA comes to its conclusion.

B. The Rule of Law Demystified

The concept of "the rule of law" is a much contested subject, with different understandings of its constituent elements by different theorists. Scholars notice the ambivalence of the idea of the rule of law, which increasingly becomes a moral high-ground lacking in substance.[587] But generally the concept can be classified into a number of different accounts. Theories of the rule of law can first be divided into formal versions and substantive versions, with the former stressing its formal and procedural character and the latter adding into formality with other content specifications such as individual rights.[588] For both versions, theories could generally be distinguished with their degree of requirements in the concept of "the rule of law," running from "thinner" to "thicker" accounts.[589] We should start off with the formal theories.

HKCU 1915 [10], Nov. 24, 2009, http://law.lexisnexis.com/webcenters/hk/Daily-Cases/Secretary-for-Justice-v-Ocean-Technology-Limited-trading-as-Citizens-Radio--Ors. But this, the entitlement or onus of the court to convict the lawbreaker, does not explicate how breaching a court injunction is compromising the rule of law.

584. H.K. B. ASS'N, THE RULE OF LAW AND CIVIL DISOBEDIENCE, *supra* note 582, at ¶ 8.

585. *Id.*

586. If we recall the discussion of Raz's theses in Part II A, seemingly the disobedient are obliged to abide by the injunction. The Movement therefore would come to an end. Under Raz's pre-emptive thesis, the court's order would be an exclusionary reason of action for the protesters, which serves to replace the original political reasons that motivated them to demonstrate. The H.K. court is the authority of the H.K. law and legal system, which has far better knowledge of the law therein than the ordinary citizens, thus satisfying Raz's 'dependence thesis' or 'service conception of authority.' But as argued in Part II, there is no reason why an authority's directive must be an exclusionary reason for action. *See* ARENDT, *supra* note 59. Moreover, even if it constitutes a non-compliance of the court's "protected reason" issued for its action, and thus breaching Raz's pre-emptive thesis, it does not warrant us to conclude that such insubordination violates the rule of law. The rule of law shall be the centre of discussion of this Section.

587. *See* BRIAN Z. TAMANAHA, ON THE RULE OF LAW 2–4 (2009).

588. *Id.* at 91–113. Substantive theories of the rule of law do not concern us in this Article, but they append other qualities to the concept besides conceding the rule of law as formal justice. Ronald Dworkin entangles the rule of law to substantive justice whereas T.S. Allan is concerned with how "the rule of law" should be applied to judges in decision-making, attaching other attributes to the concept of "rule of law" such as equity and rationality. *See* T.R.S. ALLAN, LAW, LIBERTY, AND JUSTICE, THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM 28–33 (1995).

589. TAMANAHA, *supra* note 587, at 91.

The thinnest formal account of the rule of law implies "that whatever a government does, it should do through laws."[590] This degrades the rule of law to "rule by law," stripping the idea of any concrete meaning as the law merely becomes an instrumentality of the government and not a limitation on it, which is sine qua non of the rule of law tradition.[591] Such narrative is also a misconception as it goes against the classical origins of the rule of law.[592] In ancient Greece, the law is literally the outcome of activities of the citizens.[593] Equality before the law is essential.[594] The courts and assemblies are given a separate status to protect the people against a populist tyranny, with the role of respecting the law and acting as guardians of the law and "not to declare the law as they pleased."[595] Due to the fact that a populist democracy and the rule of law would come into conflict, Plato reasoned that the government needs to be bound by the law.[596]

> Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.[597]

Aristotle echoes in his discourse: "That is why it is thought to be just that among equals everyone be ruled as well as rule, and therefore that all should have their turn. . . . And the rule of the law, it is argued, is preferable to that of any individual."[598] Brian Tamanaha summarizes several central themes of the Aristotelian idea of the rule of law: self-rule in the polis with political equality upheld; government officials subject to the law; and "the identification of law with reason" under which judges need to reason syllogistically and silence their own passions, serving to diminish the possibility of their abuse of power.[599]

