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The democracy dichotomy: framing the Hong Kong 2019 street protests as legitimacy counterclaims against an incoherent constitutional morality

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Abstract

This article evaluates the 2019 street protests in Hong Kong following the proposal of the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019, in light of the constitutional settlement of the region. Firstly it examines the “constitutional morality” of Hong Kong, or the moral principles underlying its foundational claims to moral authority. Secondly it analyses whether the administration’s “legitimacy claims” – its rational-normative arguments for obedience to law – follow from these constitutional moral principles. Concluding that the legitimacy claims of the administration pursuant to the Bill proved morally unintelligible, this research finds that protest action by citizens was a logical and rational response to a perceived legitimacy claim failure. It suggests that similar protests are likely to occur for the foreseeable future given the instability of the region’s constitutional morality.

Keywords

Protest, Legitimacy, Hong Kong, Democracy, Legal Theory

I. Introduction

This article focuses on the constitutional logics underlying the street protests in Hong Kong after the proposal of the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 (“the Bill”).¹ Specifically it examines the claims to legitimacy the Executive presented with regard to the Bill, in the context of liberal theory, in the Hong Kong Special Administrative Region (“Hong Kong”). It does so by presenting and combining two new conceptualisations of core components of liberal theory. The first is “constitutional morality,” the set of moral principles to which liberal regimes make claim. The second is the “legitimacy claim,” the normative argument posited by regimes through which, by acting in keeping with those principles of constitutional morality, their laws can claim moral legitimacy. This allows these legitimate laws to be capable of being obeyed by rational, morally autonomous subjects. This in turn can be contrasted with the “legitimacy counterclaims” made by protesters if they find the regime’s legitimacy claims incoherent or deficient. Using these normative logics, it can be demonstrated that the Bill was inconsistent with the moral principles from which the administration of Hong Kong derives its claims to moral authority.

In what follows, I give a brief synopsis of the historical background and events leading to the street protests. Then, I explore the concept of constitutional morality with relation to liberal regimes. I critically examine Hong Kong’s constitutional morality and find that it suffers from irreconcilable incoherence, as it draws from both liberal and democratic principles whilst failing to enshrine them fully. After that, I present legitimacy claims as a

¹ Legislative Council of Hong Kong, *Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019*

means of framing claims to those moral principles in pursuit of obedience from subjects. I frame the Bill using these logics and subject it to rational-normative critique, or moral reasoning, based on the liberal and democratic principles to which the administration of Hong Kong appeals in its legitimacy claims. The Bill will be seen as an example of a law founded upon an incoherent legitimacy claim. Consequently, the protest actions will be framed as legitimacy counterclaims against a Bill that had deviated from core constitutional moral principles espoused by Hong Kong, *per* a liberal regime. To the extent that obedience to that law would be normatively irrational for citizens, protest and resistance are morally permissible and rational responses to its proposal.

Most importantly, it will further be concluded that, beyond the particular instance of the anti-Bill protests, the moral constitutional logics of Hong Kong are insufficiently coherent to support consistent legitimacy claims under liberal constitutional logics. Until democracy is fully enshrined in the constitutional settlement, these incoherent claims to democratic legitimacy will continue to give cause for dissent. In short, it can be shown that as a matter of moral reasoning, such protests are not only justifiable but inevitable. Consequently, one can expect that future laws which show similar inconsistency in their claims to liberal-democratic legitimacy will give good moral reason for dissent.

