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The Lawlessness of Law and Order 「法紀之無法」

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Abstract

Critical legal theorists have long held that the law has often been given a privileged position without being explicitly defended in theoretical terms. In practical terms, many who work with the law realize that no matter how it adheres to black-letter doctrines, the law is subject to forms of governance, technical discourses of the legal science, political and economic imperatives, social consciousness, culture wars, and so on. In this essay, I focus on the fact that the civil disobedience and unrest seen in the unprecedented protest movement of Hong Kong in 2019 challenged government's repression by raising important *legal* questions. Through social activism, the protest movement in fact raised serious questions about the law's lawfulness. To unpack this, I take a discursive approach through the lens of critical legal realism, which views the law as an ambiguous whole constituted by a variety of elements appearing between the two poles that anchor the very meaning of law, namely "lawfulness" on one end of the pole and "lawlessness" on the other. To help us answer some of the tough questions about citizen disobedience and the seeming loss of integrity of the law-police complex in the Hong Kong protest movement, it is argued that we scrutinize the "continuum of the law" in relation to two vital elements in human rights practice, namely legal-political standards and the legality of police violence.

Keywords: Law's continuum; Hong Kong protest movement; Police violence; Critical legal realism

"[I]t is the impossibility of law's omnipresence plus the self-restraint intrinsic to it that both makes law socially safe, or at least safer than politics."

-- Anthony Woodiwiss, "The Law Cannot be Enough"

"The police are how government is experienced."

-- Ian Loader, "Beyond Brutality"

Introduction

In the Hong Kong Police Force (HKPF), a concept known as the "Force Continuum" is incorporated into the training of all police officers from the beginning of their foundation training and continues throughout their career.[2] The Force Continuum provides "guidance on a series of closely linked escalating or de-escalating options of force to be considered by a police officer, ranging from the mere presence of the officer to the use of firearms in response to six levels of resistance, i.e. from psychological intimidation to deadly force assault" (IPCC, 2020, 29-30). On 30 September, 2019, a leak to the media revealed that the HKPF had issued a revision to the 6th level of control – the severest level of the Force Continuum – for the use of firearms by an officer. The definition of a threat faced by an officer was revised from "assaults intended to cause death or serious bodily injury" to "assaults to cause or likely to cause death or serious bodily injury," thereby giving extensive flexibility to the use of the deadly force.

One day after the leak, a series of confrontations between police and protesters took place across the city. At around 4pm on 1 October, 2019, during a confrontation between around ten riot police officers and two dozen protesters who were armed with umbrellas and walking sticks at Tsuen Wan, a riot police officer who stood at the back during the brawl with a shotgun on one hand used another hand to draw a revolver. Rushed towards the protesters, he was holding two firearms on both hands. The officer was wearing full body armour and was in possession of a pepper spray and an extendable baton. A masked protester approached and attacked him with a 1" plastic water pipe. The officer fired his revolver at the upper torso of the protester at point-blank range without warning. Another riot police officer was then seen in camera footage

to place an iron rod next to the wounded protester, looking like he wanted to frame the injured young man. And when another protester rushed to help the wounded protester, the riot police did not stop but proceeded to subdue him. The protester who was shot at was 16 years old. Before any investigation took place after this serious incident, the HKPF spokesperson and the Commissioner of Police himself spoke to the media on the same day, saying the shooting was justified by claiming that the officer who fired the revolver was facing a life-threatening situation.

Tim Hamlett of the *Hong Kong Free Press* wrote:

> There was a shooting in Hong Kong last Tuesday night. The victim turned out to be a schoolboy. The shooter was a policeman…We need to feel confident that possible offences by police persons will be investigated with the same skill and diligence as similar offences committed by lay people... It is difficult to maintain this level of confidence if the result of the careful and impartial investigation is announced before it has even begun. And this is what happened last Tuesday. The blood had not dried on the pavement when the police spokesman was assuring the assembled media that the shooting was justified because the shooter felt that he or someone else was in mortal danger. In case we were still in any doubt, the Commissioner of Police followed up, while the victim was still in the operating theatre having a police bullet extracted from his lung, with the observation that the shooting was "reasonable and lawful"…Where does that leave the Concerned Citizen?... It leaves him, I fear, with the distinct impression that the police force, at least in its own view, is above the law, free to decide complex legal questions on the simple basis that Our Boys Can Do No Wrong. (Hamlett, 2019)

Hamlett points to a principled trust in the law for a proper investigation, but he also raises a query as to whether it applies to the police force. Like the revision to the Force Continuum, the police seems to take considerable liberty with regard to the (potentially criminal) responsibility of a shooting by one of its "boys."

As a writer and teacher of human rights with a specialization in public international law, I continued to receive queries from students, fellow academics, and concerned citizens. The queries can be summarized as follows:

- How does the law both enable and protect the act of protest, and so violently suppress protest at the same time?
- In a society that prides itself as lawful – a historical colonial legacy in Hong Kong – why does the maintenance of law and order appear so unlawful, especially with respect to the perceived problem of excessive use of force, perceived deviation from due process, and perceived differentiation of who to arrest and who seems to be let loose?