Modern theories of the rule of law have inherited from the classics and have made developments and breakthroughs.[600] Another thin paradigmatic formal theory of rule of law is introduced here, which is the common denominator of almost all formal and substantive theories. To Raz, "the rule of law" in its broadest sense means that people should abide by the law and be ruled by it.[601] But in its narrower sense in political philosophy and jurisprudence, it entails that the government should be ruled

590. Noel B. Reynolds, *Grounding the Rule of Law*, 2 RATIO JURIS 1, 5 (1989).
591. TAMANAHA, *supra* note 587, at 92.
592. *Id.*
593. *Id.* at 7.
594. *Id.*
595. *Id.* at 8.
596. *See* PLATO: THE LAWS 174 (Penguin Books ed., Trevor Saunders trans., 1970).
597. *Id.*
598. ARISTOTLE: THE POLITICS AND THE CONSTITUTION OF ATHENS 88 (Stephen Everson ed., Cambridge Univ. Press, 2004).
599. TAMANAHA, *supra* note 587, at 9.
600. *See id.* at 91.
601. RAZ, THE AUTHORITY OF LAW, *supra* note 4, at 212.

by the law and subject to it.[602] The value of the rule of law lies in its function to protect people's political freedom and dignity to a certain extent.[603] Under the rule of law, people know what to expect and can plan their lives accordingly.[604] The government's power is restricted and arbitrary power is eliminated, and the government is forbidden from changing the law retrospectively, or abruptly, or secretly for its own purposes.[605] People are able to choose lifestyles and pursuits, to fix long-term goals, and direct their lives towards them under a stable and secure legal framework.[606] The rule of law implies the self-restraint of the law, which makes it a stable and safe basis for individual planning.[607] Political freedom consists of the meaning that limits be "imposed on the powers of public authorities to minimize interference with personal freedom," and constitutional rights are protected under the rule of law.[608] Also, intrinsic in the idea of human dignity is the respect for personal autonomy and people's right to plot their future.[609] Even though the honoring of the rule of law does not guarantee respect for human dignity, given that the law may institute slavery without infringing the rule of law, the deliberate disregard of it certainly violates human dignity.[610] This is done by frustrating people's expectations and reliance on the seemingly stable legal system, depriving them of their capacity to plan for their future.[611] Raz rightly stresses that the rule of law is essentially a *negative* value by its *formal* character: "[C]onformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which could only have been caused by the law itself."[612] True, the law unavoidably creates the great danger of arbitrary power and the rule of law seeks to minimize that danger.[613] But given its character, it is compatible with gross human rights violations as it says nothing pertaining to the mechanism or system that produces the law, whether a monarchy, aristocracy, democracy, or monocracy.[614]

Most theorists could agree to the formal features of "the rule of law" that Raz delineates, even though some of them insist that there are more traits to the idea.[615] The rule of law as a political ideal requires due process and procedural justice, that the law be general by taking the form of rules, that the law be certain by being clearly expressed and adequately publicized, that the law be prospective and not retrospective, that the legal system be internally consistent, and that the discretion of government be limited.[616] Jurists agree that the virtues of the rule of law secure

602. *Id.*
603. *Id.* at 220–21.
604. *Id.* at 222.
605. *Id.* at 219.
606. *Id.* at 220.
607. *See* RAZ, THE AUTHORITY OF LAW *supra* note 4, at 220.
608. *Id.*
609. *Id.* at 221.
610. *Id.* at 221–22.
611. *See id.* at 222.
612. *Id.* at 224.
613. RAZ, THE AUTHORITY OF LAW, *supra* note 4, at 219–23.
614. *Id.* at 220–21.
615. *See id.* at 214. Albeit inexhaustible, Raz generalizes the ideal of the rule of law into eight principles. *Id*.
616. Christine Sypnowich, *Utopia and the Rule of Law*, *in* RECRAFTING THE RULE OF LAW 179 (David Dyzenhaus ed., 1999). As Raz rightly puts it, the rule of law exists *as a matter of degree*, as some laws can be