II. Theoretical framework

This research principally uses the methodology of rational-normative logic, or moral reasoning, to test the coherence and consistency of moral claims.² Specifically, the test of normative rationality will be framed using the newly-conceptualised legitimacy claim heuristic, which tests whether a regime's claims for obedience follow logically from its constitutional moral principles. It presumes that there are "moral reasons for action," "moral principles," or "grounds of obligation" – the terms are often used interchangeably – which are moral reasons for action and axiological to moral argument.³ Governments – including that of Hong Kong – often cite justice, equality, human rights and liberty as numbering amongst their legitimating constitutional moral principles, as shall be discussed in the next section.⁴ After positing such moral axioms, regimes create a chain of rational argument, which creates a conclusion as to what is morally required of citizens.⁵

A slightly altered approach must be taken when testing the legitimacy counterclaims made by protesters, although it relies upon an analogous analytic process. Unlike governments, protesters do not make claims to *de facto* authority or sovereignty: however, when engaging in protests they do make claims to the moral consistency and logic of their own claims.⁶ These claims may also be based on moral grounds similar to the state's

² Raz, J. 'Explaining Normativity: on Rationality and the Justification of Reason' (1999) 12 *Ratio* (4) 354-379

³ On moral reasons for action, as grounds of political obligation, see inter alia: Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986), 38-48; Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018), 5; Buchanan, A. 'Political Legitimacy and Democracy' (2002) 112 *Ethics* (4) 689-719, 703

⁴ *ibid.* With relation to fairness as another moral ground, see Cullity, G. 'Moral Free Riding' (1995) 24 *Philosophy and Public Affairs* (1) 3-34; regarding justice, see Kolers, A. 'The Priority of Solidarity to Justice' (2014) 31 *Journal of Applied Philosophy* (4) 420-433; and regarding the duty to assist others in need, or the Samaritan duty, see Wellman, C.H. 'Liberalism, Samaritanism and Political Legitimacy' (1996) 25 *Philosophy and Public Affairs* (3) 211-237

⁵ Raz (n 2)

⁶ Singer, P. *Democracy and Disobedience* (Oxford University Press, New York 1977), 82

constitutional moral principles. The legitimacy of the protest counterclaims will not however be the central focus of this research.

The theoretical approach of this research claims neither a positivist nor a non-positivist theoretical framework to law and legal validity.⁷ This is justifiable given that the research is not, and need not be, an examination of the vast positivist, non-positivist or natural law literature that already exists.⁸ The research focuses on moral logics of obedience, that is, whether moral obligations of obedience or disobedience apply to seemingly immoral laws. This is a separate question to whether a purportedly immoral law is legally valid.⁹ This in turn informs the judgement of whether protest action is internally coherent with the state's own purported moral axioms, as will be demonstrated in the specific example of the Hong Kong 2019 protests in this case.

III. Historical Background

The following is by necessity a brief historical background upon which to build this analysis. It is however hoped that for those unfamiliar with the constitutional background of Hong Kong, and of these protests in particular, it will prove a helpful synopsis for the purpose of framing the following discussion.

Since handover from British colonial rule in 1997, Hong Kong has been a Special Administrative Region of the People's Republic of China ("PRC"). Under its Basic Law, Hong Kong enjoys certain constitutional provisions typical of a liberal regime, including protections for human rights, and areas of administrative autonomy reserved for self-governance, including its postcolonial common law legal system. It has one of the greatest levels of autonomy of any non-sovereign administrative region in the world.¹⁰ It does however lack equal, universal suffrage in elections for the Chief Executive, and there are long-standing concerns about the influence of Beijing over the Executive branch of government, and any future progress the region may have for democratisation.¹¹ In this way, Hong Kong finds itself in a struggle between its colonial past, the political power of the PRC, and its own identity as a unique regime with liberal-democratic aspirations.

Following worries that there were discrepancies in the ability to extradite fugitives to other regions in the PRC, including Taiwan, in February 2019 the government of Hong Kong proposed changes to its extradition laws. It sought a mechanism for the Hong Kong Chief Executive to transfer fugitives to any jurisdiction with which the city lacked an existing extradition arrangement, purportedly to end any "legal loophole" – this was to be achieved through the proposed Bill.¹² For thousands of Hong Kong residents, the perceived