- Even more fundamentally, is the law to be unconditionally obeyed, regardless of context, procedures, interpretations, etc.? In other words, is the law equal to justice and morality?

Not surprisingly, civil disobedience and unrest challenge state repression not only through various forms of citizen actions but more crucially by raising important *legal* questions.

A "continuum" is a curious phenomenon in which the elements adjacent to one another are not perceptibly different from each other, but the extremes are quite distinct. The slight differences without clear dividing points should not cause confusion; rather, ambiguity is an ontological reality in a continuum. Ambiguity does not threaten the coherent whole; rather, the coherent whole is itself characterized by elements varying by small degrees. The question that animates this essay has to do with the continuum that characterizes or even constitutes law and order, specifically the built-in ambiguities that affix the two poles of law's continuum, i.e. lawfulness on one end and lawlessness on the other. Put differently, I am interested in thinking about the negative positivity of the law, or in other words, how its lawfulness needs a structural "collection of lawlessnesses."

The Context

Beginning in the summer of 2019, the citizens of Hong Kong experienced a shocking reality that, for many, was difficult to fathom. Twenty-two years after the handover, the public's continued scepticism to perceived encroachment into their way of life by the Mainland Chinese authority was not new. The scepticism grew to a staunch resistance to the HKSAR government's proposal for an extradition bill allowing the city's authorities to transfer suspected individuals for crime to be handled by the Mainland legal system. What was

astonishing was the manner in which the government pressed ahead to pass the bill despite a massive public protest of two million people on the eve of the government's obstinate action. In June, the massive public protest was in fact already fractured, with a peaceful but fuming assembly that filled major roadways in the day time and episodic disorderly actions by a small but growing number of protesters in nightfall. By most account, the night protesters were mostly young people, blackclad and mask-wearing, quick in action and resolute in spirit. And the more unresponsive the government was, fanned by the cool mannerism, programmed rhetorics, and perceived arrogance of Carrie Lam, the Chief Executive of HKSAR government, the more these wayward protesters were agitated. As a result, what were a fracturing few engaging in mainly night actions swelled to occupy the center stage of an unprecedented public protest movement that did not stop but returned after the public health crisis of the Coronavirus pandemic somewhat stabilized in the city in mid-2020.

The longer the civil unrest continued, the more urgent questions were raised, many of which concern the vexed problem of law and order. At the same time, the ongoing debate stirred by the public crisis in Hong Kong, especially about the police use of force and its alleged mismanagement of social unrest, presses conventional laws to relate to two vital elements in human rights practice, namely legal-political aims and the narratives and spectacles of violence and trauma. Increasingly, and notwithstanding the global reassessment of the efficacy of policing that arose in the summer of 2020,[3] critics have advised that any control of civil disobedience and unrest by dogmatic legal means is highly questionable, unless legal-political standards and the legality of police violence are robustly scrutinized (see Amnesty International, 2019; Progressive Scholars Group, 2020). Here, we must not reduce the crisis to the problem of police brutality, on whether or how legal it is. We must see police brutality as part of the much wider and deeper woes of the system – and ideological power – of law and order.[4] As Conway Blake (2008) reminds us,

> There are indeed sound and practical reasons, as well as theoretical justifications for resorting to law in advancing human rights. However, law has often been given a privileged position without being explicitly defended in theoretical terms, or, at least its full implications being worked out. (243)

As a departure from positivist legal theory, the "critical legal realist" approach opens up some

of the most interesting questions for consideration, especially in times of crisis:

- Should citizens be coerced into obedience to tyranny or unjust laws?
- Is there an absolute responsibility to follow the law irrespective of the quality of the law?

- Can protest derive a sort of legal legitimacy that can counter-balance the adherence to an absolute deference to the law?

- In Hong Kong today, might law – and not class or generational differences, as proclaimed by the government – be the ultimate culprit of the conflict: the deepest, most divisive chasm that is bringing the city to the brink of collapse?

My commentary below will attempt to address these questions. Specifically, I will discuss the ways in which each of the two issues identified above, i.e. legal-political standards and the legality of police violence, display a continuum of legality and, by implications, a continuum of the ways in which citizens abide by the law. But first, a few words about the critical approach that I adopt for examining the question of law.

Eyes Wide Open, or Why We Need Critical Legal Realism

From the outset, it must be said that the legal precepts of rights, responsibility, and the rule of law are subject to contingent and contextually appropriate interpretations by different legal actors. The critical legal realist position challenges the view that orthodox legal institutions and doctrines provide an autonomous and self-executing system of legal discourse untainted by politics. In this view, it is necessary to recognize the overdetermined nature of legal reasoning and of the legal process itself (see e.g., Coombe, 2001; Erni, 2011, 2012, 2015, 2019; Sarat & Simon, 2003). Briefly, this necessitates rethinking three problematics.