people's liberty, individuality, autonomy, and equality before the law.[617] Having analyzed the rule of law by its historical layers, political role, and its theoretical variations, Tamanaha boils the concept down to three overrunning themes.[618] The first theme is "government limited by law."[619] This thread runs from the classical notion of restraint on the tyranny of government to the modern version of individual liberty under the law.[620] There are two senses to this ideal. In the first sense, the government must abide by the currently valid law.[621] The law could be changed with the existing mechanism, but until then the government officials are bound by it.[622] In the second sense, the government is not to change the law as it wishes, but only with its permitted law-making power.[623] In the Middle Ages, the restraint was divine law, and in modern times, it is values such as human rights or the constitution.[624] The second theme is formal legality.[625] The rule of law from this perspective requires public, perspective laws with the qualities of generality, certainty, and equality of application.[626] The fullest procedural meaning of formal legality also entails the availability of a fair hearing in the judicial process.[627] The third theme of the meaning of the rule of law is contrasted with the rule of men.[628] The rule of law in this third sense applies constraints to all officials in their governmental capacity and necessitates the judiciary to ensure that all other government officials are held accountable to the law.[629] This could only be made possible with the separation of powers and the independence of the judiciary, as well as the legal profession maintaining its legal services.[630]

C. Misconceiving the Rule of Law

A question certainly arises. How do political acts such as civil disobedience or revolutionary disobedience transgress or "unquestionably erode" the rule of law, as the HKBA puts it?[631] I suggest that we can find an answer by tracking down to John Rawls. In *A Theory of Justice*, Rawls devoted a section to analyze how the rule of

retrospective even though they cannot be pervasive for the rule of law to be respected, and laws should typically be general but government departments do have legal discretion and courts do make specific laws such as punishments.

617. *See* ALLAN, *supra* note 588, at 28. Despite Allan's criticism of Raz downplaying the rule of law as he overlooked "the fundamental role of law as constituting a stable framework of rules, which enable[s] everyone to pursue his own aims in a reasonable confidence about the likely conduct of others," Raz explicitly recognized such political freedom allowed by the rule of law. *See* RAZ, THE AUTHORITY OF LAW, *supra* note 4, at 224, 228–29.

618. TAMANAHA, *supra* note 587, at 114–19.

619. *Id.*

620. *See id.* at 115.

621. *Id.*

622. *See id.*

623. *Id.*

624. TAMANAHA, *supra* note 587, at 115.

625. *Id.* at 119.

626. *Id.*

627. *Id.*

628. *Id.* at 122.

629. *Id.* at 122.

630. *See* TAMANAHA, *supra* note 587, at 123.

631. H.K. B. ASS'N, MASS DEFIANCE OF COURT ORDERS, *supra* note 581, at 2.

law contributes to furthering justice and liberty.[632] He argues that "the conception of formal justice, the regular and impartial administration of public rules, becomes the rule of law when applied to the legal system."[633] To Rawls, the rule of law is vital, albeit not all-inclusive, in protecting people's liberty by establishing a basis for legitimate expectations.[634] Given the comprehensive scope and regulative powers of a legal system, restraints must be placed upon such embracive power, and the rule of law provides "a more secure basis for liberty and a more effective means for organizing cooperative schemes."[635] It ensures people's legal liberty.[636] But Rawls certainly notes that the rule of law is compatible with injustice and only imposes "rather weak constraints on the basic structure."[637] In a later chapter, he explicates the role of civil disobedience in his liberal theory of justice.[638] An act of civil disobedience, Rawls analyzes, breaks the law to appeal to the sense of justice of the majority of the community.[639] However, despite acting contrary to the law, fidelity to law is expressed by the willingness of the civil disobedients to accept the legal consequences.[640] But Rawls never directly addresses the relations between civil disobedience and the rule of law. In fact, within the theoretical tradition of the rule of law understood as a political ideal, it is extremely hard to see how civil disobedience or non-compliance with court injunction would be inimical to the rule of law.