⁷ Hart, H.L.A. *The Concept of Law* (2nd edn Oxford University Press, New York 1994); Friedman, N. and Cornell, D. 'The significance of Dworkin's non-positivist jurisprudence for law in the post-colony: essay' (2010) 4 *Malawi Law Journal* (1) 1-94

⁸ Singer (n 6), 10

⁹ Hart (n 7); Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979), 23

¹⁰ Gittings (n 10)

¹¹ Hsin-Chi, K.; Siu-Kai, L. 'Between Liberal Autocracy and Democracy: Democratic Legitimacy in Hong Kong' (2010) 9 *Democratization* (4) 58-76

¹² South China Morning Post, 'Extradition bill not made to measure for mainland China and won't be abandoned, Hong Kong leader Carrie Lam says' (1 April 2019) [Online] Available at: <https://www.scmp.com/news/hong-kong/politics/article/3004067/extradition-bill-not-made-measure-mainland-china-and-wont> [Accessed 11/11/2019]

involvement of Beijing in those drafting processes, the lack of democratic mandate for the law, and the potential for such extraditions to undermine local human rights protections for suspects, were causes for great concern.¹³

The first protests occurred on 31 March, with approximately 12,000 protesters (according to organisers, the Civil Human Rights Front) demanding the withdrawal of the Bill.¹⁴ Throughout April, the movement gained numbers as approximately 130,000 protesters joined demonstrations. Tens of thousands, if not hundreds of thousands, would gather in subsequent marches in May and June.¹⁵ During these subsequent months, protesters began to make demands beyond withdrawal of the Bill, including amnesty for arrested protesters, an independent inquiry into alleged police brutality, and implementation of complete universal suffrage, which is lacking under the current Basic Law. It is also during this time that actions beyond peaceful protest, including vandalism of government property and skirmishes with the police, began slowly to emerge at the peripheries of the movement.¹⁶

With this background in mind, the following section will now focus on the theoretical underpinnings of claims to liberal governance. It begins with general principles of constitutionality and morality common to any purportedly liberal regime, and not only to Hong Kong. However, it will then examine the constitutional framework of Hong Kong specifically, including its unique constitutional morality, and will then frame the anti-Bill protests accordingly.

IV. Constitutional Morality and Democracy

Liberal theory suffers from what Dworkin called the “paradox of civil society.”¹⁷ This is the dilemma of how a liberal state justifies coercion against subjects who are purportedly morally autonomous.¹⁸ The ability to make decisions based upon one’s own evaluation of moral principles and considerations, or “practical reason,” requires citizens to consider their moral principles and act in accordance with them.¹⁹ Yet the coercive nature of government, and law in particular, requires us to bend our wills to that of the law, at times contrary to our autonomous moral rationality.²⁰ Part of the entire appeal of liberal regimes, fundamental to their internal logics, is that they preserve the autonomy of citizens as moral agents. At the

¹³ Wu, A.M. ‘HK leaders must avert rule-of-law decline’ *The Sunday Times* (7 July 2019) [Online] Available at: <http://news.nus.edu.sg/sites/default/files/resources/news/2019/2019-07/2019-07-07/HK-st-7jul-pB7.pdf> [Accessed 11/11/2019]

¹⁴ Hong Kong Free Press, ‘In Pictures: 12,000 Hongkongers march in protest against ‘evil’ China extradition law, organisers say’ (31 March 2019) [Online] Available at: <https://www.hongkongfp.com/2019/03/31/pictures-12000-hongkongers-march-protest-evil-china-extradition-law-organisers-say/> [Accessed 21/11/2019]

¹⁵ Hong Kong Free Press, ‘Over a million attend Hong Kong demo against controversial extradition law, organisers say’ (9 June 2019) [online] Available at: <https://www.hongkongfp.com/2019/06/09/just-no-china-extradition-tens-thousands-hong-kong-protest-controversial-new-law/> [Accessed 21/11/2019]