First, we need to recognize that the question about the social sites of legal knowledge – that is, the assumption that the legislature, courts, and law societies as the singular formation or site of legal knowledge – needs to be replaced by the recognition that there is a multiplicity of legal consciousness and uses by citizens that form the social origin of law. A famous aphorism by Oliver Wendell Holmes Jr. (1963), an early proponent of American legal realism, is that "the

life of the law has not been logic; it has been experience" (5). It is here that the notions of rights, duties, and laws connect strongly with the politics and lived experience of "the popular." In Hong Kong today, it is little wonder that a societal tug-of-war has been growing regarding who could speak about the law, interpret it, and even challenge it.[5]

Second, the problem of doctrinalism – that is, the assumption that legal principles are the essence of law or its only source of value – needs to be replaced by the understanding of the radically contingent nature of legal interpretations in empirical situations, especially in times of "crisis governance" (Lazar, 2009). This connects to the tradition within critical legal studies of liberal constitutionalism in which activist liberal law professors and public-interest lawyers argue that legal interpretivism is *already* built into law itself, especially in the provisions guaranteeing various kinds of rights (see Kennedy, 2002).

Friedrich von Hayek (1960) and other conservative legal positivists would argue that the correct role of government is best confined to establishing clear, fixed rules of law that amount to a stable set of minimum rules that are applied in a uniformed, non-discretionary manner. In contrast to legal positivism, Benny Tai (戴耀廷), one of the key architects of the 2014 Occupy Central movement and a specialist in constitutional law, exemplifies the aspirations of legal interpretivism by explaining his view on the various "levels" of governance by law. According to Tai, the "low levels" consist of a basic recognition of the law and an absolute obedience to the law (Tai, 2014). These two strata are built upon minimal elements, such as the clarity and transparency of the law and the proper institutionalization of legal practice. Tai considers these "low" levels because they are generally incapable of restraining power:

> Beginning-stage governance by law lacks an effective means to restrict power. The determination of how the law would be exercised properly relies solely on the government or the legislator's subjective view. Because this kind of governance by law makes little or no demand on the substance of the law, the legal infrastructure ends up being utilized to maintain power, at the expense of protecting basic citizen rights. To leap toward a higher level of governance, the law would have to be transformed from functionalities (as the tool of the powerful) to a system of checks and balances (affording a restriction to power), which can then lead to the actualization of legal purpose (the chief purpose of the law is to practise justice). (Tai, 2014, A37, author's translation; see also Tai, 2017; Ku, 2017)

Tai's legal interpretivism is set in normative terms. Without straying from basic legal theory, he nonetheless rejects blind adherence to predetermined law. In philosophical terms, legal interpretivism adheres to the Kantian assumption of the moral imperative of "means without ends." More accurately, in the context of civil disobedience as citizen action, it is politics without ends. Perhaps one of the most influential thinkers who takes to heart the conviction of "politics without ends" in her writing on human rights is Hannah Arendt. I shall return to Arendt later.

Third, the question of legal essentialism – the assumption that there is stable and universal distinction between legal and non-legal practices and relations – needs to be replaced by the recognition that legal relations are always partly discursive or relationally produced. Here, "non-legal" means at least two things. It means all aspects of life that neither express themselves through law nor embody law. However, it also means that which is fundamentally important to human life and therefore will be incorporated into law and policy. Both meanings of the term render any fixed or absolute distinction between law and non-law untenable, thereby returning us to the anti-reductionist ethos of legal realism. According to this view, the plethora of social creativity expressed individually or collectively during the protest movement of 2019-20, from artworks, graffiti, Lennon Wall postings, slogans, protest song ("Glory to Hong Kong" 願榮光歸香港) to the ad hoc mobilization of a variety of human assistance provided in make-shift spots across protest sites, evidences an extensive discursive sphere. This is a sphere that must be recognized as constituting (non-legalistic) patterns of anxious civility, formation of a collective will, and self-respect. Legal realist thinking incorporates all empirical social behaviour that spawns a kind of social-order-in-chaos as part of the general atmosphere of social law, grounded in an anti-reductive understanding of the social functions of law.

In short, the legal determination of the social totality is not any simpler or more monolithic than any other levels of determination, whether economic, political, or cultural. The modernist roots of law do not and cannot negate the fact that law is radically contextual and situationally contingent. The power exercised by law, it must therefore be insisted, is a matter of contextual struggle whereby the constitutive power of law enters into an intricate negotiation with the sites in which it is supposed to constitute its own power (see Erni, 2019).

I understand that not everyone is necessarily convinced by the preference given to the critical legal realist view over either the conventional or the postmodern views of law.[6] No matter how vigorously we work to depict law without denying or distorting the empirical picture of sharp moral, political, and social conflict, those who adhere to conventional legal orthodoxy would still ask the following question: who is to judge and where is the line drawn? Equally, those who advocate radical views would decry legal realism as a sell-out because the latter is still seen as being circumscribed by the normativity of law. The simple (but hopefully not simplistic) answer is that the legacy of legal realism rests precisely on political and moral persuasion. It sees the law as *articulated politics*. By rejecting the self-sufficiency of law as radical decontextualization, the legal realist position insists on looking vigorously and empirically at the intricate ways in which law, morality/justice, social life, and politics are inter-implicated. In the Foucauldian parlance, it bears remembering that, in governmentality, the power of law is never conceived of as a total or totalizing sphere (e.g., Foucault's famous phrase about cutting off the king's head), but as a network implying an intricate interweaving of many micro-events of power and counter-power. At the same time, by rejecting the other version of the self-sufficiency of law as pure radicalism, which is a certain strand of the postmodern politics espousing a certain endless deconstruction of law, the legal realist position once again returns to the empirical ground of experiences and interpretations as sites of the strategic but temporary negotiation of what matters. As Rosemary Coombe (1998), a scholar of legal anthropology, reminds us, "If law is central to hegemonic processes, it is also a key resource in counterhegemonic struggles" (35).