The ideal of the rule of law requires a government limited by law, procedural justice, formal legality, and the rule of law and not men. The rule of law cannot be harmed by disobeying some court orders. But it may not be stretching too far to argue that a proper understanding of the rule of law requires the acceptance of punishment and obedience of court orders by civil disobedients, as the rule of law requires everyone to be subject to the law's purview and authority equally.[641] As Matthew Hall contends, "[a]cceptance of punishment establishes that civil disobedience respects the rule of law."[642] But Rawls' discussion of civil disobedience is contextualized in a "more or less just democratic state" wherein the citizens

632. RAWLS, *supra* note 1, at 206.
633. *Id.*
634. *See id.* at 207.
635. *Id.* at 208.
636. *Id.*
637. *Id.*
638. *See* RAWLS, *supra* note 1, at 319.
639. *Id.* at 320.
640. *Id.* at 322.
641. The most plausible argument for insisting that civil disobedience must entail the acceptance of punishment, I suggest, builds on the idea that for a legal system to exist, it possesses legal authority over everyone, albeit not ultimate authority, which is extra-legal in nature and rests in the people. Denying punishment may erode the legal and constitutional fabric by rejecting the legitimate authority of the legal system, and a functioning legal system is the prerequisite and foundation of the rule of law. But even this, it does not mean rejecting punishment and disregarding the rule of law if justice and other ideals so require must be wrong and prohibited. The value of the rule of law is not absolute, and must be weighed against other values. *See id.*
642. Matthew R. Hall, *Guilty but Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law*, 28 CARDOZO L. REV. 2083, 2084. But even Hall acknowledges that "[t]he concept of disobedience poses no dilemma under an illegitimate regime because no duty of obedience pertains." *Id.* at 2086. In fact, "the rule of law" in his argument seems to mean the rule of law of the community enacted and approved by the majority therein rather than the rule of law as a political ideal. *See id.*

"recognize and accept the legitimacy of the constitution."[643] Only under such conditions, as Rawls himself admits, a conflict of duties would have arisen whereby the disobedients have a duty to comply with the laws created by a legislative majority.[644]

As contended in previous parts, the Hong Kong government lacks in political legitimacy. Under such a circumstance, the civil disobedients can rightfully refuse to accept punishment, let alone court injunctions.[645] But the willing acceptance of punishment is not identical with obeying court injunctions and orders. The HKBA utterly missed the point on insisting that resistance to the court injunctions to leave the protest sites would be "inimical to the Rule of Law."[646] In fact, a state court injunction was deliberately violated by Dr. Martin Luther King, Jr. in Alabama.[647] An injunction forbade him from exercising his right of freedom of assembly, and he was accordingly sentenced to prison for breaching the injunction.[648] The Supreme Court upheld the verdict.[649] In *Concerning Dissent and Civil Disobedience*, Justice Abe Fortas of the Supreme Court of the United States elaborates on this example, arguing that "Dr. King, without complaint or histrionics, accepted the penalty of misjudgement. This, I submit, is action in the great tradition of social protest in a democratic society where all citizens, including protesters, are subject to the rule of law."[650] This line of reasoning powerfully quashed the HKBA's argument. Even if the willing acceptance of punishment of civil disobedients is central to the rule of law, they do not have to abide by certain court injunctions. Unfortunately, the HKBA's impoverished understanding of the rule of law degrades it to a synonym for "obedience to law" and law and order. What is truly "alarming" is that the HKBA is treating the rule of law as an absolute and inviolable value with overriding supremacy. "Whenever implemented," Tamanaha warns us, "the rule of law (understood in terms of all three aspects) should always be subject to evaluation from the standpoint of justice and the good of the community."[651]

The rule of law in its sense of formal justice is at best a negative value. We must bear in mind that the normativity and force of the Western idea of the rule of law are entangled with democracy.[652] The English constitutional theorist-heavyweight A.V. Dicey ties his endorsement of the rule of law to parliamentary sovereignty, in which the parliament is sovereign under democratic election and supervision.[653] The former Chief Justice of the Supreme Court of England and Wales, Tom Bingham, observes that the normative force of the idea of the rule of law derives from a "fundamental bargain between the individual and the state, the governed and the governor, by

643. RAWLS, *supra* note 1, at 319.
644. *See id.*
645. *See* ZINN, *supra* note 10, at 29.
646. H.K. B. ASS'N, THE RULE OF LAW AND CIVIL DISOBEDIENCE, *supra* note 582, at 3.
647. ZINN, *supra* note 10, at 29.
648. *Id.*
649. *Id.*
650. *Id.*
651. TAMANAHA, *supra* note 587, at 141.
652. *See* ZINN, *supra* note 10, at 28–29.
653. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 271 (1982) ("The supremacy of the law necessitates the exercise of Parliamentary sovereignty.").