¹⁶ For a synopsis see BBC, ‘Why are there protests in Hong Kong? All the context you need’ (4 September 2019) [Online] Available at: <https://www.bbc.co.uk/news/world-asia-china-48607723> [Accessed 28/10/2019]; Los Angeles Times, ‘Hong Kong leader will suspend unpopular extradition bill indefinitely’ Los Angeles Times (15 June 2019) [Online] Available at: <https://www.latimes.com/world/la-fg-hong-kong-extradition-20190615-story.html> [Accessed 28/10/2019]

¹⁷ Dworkin, R. *Justice for Hedgehogs* (1st edn Harvard University Press, Cambridge M.A. 2011)

¹⁸ Raz, J. *The Morality of Freedom* (Clarendon, Oxford 1986)

¹⁹ Raz, J. *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford 1979); Raz (n 18); Waluchow, W. ‘Authority and the Practical Difference Thesis: A Defense of Inclusive Legal Positivism’ (2000) 6 *Legal Theory* (1) 45-82, 61-63

²⁰ Raz (n 18)

same time, the regime must be able to coordinate behaviour according to law, often in contrast to citizens' individual moral rationalities and perforce coercing subjects to maintain obedience.²¹

There are several theories which attempt to resolve this. Some take a social contractarian, or consent-based approach, where the citizen's voluntary participation in the political life of the state waives their moral claims to autonomy and disobedience.²² Other theories are founded on fairness, or the need for citizens to accept equal concern and participation including reciprocal expectations of obedience.²³ These are all *moral* arguments regarding political obligation, whatever the theoretical source of that obligation may be.²⁴ Most usefully for current purposes, there are other arguments which use rational-normative moral logics in order to justify obedience to law as being legitimate, despite the moral autonomy of subjects, in certain circumstances.²⁵ More will be said of these challenges in the next section, regarding claims to legitimacy within the framework of the law and its coercive powers. It can be observed for current purposes, however, that liberal regimes make moral claims to justify coercion. They do so by appealing to specific moral principles as grounds of political obligation, in justification of their constitutional morality. It will now be useful to explore briefly the concept of "constitutional morality," and its wider meaning in liberal theory, before turning to its specific pertinence to the difficulties in Hong Kong.

A. *Moral grounds and constitutional morality*

One must look to an entirely different liberal regime in order to find the root of this particular conception of "constitutional morality." For the purposes of this article, the phrase has been adapted from Ambedkar's discussion during Constituent Assembly debates. As the Indian Constitution began to take shape after British colonial rule, a number of difficulties beyond the mere text of the Constitution were addressed.²⁶ Ambedkar claimed that in order for the Constitution to succeed in its purpose, certain moral principles would have to inform a wider democratic constitutional culture so as to counterbalance the postcolonial, caste-based society on which the Constitution was, as he considered it, being superimposed.²⁷ Such principles would include equality of citizens, faith in the rule of law, and a principle of constitutional democracy beyond merely formal democratic institutions and governance. B eteille explored how Ambedkar was concerned that there should be the extra-textual, cultural and moral elements of constitutionalism within a democratic polity.²⁸

Raz describes this conceptualisation as the "thick" sense of constitutionalism: a normative culture and normative rationality founded in constitutional moral principles beyond the mere text of a written constitutional document.²⁹ The legitimacy of the constitutional settlement fundamentally depends upon such moral principles. For an emerging

²¹ Simmons, A.J. *Moral Principles and Political Obligations* (Princeton University Press, Princeton NJ 1979), 75-100

²² Macpherson, C.B. (ed) Locke, J. *Second Treatise on Government* (Hackett, Indianapolis 1980); Rousseau, J.-J. 'The Social Contract' in Gourevitch, V. (ed) *The Social Contract and Other Later Political Writings* (Cambridge University Press, Cambridge 1997); Simmons (n 21)

²³ Waldron, J. *Law and Disagreement* (Clarendon Press, Oxford 2004)

²⁴ Simmons (n 21), 75-100

²⁵ For example the service conception of authority: Raz (n 18)