In the protest movement, the legal terrain of civil disobedience and unrest, insofar as it is underscored by fundamental struggles over basic rights, exhibited exactly an empirical field or network of dynamic socio-legal entities. Indeed, when we consider civil disobedience and unrest as consisting of a set of actions – including consciousness-raising, self-education of relevant laws, journalists' monitoring, the protestors' self-monitoring, provoking police response, or response to the court's intervention – then the whole sphere of rights-associated social laws presents a critical "apparatus" in the Gramscian sense. This apparatus opens onto a multiplicity of overlapping and contradictory actions, spaces, and even cultural standards of justice. This "extra-legal" apparatus embeds actors (civil society, independent citizens, human rights monitoring groups, peaceful participants (和 理 非) and radical protesters), processes (planned and fluid "Be Water" actions, "centerless" mobilization, search for ad hoc consensus,

debating principles and values, and rigorous documentation), and relations (deliberative, technological, political camps ("Yellow" vs. "Blue"), even anarchic), and scales (domestic, regional, and international).

The critical legal realist approach to understanding law and order lends itself to something important: a theorization of law's continuum. In practical terms, there is a spectrum of lived experiences of the law, just as there are various components and processes through which a law becomes law. *Put provocatively, law has no inherent legality. Instead, we may say that for law to be legal, it must first be legalized. The legalization of law – a necessary tautology – in fact reinvigorates our understanding of the value of law, by engaging us with questions about what, why, when, and how a government would bind itself to a legal apparatus and, in doing so, how it would influence its own conduct and use it to establish legitimacy and sovereignty*. If we accept that law – or for that matter, a government – has no natural or intrinsic legality, then in the process of self-legalization, the specter of a "spectrum of lawfulness" would appear on the horizon, which would ironically include elements of lawlessness. From a critical legal realist perspective, we can regard the lawless-lawful continuum as normative and necessary, given the curious dynamism of law. To this end, it is the normativity of law that requires fresh thinking.

The Lawless-Lawful Continuum

We are, therefore, to tweak Gramsci, in a legal war of positions. And the stakes are high. Focusing on the notion of a continuum, let me now turn to the question of how to think about the two issues identified earlier, i.e. legal-political standards and the legality of police violence. In crucial ways, these issues define the core essence of our current crisis, namely the struggle over the fundamental life of the law. Understanding these issues will help us recalibrate how we are to go on living under the current legal and policing systems.

A Continuum of Standards

The "legalization of law" necessitates setting the legal-political standards. In the world of human rights as a legal system, "legalization" is generally described as a particular form of institutionalization, which, according to political scientists Alexander Dukalskis and Robert C. Johansen (2013), carries a set of institutionalized legal characteristics with three components: obligation, precision, and delegation. *Obligation* is about norm conformity, and it can range from abiding by an expressly non-legal norm to exercising a binding rule. *Precision* is a matter

of producing exactitude according to legal principles, which can vary from vague to highly elaborated rules. *Delegation* refers to how much states may transfer authority over matters of legal interpretation, monitoring, and enforcement to other institutions. The delegation can be directed to a range of actions. In an international arena, this can range from diplomacy as the least legalized action to an international tribunal or a court to secure a binding arbitration as the most legalized action. In a domestic conflict, such as the one in Hong Kong, we have seen a persistent resistance of the government to delegate the law to any kind of independent investigation. In all, legalization engages with questions about why, when, and how states would bind themselves in a legal process and how, in doing so, would shape state conduct and its legal legitimacy. It is what Saladin Meckled-García and Basak Çali (2006) call the "ingredient view" in their investigation of the problems of and promises in the "legalization of human rights" (1). That is, a number of features and facets of the life of law must be configured in order to underwrite the protections, guarantees, and modes of lawful behavior associated with human rights aims. To visualize this ingredient view, I provide the table below:

Obligation	**Precision**	**Delegation**
High (e.g. explicit rules)	High (e.g. carefully elaborated rules)	High (e.g. independent investigation)
Medium (e.g. customary norms)	Medium (e.g. degrees of permissibility)	Medium (e.g. semi-dependence)
Low (e.g. on paper only)	Low (e.g. a large margin of appreciation[7])	Low (e.g. centralization of power)

Taking the International Criminal Court (ICC) as an exemplar of a legal body, Dukalskis and Johansen (2013) point out that the ICC represents what might be considered nearly maximal legalization in the current historical era. The operation of the ICC requires