which both sacrifice a measure of the freedom and power which they would otherwise enjoy."[654] Democracy is also essential to such a "bargain," without which judges are "mere custodians of a body of arid prescriptive rules" and not "guardians of an all but sacred flame which animates and enlightens the society in which we live" as they would be under a democracy.[655] German philosopher Habermas's thick formal theory of rule of law likewise incorporates democracy into formal legality, which is the essence of his theory of the rule of law.[656] He contends that the modern legal order can derive its legitimacy only from democracy, a decision procedure which is substantively empty as it decides nothing regarding the content of law, but central to the idea of self-determination under which citizens are entitled to be authors of the law to which they are subject.[657] It is fair to say that without democracy, the rule of law is stripped of a fundamental layer of normative weight.

D. Revolutionary Disobedience: The Different Implication for the Rule of Law

In the above parts, the potential conflict between civil disobedience and the rule of law is accounted for. For civil disobedience, the willingness to accept punishment in Rawls' liberalist theory is vital not only for the rule of law but to circumscribe the disruption within the current constitutional order.[658] But revolutionary disobedience seeks to end the authority relationship between the governors and governed, in the process of which revolutionary disobedients are acting outside and above the constituted order as in Schmitt's first moment of democracy.[659] As such, the willingness to accept punishment by dissenters is not essential for revolutionary disobedience since they are not obliged to express their fidelity to the law. In the first place, no conflict of duty necessarily arises in the case of revolutionary disobedience as it does with civil disobedience, where in the latter the disobedients may have an obligation to honor their duty as the piece of majority-approved legislation that they morally reject is socially binding upon them.[660] For revolutionary disobedience, the undemocratic or illegitimate character of the regime warrants the revolutionary disobedients to defy the laws to suspend the legal system, either due to the illegitimacy of the government, the state, or the constitution, or if the office of government is acting in defiance of the terms of the social contract. Other legal instrumentalities are exhausted, which warrants the people's use of extra-legal means to redeem authorship of the sovereign will. So far as the rule of law is concerned,

654. Lord Bingham, *The Rule of Law*, 66 CAMBRIDGE L.J. 67, 84 (2007).
655. *Id.* at 85.
656. *See* JURGEN HABERMAS, BEYOND FACTS AND NORMS 449 (William Rehg trans., 1996).
657. *See id.*
658. This point could offer a rebuttal to the HKBA's ungrounded argument that defiance of an injunction is equivalent to taking "the law into one's own hands, thereby going down a slippery slope towards a state of lawlessness." H.K. B. ASS'N, MASS DEFIANCE OF COURT ORDERS, *supra* note 581, at ¶ 4. An act of civil disobedience is proceeded under the premise of preserving the constitutional fabric and juridical order and not their demolition. Hence, the contention that defying court orders is descending into "lawlessness" or anarchism is utterly unwarranted and far-fetched.
659. *See* Hoyos, *supra* note 474, at 1.
660. RAWLS, *supra* note 1, at 319.

revolutionary disobedience does not come into conflict with it. Even the rule of law is conceived in its broad sense that everyone is equally subject to the authority of the law; revolutionary disobedience decides the exception by invoking popular sovereignty, which is beyond the purview of the established legal system. With civil disobedience, it recognizes the legitimacy of the government and validity of the legal order;[661] with revolutionary disobedience, it may reject the legitimacy of the government and seek to destroy it as well as suspend the legal order. If we say that an operative legal system is the prerequisite of the rule of law, an act of civil disobedience is bound by the rule of law, whilst revolutionary disobedience is immune to the rule of law as the people are acting above it and therefore unbounded by it.