²⁶ B eteille, A. 'Constitutional Morality' (2008) 43 *Economic and Political Weekly* (40) 35-42

²⁷ Constituent Assembly Debates, *Official Report* (Lok Sabha Secretariat, New Delhi 1989)

²⁸ B eteille (n 26), 36

²⁹ Raz, J. 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 153

postcolonial liberal democracy, according to Ambedkar, absence of a culture and morality of liberal democracy might jeopardise faith in the new constitution.³⁰ Again, these moral principles are not standards for *legal* validity within the constitutional settlement. Nevertheless, they are imperative if the constitutional order is to be perceived as legitimate, inasmuch as it can then command the respect and obedience of its (morally autonomous) subjects.³¹

“Constitutional morality,” as a term of art, is not used consistently across the vast literature on liberal constitutionalism. In United States jurisprudence the phrase has been burdened with a highly specific meaning with relation to originalism in adjudication.³² Other theorists address the core concept either in different terminologies, or in an abstracted manner that does not provide the concept with a specific moniker. For example, Dworkin considers constitutional morality as the body of principles of political morality that define the political community and give justification to its laws.³³ On the other hand, Raz considers it to be the corpus of “moral principles” which give constitutions and their legal systems normative effect “as long as they remain within the boundaries set by [those moral principles].”³⁴ For Lyons, these principles may be considered to be “moral presumptions” which form the starting points for arguments for or against obedience to law.³⁵ These principles go by so many different and often overlapping names: grounds of political obligation,³⁶ moral reasons for action,³⁷ or grounds of moral obligation.³⁸ Regardless the nomenclature, they ground the constitutional order with the legitimacy necessary to make reasonable claims for obedience from morally autonomous citizens.

This constitutional morality should not be mistaken for an attempt by individual citizens to impose their own moral principles in interpretation of the constitutional settlement. Within the state’s own constitutional regime, one can ascertain its political morality as “the full set of moral considerations that inform judgments of justice and legitimacy.”³⁹ To make compelling claims to morally autonomous subjects, a constitution must make appeal to recognized political and moral values.⁴⁰ This means that, although different political communities enjoy a different variety of principles and values, any given regime’s claims to constitutional morality rely upon moral principles found within the state’s own political morality.

³⁰ Bételle (n 26)

³¹ Wall, S. ‘Political Morality and the Authority of Tradition’ (2016) 24 *Journal of Political Philosophy* (2) 137-161, 149-150; for the discussion on what legitimacy entails see the second section below

³² See for example Frohnen, B. P. and Carey, G. W. *Constitutional Morality and the Rise of Quasi-Law* (Harvard University Press, Cambridge MA 2016)

³³ Dworkin, R. *Law’s Empire* (1st edn Hart, Oxford 1998)

³⁴ Raz (n 29), 173

³⁵ Lyons, D. ‘Reason, Morality, and Constitutional Compliance’ (2013) 93 *Boston University Law Review* (4) 1381-1388, 1382

³⁶ Delmas, C. *A Duty to Resist: When Disobedience Should Be Uncivil* (Oxford University Press, New York 2018)

³⁷ Raz (n 18)

³⁸ Simmons, A.J. *Justification and legitimacy: essays on rights and obligations* (Cambridge University Press, Cambridge 2001)

³⁹ Wall, S. ‘Political Morality and Constitutional Settlements’ (2013) 16 *Critical Review of International Social and Political Philosophy* (4) 481-499, 483

⁴⁰ Alexander, L. ‘Introduction’ in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998)

Sources of constitutional morality – that is, where one might find evidence of the existence of certain moral constitutional principles – will depend upon the state in question but might include constitutional documents, academic opinion, case law and precedent, legislative debate, and particular legislation that refers to or incorporates these moral principles.⁴¹ The advantage of using these sources to discover these moral principles is that the state, or the proponents of the liberal order in question, will posit them in claims for obedience. This is useful for identifying the regime’s claims to legitimacy, as it is evident which moral aims it uses in its appeals to authority.⁴²