> *high obligation* based on explicit rules sustained by *jus cogens* norms, thereby applying to all, even without formal ratification of a treaty specifying a law; (2) *high precision* in the sense that carefully elaborated rules specify permissible conduct in honoring the

> prohibitions of war crimes, genocide, and crimes against humanity; and (3) *high delegation* insofar as an independent international legal institution, the ICC can hold individuals criminally accountable to international law if their domestic legal systems do not. If the Security Council makes a referral, a state's nationals may be brought before the ICC even without the consent of their own state, an unusually high degree of delegation of authority. (573; emphases added)

In this quick snapshot of the various components of normative positive law, we witness the primacy given to norms, procedures, and infrastructures. As a result, the legal-political standards of positive law are spread out in a matrix of high-medium-low adherence to the three operating components.

To illustrate further, when the Hong Kong government resorts to seek interpretation of the provisions of the Basic Law from the standing committee of National People's Congress in Beijing, it may be constructing a life of the law in the following configuration commensurate with the "One Country, Two Systems" principle (highlighted in bold):

Obligation	*Precision*	*Delegation*
High (e.g. explicit rules)	High (e.g. carefully elaborated rules)	High (e.g. independent investigation)
Medium **(e.g. customary norms)**	**Medium** **(e.g. degrees of permissibility)**	**Medium** **(e.g. semi-dependence)**
Low (e.g. on paper only)	Low (e.g. a large margin of appreciation)	Low (e.g. centralization of power)

And in the case of police self-investigation of citizen complaints of alleged excessive use of force, which is a modality preferred by the Hong Kong government in its staunch rejection of the citizens' demand for an independent investigation of police conduct, the legal configuration may look like this:

Obligation	*Precision*	*Delegation*
High **(e.g. explicit rules)**	High (e.g. carefully elaborated rules)	High (e.g. independent investigation)
Medium (e.g. customary norms)	Medium (e.g. degrees of permissibility)	Medium (e.g. semi-dependence)
Low (e.g. on paper only)	**Low** **(e.g. a large margin of appreciation)**	**Low** **(e.g. centralization of power)**

It can therefore be said that the Independent Police Complaints Council (IPCC, **獨立監察警方處理投訴委員會**), which is a civilian body of the government of Hong Kong, operates in an environment characterized by high obligation, low precision, and low delegation. But there is another basis of positive law, one that is most contentious in legal debates. Widely known as the "separation thesis," it is believed that "determining what the law is does not necessarily, or conceptually, depend on moral or other evaluative considerations about what the law ought to be in the relevant circumstances" (Marmor, 2006, 686). Law and morality are said to be "separated" when determining what law is and does. Indeed, for the law to be logically strong and operationally clear, legal positivism dictates that it needs to be "instrumentally good" (Marmor, 687). Yet, even staunch defenders of positive law today would not deny the "reference to morality"; they just do not believe that *recognition* of what a law is and performing the *duty* of law (e.g. by judges) necessarily stems from moral considerations. This is another way in which the law modulates. Marijan Pavčnik (2017) laments that "[l]egal positivism can be considered corrupt if it justifies just any positive law irrespective of its possible lack of morality. Actually, this is not legal positivism as a science, but an apologetic legal positivism as a servant of politics" (112). Therefore, in the adjudication and exercise of the law, a space is opened up for thinking through a legal-political continuum of legality from "the instrumental" to "the moral." How these two facets in the continuum refer to the ends or means of law – that is, whether the conceptual arc spans from the "instrumental means" to the "moral ends" or whether it does so from the "moral means" to the "instrumental ends" – should be a subject of a proper rigorous debate today.

A Continuum of Police Power

After months of wrangling and in defiance of public demand for an independent investigation of police conduct, the IPCC issued its own report on 15 May, 2020. Billed as "a fact-finding exercise, not an investigation into complaints or conduct of individual officers in the course of actions" (press release, 2020), the IPCC implicitly acknowledges its own constrained scope and power of investigation. Aside from calling itself with the misnomer of an "independent" council, the IPCC's statutory functions exclude any investigative power to issue search warrants, compel testimony, or hold witnesses in contempt if they fail to cooperate. [8] As members are directly appointed by the Chief Executive, the council is seen as packed with pro-establishment figures and other "police sympathizers."[9] According to Clifford Stott, one of five members of an expert panel recruited for the IPCC in September 2019 to assist in preparing a report for the public, "structural limitations in the scope and powers of the IPCC inquiry [inhibit] its ability to establish a coherent and representative body of evidence" (HKEJ editorial, 2019; see also Taylor & Xinqi, 2019). Stott believes that the IPCC "needs to substantially enhance its capacity" so that will be in a position to "assemble a coherent account of the facts from police and other bodies; to access important documents and validate accounts supplied by police and others in a timely fashion; and to significantly improve its capability to identify and secure evidence from key witnesses outside policing" (ibid). Eventually, Stott and the other experts resigned from the panel, leaving the IPCC without participation from more objective outside international expert voices.