An analogy may clarify the point better. Imagine that a group of children are playing a baseball game in an empty room and periodically cease the game to argue about the rules (they might create new rules, debate about the interpretation of existing rules, or oppose the application of the present rules of the umpire who they have appointed).[662] There is a difference between "playing the game" and "arguing about the rules or composition of the game," whereas in a political society, the distinction is between "being subject to primary rules" and "participating in activities that seek to change how such rules are generated (rule of recognition)[663] or the constitution of the polity."[664] The former act is subject to the rule of the game whilst the latter is not, as it is withdrawn from the game. Civil disobedience goes along with the former logic, as it is under the purview of the rule of law of the land, whereas revolutionary disobedience follows the latter, which suspends the rule of law and hence goes beyond its reach.[665] But both civil disobedience and revolutionary disobedience start off with individuals. The legal system cannot be suspended in an instant but must be done gradually with the accumulation of individuals. But the difference is that for revolutionary disobedience, revolutionaries do not have to commence with the premise that they are morally required to accept punishment and abide by the law and court orders, as the legal system has already lost its moral force towards them. In fact, they do not have to accept punishment even though they may be subject to it.

Returning to the HKBA's earlier contentions on constitutional issues, again they display the HKBA's inadequate knowledge of world history, jurisprudence, and constitutional theory.[666] The HKBA's allegation that "the inescapable fact is that any discussion of electoral progress *must* be conducted within the framework of what is

661. *See* ZINN, *supra* note 10, at 39.

662. *See* Hampton, *supra* note 574, at 28–29.

663. The rule of recognition is the secondary rule in a legal system by which the primary rules (i.e. the laws) come into being and be recognized. *See* H. L. A. HART, THE CONCEPT OF LAW 100–01 (Oxford Univ. Press, 2d ed. 1994).

664. *Id.*

665. When the rule of law is interpreted as a political ideal, both civil and revolutionary disobedience would not clash with it. But the rule of law broadly understood as "that people should abide by the law and be ruled by it," its compatibility with civil disobedience entails the willing acceptance of punishment and adherence to court orders, which are unnecessary for revolutionary disobedience due to the fact that the rule of law is suspended in such instance.

666. *See* H.K. B. ASS'N, MASS DEFIANCE OF COURT ORDERS, *supra* note 581.

constitutionally permitted" is simply untrue and misleading.[667] As has been explicated above, illegality is a key ingredient in defining the constitutional moments and the constitution of the land, which clearly signifies a breakthrough from its constitutional past.[668] This can be discerned in the history of the founding fathers of the U.S. who continuously disobeyed laws issued from Britain, such as tax laws on sugar and tea due to the lack of American representatives in the British Parliament, and, eventually, the Patriots determined to form a new state and constitution in 1776 and became independent from Britain.[669] The U.S. Constitution, as explicated earlier, was originally an "illegal convention of virtuous citizens" who spoke in the name of *the People* "with an authority that had fundamental constitutional significance."[670] Also, "the Federalists asserted that an illegal convention could be a source not only of law, but of higher law."[671] The people are the ultimate source of a constitutional order and legal system, and thus they are to decide whether or not the order will continue.[672] People's right to change and redefine the fundamental units—the constitution or the rule of recognition—of the polity and to end the government exists outside the legal system. Because the election system is part of the constitution of the state, the people have every right to change it, be it constitutional or not. The people's right always exists above "what is constitutionally permitted," which is an extra-legal right that no one else beside the people themselves can judge and surely not the HKBA.[673] The HKBA is right to stress that not "any discussion of constitutional or legal principles is a form of 'trickery' or insistence on 'trivial technicalities.'"[674] Such discussions are of great significance. But the constitution and legal principles must live up in accordance to the will of the people and be subject to changes, legal or extra-legal, but they shall not take precedence over the people's decision. The HKBA's firm ideological convictions on the "rule of law" and constitutionality lack in any solid foundations, can only serve to save the constituted order at the unbearable cost of stifling democracy and people's right to self-determination, disallowing any fundamental changes in cases where legal means for changes are denied and unavailable.[675] This is exactly the plight that Hong Kong finds itself in[676] and the failure of the Umbrella Movement rests precisely in the people's puzzlement that they must only act within the constituted order.

667. GUY BRESHEARS, OF PAPERS AND PROTESTS: HONG KONG RESPONDS TO OCCUPY CENTRAL 4 (2016).

668. *See* discussion *supra* Section VII(C)(1). This does not lead to the conclusion, nevertheless, that constitution reconstruction or the eviction of government must happen with illegality, unconstitutionality, or extra-legality. If a dialogue is initiated and an agreement is reached, those changes could happen within the constituted order in which case revolutionary disobedience would not have to be brought into being. *See id.*

669. *See* REVOLUTIONARY FOUNDERS: REBELS, RADICALS, AND REFORMERS IN THE MAKING OF THE NATION 5–7 (Alfred F. Young et al. eds., 2011).