Some moral principles appear almost universally across self-proclaimed liberal regimes. “Justice” is a classic example. There are countless sources in which one can observe claims to this moral principle: Ministries of Justice, “justice” as a euphemism for law enforcement, the names of criminal justice statutes, of prisons, of all manner of state-mandated laws and practices in pursuit of law-enforcement, and countless other examples besides. These can be found in every liberal regime, democratic or otherwise. All of this discourse and practice depends upon a claim to legitimacy founded on the principle of justice as a moral reason for action in itself. It is a justification for state interference with the liberty of citizens, beyond mere law-enforcement.⁴³ It would be farfetched to claim that a state could make reasonable claims to obedience of morally autonomous agents, as a liberal regime, if it only made claims to law enforcement, and not to justice, when interfering with this very moral autonomy. One might say that the absence of a clear claim to justice would render such a state’s constitutional settlement unintelligible as a liberal polity, bereft of the moral authority necessary to claim legitimate coercive power over autonomous citizens.⁴⁴

A different constitutional principle, of definitive value to a self-proclaimed liberal state, is (at least some formal) equality amongst citizens as political participants.⁴⁵ The fundamental importance of equality in justifying the coercive nature of political life under a liberal regime, certainly inasmuch as all citizens should have some participatory rights, is found consistently across the literature.⁴⁶ For liberal theory to resolve the paradox of civil society, it needs a relative moral parity of value between citizens. Democracy in particular requires equal rights of participation to claim legitimacy as a means of solving collective problems and coordinating behaviour.⁴⁷ It is almost impossible to imagine a democracy that would not proudly claim – if not always secure in reality – a formal, civil and political, equality among its *demos*, however composed. It is a separate question altogether whether such claims are realized fully, or if they might also include substantive rights, in any given liberal regime. Importantly, for liberal theory to make any coherent claim to legitimacy, it seems generally understood that the state must make claim to some minimal political conception of equality.⁴⁸

Some states may espouse different variations of moral principles, or interpret and apply them in different ways.⁴⁹ Regional variations exist in how such principles apply in

⁴¹ Bêteille, A. *Democracy and its Institutions* (Oxford University Press, New Delhi 2012)

⁴² Raz (n 18)

⁴³ Harris, J.W. *Legal Philosophies* (2nd edn Butterworths, London, Edinburgh and Dublin 1997), 280

⁴⁴ Delmas (n 36), 74

⁴⁵ Dworkin (n 33), 381-382; Rousseau, J.-J. ‘The Social Contract’ in Gourevitch, V. (ed) *The Social Contract and Other Later Political Writings* (Cambridge University Press, Cambridge 1997)

⁴⁶ Waldron (n 23); Dworkin (n 33), 381-382

⁴⁷ Waldron, J. *The Dignity of Legislation* (Cambridge University Press, Cambridge 1999); Waldron (n 23)

⁴⁸ Delmas (n 36), 169-177

⁴⁹ Raz (n 29) 152

liberal regimes, across such various countries as the UK, Germany, Kenya, the USA, and India.⁵⁰ Even so, the governments of each of these states make claims to moral principles to legitimize their authority and the obedience of their citizens.⁵¹ Their moral grounds differ but variously include appeals to justice,⁵² fairness,⁵³ equality,⁵⁴ dignity,⁵⁵ the rule of law,⁵⁶ liberty,⁵⁷ democracy,⁵⁸ and human rights.⁵⁹ It is not the purpose of this research to investigate these concepts or their definitions, nor is it necessary to ask whether such moral principles exist absolutely, universally or objectively.⁶⁰ It is sufficient to show that proponents of liberal theory, and the regimes that rely upon its logics to legitimate their rule, including Hong Kong, do make claim to posited moral grounds for legitimacy and therefore obedience. If they did not, their claims to *moral* authority would be unintelligible.⁶¹ Claims relating to the justifiability of the regime's coercive powers are only morally intelligible if they are in accord with the same moral grounds to which the regime makes claim.⁶²