It is in the IPCC's report published on 15 May, 2020 that the term "force continuum" is deployed. In it, the concept of personal accountability is emphasized, in which the police officers "*should exercise their own discretion to determine what level of force is justified in a given situation*" (IPCC, 2020, 30; emphasis in the original). On the strength of the force, the "force continuum" doctrine emphasizes the "use of minimum force necessary to achieve the lawful purpose," yet at the same time, "the Force Continuum recognizes that an officer would be justified to use a level of force greater than that of the subject in order to apprehend the subject or control the situation" (30). Such a language of "minimum force" but "a level of force greater than that of the subject" does not only spawn haziness if not contradiction, it confounds any person to make a judgment on the level of force to be deployed on the ground. One deduces from this confusion that "every second counts," because for the police officer to make a reasonable discretionary reaction in a moment of confrontation, the decision made "in a given

situation" boils down a highly compressed temporal decision. In this way, the "force continuum" speaks not only to a gradation of force, but also one of time.

Within the temporal continuum in which force is used, a police shooting using a firearm is frequently a discretion justified on what J.J. Fyfe (2015) calls the "split-second syndrome." Fyfe studied police defense of "shoot-to-kill" cases, and found the justifications given were often questionable. According to Fyfe, the "split second syndrome" is

> based on the mistaken idea that decisions officers make in dealing with dangerous situations are typically made in a fraction of a second, that there are no principles that may be applied to the diagnosis of specific situations; that police operate under such stresses and time constraints as to create a high percentage of inappropriate decisions; and that assessments of the justifiability of police conduct are most appropriately made on the exclusive basis of the perceptions of the immediate situation in which a decision has to be made (cited in Adang, 2012, 153).

In other words, within the temporal continuum of a confrontation, police defense of their use of force tends to focus on a small, fleeting, and final slice of a situation. With this radical compression of the event to that ephemeral final moment of contact, the police officer disregards the whole temporal unfolding of the confrontation. As a result, research shows that in practice, "many officers manoeuvre themselves into situations where the only option left to them is to shoot" (Adang, 154). Other researchers have established a temporal sequence of an event involving a suspect. For instance, Scharf and Binder (1983) distinguish the following phases: anticipation; entry and initial contact; information exchange; physical tactics of regulation; final frame decision; aftermath.

Pauwels et al. (1994) show that when an initial judgement has been exercised in earlier moments of the encounter, situational judgement can be greatly simplified. Fyfe concurs that if attention is not adequately given to the various stages of an event, "the moment officers are confronted with a life-threatening situation/suspect, they no longer act on the basis of cognition but mechanically and instinctively" (cited in de Jong & Mensink, 1994, 42). Fyfe and others recommend that education and training should therefore address those moments and circumstances where the police officers still have a choice about what the best possible next

step can be.

Unfortunately, police reaction in times of imminent danger often results in the split-second syndrome, which "serves both to inhibit the development of greater police diagnostic expertise and to provide after-the-fact justification for unnecessary police violence" (Fyfe, 2015, 526). In Hong Kong, spokespersons of the police force are often found to be using the phrase *din gwong for sek* (電光火石). A Cantonese idiom, it graphically depicts a disappearance of time, or a moment that slips by so fast that no one can catch it, like the light of a thunder or the flint of a fire. Such an exaggeration, which is itself reliant on an exaggeration of the civilian's force, is used to defend police shooting, inferring that no one can act perfectly in that squeezed temporality. Fyfe (2015) adds that the syndrome sprouts from the police's assumption that

> assessments of the justifiability of police conduct are most appropriately made on the exclusive basis of the perceived exigencies of the moment when a decision had to be taken. So long as a citizen has, intentionally or otherwise, provoked the police at that instant, he, rather than the police, should be viewed as the cause of any resulting injuries or damage, no matter how excessive the police reaction and no matter how directly police decisions molded the situation that caused those injuries or damages. (527)

Tim Hamlett's (2109) diagnosis cited at the beginning of this paper – that a police shooting left him with a distinct impression that the police force, in its own view, is above the law on the simple basis that "Our Boys Can Do No Wrong" – comes to a clearer view. This is because while the HKPF institutes the "Force Continuum" policy, which should in turn produce a certain continuum of time, the split-second syndrome radically compresses time in order to give rise to the absolute power of the police to shoot. In this formulation, *there is no continuum of who provokes, who reacts, who is responsible.* What remains is the absolutism of force. The absolute power of "doing no wrong" arises in large part from a temporal imagination in which the civilian is always the provocateur and the police is always the defender of his own safety. The active shooter, it turns out, becomes a so-called passive defender. The one who possesses the disproportionately higher level of force is constructed as the vulnerable party under attack.