670. ACKERMAN, WE THE PEOPLE: FOUNDATIONS, *supra* note 314, at 216.

671. *Id.*

672. *See* HART, *supra* note 663, at 60–61, 91 (discussing Hart's contractarian thesis of the legal society); *see also* Hampton, *supra* note 574, at 28–29.

673. H.K. B. ASS'N, THE RULE OF LAW AND CIVIL DISOBEDIENCE, *supra* note 582, at 3.

674. *Id.*

675. *See id.*

676. *See* Buckley, *Three Months of Protests End Quietly in Hong Kong*, *supra* note 570 at 2.

CONCLUSION

We have come to an age of forgetfulness. Living in the post-Rawlsian epoch, some of us lose our questioning capacities towards the government, the constitution, and the state. Under the Rawlsian liberalist formula, unjust laws are to be obeyed given that the structure of the state is largely just, and we never come to question the state and the unit of the people under his theory.[677] We forget that the constitution and the state are not in perpetual existence and that they could be demolished and reconstructed, and the government which claims to represent us could be ousted from office and its structure of institutions rebuilt. The government and the people coexist in a fiduciary relationship, whereby the people authorize the government as their agent to better attain their goals.[678] The political authority of the government can always be revoked by the people when it fails to live up to the people's demand. A government's power needs to be justified.

Revolutionary disobedience challenges our imagination of the constitutional order and reminds us of the danger that the government that is supposed to represent the people might act contrary to their will and transgress its authorized limits, which requires the direct presence of the people themselves to assert their will to re-establish the constitution and rebuild the state if they so wish. Where the government does not wield legitimate authority, the people can eject it out of office without further justifications, given that revolutionary disobedience is democratic and an act of self-determination *ipso facto*. But even if the government possesses legitimate authority, this merely endows it with the minimum threshold that it must pass in order to render its employment of governmental power justifiable. Nevertheless, when the government oversteps constitutional limits or breaks the constitutional contract, it could lose its legitimacy. It is ultimately for the people to determine whether the government is still fit for office, and they have the right to resist it and oust it from office and directly author the constitution. Failure of the larger state's system capacity to accommodate sub-state units and preserve national culture and distinctiveness, as well as a sub-state people being subject against their will or suppressed by the larger state, among other things, could all justify revolutionary disobedience where legal attempts have failed and proved to be of no avail.[679] It could take the form of direct presence by the people as popular sovereign or a sub-state government acting against the central government, should the latter be authorized by the sub-state people to do so. That said, measures of revolutionary

677. *See* RAWLS, *supra* note 1, at 322.

678. John Locke's social contract theory sees the power of rulers as being entrusted by the people and only the agent of them instead of their master. *See* Hampton, *supra* note 574, at 31. Jeremy Bentham similarly contends that the ruler exercises "fiduciary" power solely for and on behalf of the "investing body," which is the people. *See* OREN BEN-DOR, CONSTITUTIONAL LIMITS AND THE PUBLIC SPHERE: A STUDY OF CONSTITUTIONALISM 60 (Hart Publ'g, 2000. Such power must be conditioned by the constitutional limits, and the people are to judge collectively whether such limits have been transgressed and if the social justification of the ruler's authority expires. *Id.* at 110–11.

679. Besides the abovementioned, there are an inexhaustible number of grounds of justifications for the recourse to revolutionary disobedience, which could be the subject of future studies and research. But the fundamental justifications of revolutionary disobedience are democracy and self-determination, which could only be realized through illegality and unconstitutionality when legal means fail. *See* discussion *supra* Section VII(C)(1).

disobedience need to be proportionate to their aims and the injustice suffered, ranging from non-violent to violent instruments, but violence could indeed be justified.