Conclusion

To recap, in this essay, I am reminded of Conway Blake's (2008) provocation that "law has

often been given a privileged position without being explicitly defended in theoretical terms, or, at least its full implications being worked out" (243). It therefore comes as no surprise that while civil disobedience and unrest challenge state repression, they do much more than that. Ultimately, citizen disobedience raises profound legal questions. In deliberating on the virtues and reasoning of the law, its power, as well as the way in which its power should be limited, I have suggested that one must robustly scrutinize conventional laws in relation to two vital elements in human rights practice, namely legal-political standards and the legality of police violence. Through the lens of critical legal realism, I have taken the discursive approach that views the law as an ambiguous whole constituted by a variety of elements appearing between the two poles that anchor the very meaning of law, namely "lawfulness" on one end of the pole and "lawlessness" on the other. This discursive approach, I believe, provides an important explanation for why or how law's lawfulness can theoretically be said to be built on a structural "collection of lawlessnesses." In the conclusion, I'd like to press our thinking a bit more. If the law that assigns power to the police includes in its fold the "collection of lawlessnesses," how should citizens act? Should they be coerced into obedience to tyranny or unjust laws? Is there an absolute responsibility to be subjected to the law (irrespective of the quality of the law or the character of the police)?

> As long as civil disobedience is seen as a network of socially, culturally, and politically embedded practices, and if these practices follow the normative conventions of lawfulness (i.e., non-violence, proportionality, assumption of legal responsibility, and so on), then the extent to which civil disobedience can challenge law and order is minimal. During the days of the 2014 Umbrella Movement in Hong Kong, Benny Tai (2014) argued that all civil disobedience could do was to disrupt the "low levels" of governance-by-law, because it required a basic recognition of the law and an absolute obedience to the law, even as it exerted pressure on governance at the "higher levels." Tai elaborated on what made governance-by-law lawful at the higher levels:
>
> The higher echelon of governance entails the use of law to restrict power and to achieve justice. The restriction of power by the law is mainly accomplished through decentralization, including the separation of government powers (constitutional restriction), monitoring of the government by the courts (judicial restriction), monitoring by the social body (administrative restriction), popular elections (political

> restriction), and monitoring by the media and civil society (social restriction)…At a higher level, the use of law to achieve justice must be responsive in a variety of ways, including ensuring proper legal procedures (procedural justice), offering basic protections (civil rights justice), ensuring equality (political rights justice), maintaining basic provisions of living (social and economic rights justice), and establishing communicative democracy (deliberative justice). (Tai, 2014, A37, author's translation; see also Tai, 2017; Ku, 2017)

Both the Umbrella Movement in 2014 and the Anti-extradition Bill Movement of 2019-20 tapped into Tai's schema, which implies that there is a continuum of law and governance from high to low. Within the continuum, the social realism of civil disobedience is not incompatible with the obedience to the law. Nevertheless, neither is civil disobedience willing to disarticulate law from justice or to collapse "is" (that which exists as black-letter doctrines) and "ought" (that which is desirably just as an outcome of political struggle). Put more clearly, civil disobedience is a form of struggle to press "is" into "ought". To delink law from the elements that constitute it – i.e. justice, politics, equality, social life, and events of struggles – would be to make a questionable assertion that the law has unqualified and unlimited power. In the very instance of making that questionable assertion, the law-and-order system inevitably and predictably enacts a repression of freedom.

> It is reasonable to believe that in a lawful society, citizen grievances can be dealt with through established channels of complaint, such as through working with legislators to formulate objections, through independent investigations of alleged misconduct, through exerting pressure on the government by the media, or through the ballot box. However, in the events leading up to the Anti-extradition Bill Movement, none of these avenues seemed to yield the desired results or even existed. The hypothetical question that arose concerned whether individuals or groups would have the right to challenge the law. In the face of the lack of adequate response from the government to citizens' grievances and the wholesale rejection of an independent investigation of the police, would the citizens have a duty to question the law? Legal scholar Collins Udeh (2014) reminds us of the following:
>
> A government true to democratic precepts of representativeness and fairness must be

> sensitive to demands for change. If it fails in that regard, it is at least arguable that demands for change, while entailing technical breaches of the law, should be accommodated within the constitutional framework… As we have seen in the twenty-first century civil disobedience starting from the Arab Spring up to the Ukrainian uprising, major social changes of such magnitude would have been impossible without recognition that under certain limited conditions there exists a right of legitimate protest, however inconvenient and uncomfortable this is for governments around the world…[I]t is not necessary to look to such major societal changes brought about by defiance of law in order to refute the law and order model and proclaim some entitlement to dissent. (36)

Hannah Arendt (1972) went further by saying "it would be an event of great significance to find a constitutional niche for civil disobedience – of no less significance, perhaps, than the event of the founding of the constitution libertatis, nearly two hundred years ago" (83-4). In contrast to major liberal thinkers (e.g., John Rawls) who argued that civil disobedience was compatible with a constitutional government that possessed tolerant attitudes, Arendt argued that civilly disobedient citizens should be given access to the very heart of decision-making (Smith, 2010). In the context of the United States, Arendt's proposal included inviting representatives of civil disobedience movements to "influence and assist Congress by means of persuasion, qualified opinion, and the numbers of their constituents" (Arendt, 1972, 101). William Smith (2010) suggested that Hannah Arendt's proposal to institutionalize civil disobedience, that is, to take it off the streets and into government, is unprecedented within political theory.