Furthermore, the trend of democratic and nationalist movements over the past decade has provoked us into thinking about the size and unit of the state: the democratic boundary. Struggles for autonomy and independence from sub-state nations such as Catalonia, Scotland, and Quebec against Spain, the United Kingdom, and Canada, respectively,[680] remind us that the state's existence or dissolution hinges upon its institutional capacity to express and align with the will of the people(s), be it a nation or not. More nationalist and secessionist movements are certainly growing.[681] Continual failure of a larger state to accommodate sub-state people or a nation casts a warning sign that warrants the claim to devolution within a unitary state, or the structuring of a federal state or a confederation to adapt to different sub-state units, and even secession from the state. Not all countries are as fortunate as Scotland, which can afford itself of a legal referendum approved by the Westminster.[682] In regions such as Catalonia, which is struggling for independence from Spain but lacks legal means to achieve it, the supra-legal revolutionary disobedience can always be the last resort.[683] Confronted with a political deadlock, sub-state units, such as Hong Kong and Macau under China, can also initiate revolutionary disobedience to realize their own constitutional creation.[684] The current or established state structures are not given but are originated from villages, tribes, and communities. If the predominant nation-states or multinational states fail to institutionally and democratically accommodate smaller units of people, we may want to return to the small city-states which Rousseau stresses are of optimal size for a self-governing polity.

I would like to end this Article by discussing Hannah Arendt. In *Eichmann in Jerusalem*, Arendt accuses Eichmann, the organizer of the Holocaust, as practicing "the banality of evil."[685] To Arendt, Eichmann is not stupid but "thoughtless."[686] In refusing to think, to deliberate, or to engage in an internal dialogue with oneself but to partake in such atrocity, a person refuses to be a human being with conscience.[687] When a government refuses to engage in a genuine dialogue with the people, to

680. NATHALIE DUCLOS, *The Strange Case of the Scottish Independence Referendum: Some Elements of Comparison Between the Scottish and Catalan Cases*, FRENCH JOURNAL OF BRITISH STUDIES (2014).

681. For instance, Greenland is seeking independence from Denmark and Somaliland questing for international recognition as an independent state from Somalia. *See Greenland Is Getting Ready to Stand Alone*, THE GUARDIAN (June 15, 2010, 4:00 EDT), https://www.theguardian.com/commentisfree/2010/jun/15/independent-greenland-mineral-resources-denmark.

682. *Scottish Independence, Nicola Sturgeon to Seek Second Referendum*, BBC NEWS (Mar. 13, 2017), http://www.bbc.com/news/uk-scotland-scotland-politics-39255181.

683. *Catalonia's Push for Independence from Spain*, BBC NEWS (Nov. 11, 2015), http://www.bbc.com/news/world-europe-29478415.

684. *See Showdown Looms in Hong Kong as Civil Disobedience Meets Tear Gas*, THE INDIAN EXPRESS (Sept. 29, 2014), http://indianexpress.com/article/world/asia/showdown-looms-in-hong-kong-as-civil-disobedience-meets-tear-gas/.

685. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 231 (2006).

686. *See id.* at 229.

687. MARGARET CANOVAN, HANNAH ARENDT: A REINTERPRETATION OF HER POLITICAL THOUGHT 177 (2002).

rectify its wrongs, and to admit that its power derives from the people who can forfeit it, the people have no other options but coercion. This is where revolutionary disobedience comes into place. It is a distinctive form of political disobedience, which is different from civil disobedience in profound manners. Whilst both can lead to a change of "the *authoritative*," or the constitution, considering Ackerman's powerful argument that Dr. King's civil disobedience movement has led to changes in the constitution, the latter is achieved by the government re-presenting the people's will whereas, in the former, the people directly author such changes as the popular sovereign, and only an act of revolutionary disobedience denies the authority of the constituted power and seeks to destroy it.[688] Unlike in civil disobedience, where the authority relationship still exists between the constituent power and constituted power, in the case of revolutionary disobedience, it completely breaks down. In such a case, the office of government is forced into a dialogue with the people and must make concessions. If suppression and denial ensue persistently, revolutionary disobedience would necessarily turn to violence when the resort to rationality and conversation fails. The constituent power would bring about a new "*in* authority," a re-creation of the authority relationship and possibly a new constitutional order.

688. *See* ACKERMAN, *De-Schooling Constitutional Law*, *supra* note 41, at 3123, 3128.