In the context of Hong Kong, where the government is beholden to interests in the central government in Beijing, Arendt's revolutionary spirit may be impractical. Arendt's laudable approach of "politics without ends" does not suit this historical context. Our concern, however, is to provoke a discussion regarding whether it is possible to recognize civil disobedience as consisting of a range of actions embedded within the processes of struggle for a "livable law" across the continuum of law. Given that the lawful/lawless dichotomy is conceived of as part of law's own continuum, a "livable law" is conceivable, one in which both "the duty to obey" and "the right to express disagreement" should be allowed to be realized. Seen in this way, the disobedient citizens are not necessarily enemies of the state and its laws because the discursive-

political continuum seems to suggest that the law is only *prima facie* legal within the *uncompleted process of democratizing*. It is in this sense that Habermas's (2004) ideas poignantly resonate, when he made the striking argument that citizens engaging in civil disobedience may "contrary to their image, prove themselves to be the true patriotic champions of a constitution that is dynamically understood as an ongoing project – the project to exhaust and implement basic rights in changing historical contexts" (Habermas, 9; see also Habermas, 1985, 1996, 1998). By calling these citizens "ambivalent dissidents" (9), Habermas speaks to the legitimacy of thinking about the dual responsibility both to uphold the law and to argue with it. The critical legal realist view of citizens' actions, thus, is interested only in advancing and guarding an *alternative legal normativity* in the ongoing struggle for livable laws in a society under siege.

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[2] For a discussion of the concept of "force continuum" in police studies dating back to the 1970s and 1980s, see Desmedt, 1984; Garner et al, 1995; Terrill, 2001, 2005.

[3] In May 2020, the death of George Floyd, a black man, in Minneapolis in the U.S. by a brutal police practice during Floyd's arrest, has sparked widespread protests across the U.S. and

beyond. It has also re-ignited the Black Lives Matter movement that is also spreading around the world. Calls for fundamental and deep reform of policing abound, with the potential to address new ways to tackle police brutality and systemic racism.

[4] Indeed, police brutality is part of the much wider and deeper woes of the system of law and order. Nonetheless, it is still important to name the kinds of abuse that many found to be perpetrated by the Hong Kong Police. The Progressive Scholars Group (2020), for instance, lists the police abuse as follows:

1. Disruption of Public Demonstrations
2. Tactics in Crowded Space
3. Use of Firearms
4. Use of Less Lethal Weapons
5. Use of Vehicle
6. Display of Identity and Insignia
7. Gender and Sex-related Misconducts
8. Violations of Religious Freedom
9. Targeting Media
10. Targeting Human Rights Watchers
11. Disruption of Rescue and Medical Works
12. Discriminations in Policing
13. Use of Undercover Officers
14. Suspected Use of Titushky
15. Excessive Use of Force in Arrest
16. Allegations of Perverting the Course of Justice
17. Rights of the Arrested and Legal Procedure
18. Dehumanization of Citizens

[5] The dispute on who would have the ultimate legal authority to speak about and evaluate the social unrest and police power took a sudden turn as the Central government passed a new National Security Law (NSL) to be imposed on HKSAR, which took effect on June 30, 2020. Notwithstanding a certain incompatibility between Chinese law and Hong Kong's common law system, the new NSL sent shock waves to the Hong Kong legal circles as many of its stipulations did not follow common law practices (e.g. judicial independence and oversight, selection of judges, due process on police searches and surveillance, etc.). The NSL set an important precedent on the way the whole legal system in the HKSAR operates for a long time to come. See Cheung, 2020; Ho, 2020; Ng et al, 2020.

[6] See Erni (2015) for my own attempt to critically examine the role of civil disobedience in

the 2014 Umbrella Movement in resisting the government's crackdown in the name of law and order.

[7] The phrase "margin of appreciation" is a legal doctrine, first developed in European law, to refer to "some latitude of deference" given to the authority (usually the judges) to make a compromise stance in an adjudication. Viewed as a balancing act and one of appreciating complex factors, the margin of appreciation deliberately builds in the possibility of imprecision.

[8] The statutory functions of the IPCC as provided for under the IPCC Ordinance are:

1. To observe, monitor and review the handling and investigation of Reportable Complaints by the Commissioner of Police
2. To monitor actions taken or to be taken in respect of any police officer by the Commissioner of Police in connection with Reportable Complaints
3. To identify any fault or deficiency in police practices or procedures that has led to or might lead to a Reportable Complaint
4. To advise the Commissioner of Police and/or the Chief Executive of its opinion and/or recommendation in connection with Reportable Complaints
5. To promote public awareness of the role of the Council

It is reported that despite a considerable number of reportable complaints filed with the IPCC, only a small percentage of them were classified as substantiated. In the 6,412 complaints alleging police assault received between 2004 and 2018, only four cases were substantiated, while over half of the cases were dismissed without actionable conclusions. And when the cases are substantiated, officers in the majority of cases were only given "advice."

[9] The IPCC's report released on 15 May 2020 received serious criticism. See, e.g. Amnesty International Hong Kong, 2020; Davidson, 2020; Marlow, 2020; McGleenon, 2020.