To counter accusations that this approach relies upon dubious historiography, it should be noted that whether states are historically “founded” upon stated moral grounds is of little importance. That a state may not be so founded would not prevent a rational-normative evaluation of its constitutional settlement and the moral principles to which it now makes claim.⁶³ The UK constitution for example, to the extent that it has ever had a deliberately founded constitution or codified its constitutional development, has developed due to pragmatic or political motivations rather than due to constitutional-moral imperatives.⁶⁴ Likewise – and crucially for our purposes – the same democratic deficit and illiberalism pervaded the colonial history of Hong Kong.⁶⁵ It is not however the historical foundation that is of importance to current moral argument, but the present constitutional settlement. All liberal regimes, inasmuch as they presently make claim to be such a regime, refer to moral principles in their claims to legitimate authority. These regimes overtly and deliberately use these principles in their discourse in order to justify their claims for obedience.⁶⁶

⁵⁰ For example, contrast can be made to “Dignity” as a concept in the German constitution, as against representative democracy and the Rule of Law – in their peculiarly British manifestations – in the UK. See Germany *Basic Law for the Federal Republic of Germany* (23 May 1949). [Online] Available at: <https://www.refworld.org/docid/4e64d9a02.html> [Accessed 15 March 2019]; Allan, T.R.S. *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford 2001); Murkens, J.E.K. ‘Democracy and the Legitimizing Condition of the UK Constitution’ (2018) 38 *Legal Studies* 42-58

⁵¹ For example, Blackburn, R. ‘Britain’s unwritten constitution’ *The British Library: Magna Carta* (13 March 2015) [Online] Available at: <https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution> [Accessed 3 March 2019]

⁵² Kolers, A. ‘The Priority of Solidarity to Justice’ (2014) 31 *Journal of Applied Philosophy* (4) 420-433

⁵³ Cullity, G. ‘Moral Free Riding’ (1995) 24 *Philosophy and Public Affairs* (1) 3-34; Renzo, M. ‘Fairness, Self-Deception and Political Obligation’ (2013) 169 *Philosophical Studies* (3) 467-488

⁵⁴ Dworkin (n 33)

⁵⁵ Becchi, P. and Mathis, K. (eds.) *Handbook of Human Dignity in Europe* (Springer, Cham 2018)

⁵⁶ Allan, T.R.S. *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford 2001)

⁵⁷ Feinberg, J. *Harm to Others* (Oxford University Press, New York 1984)

⁵⁸ Allan, T.R.S. (n 56)

⁵⁹ Simmons (n 21); Delmas (n 36)

⁶⁰ Railton, P. *Facts, Values, and Norms : Essays Toward a Morality of Consequence* (Cambridge University Press, Cambridge and New York 2003)

⁶¹ Raz (n 18), 38-69

⁶² Raz (n 19)

⁶³ Raz (n 29)

⁶⁴ Gearty, C. *Liberty and Security* (Polity Press, Cambridge 2013), 4

⁶⁵ Ngo, T.-W. *Hong Kong's History: state and society under colonial rule* (Routledge, London 1999)

⁶⁶ *ibid.*

Moral principles are seldom absolute or infeasible, and rarely operate in isolation.⁶⁷ Our decisions as moral actors inevitably involve multiple moral imperatives, some of which appear to conflict in everyday life. These moral grounds act chiefly as reasons for action, to be balanced and contrasted with other relevant moral considerations.⁶⁸ The same applies equally to constitutional morality. Each regime will make claim to, and seek to pursue, numerous countervailing moral claims: at times prioritizing fairness over justice, or the rule of law over individual liberty, and so forth.⁶⁹ This is a difficult balance to strike. But this does not necessarily make the state's constitutional morality unintelligible, nor justify our abandoning the project of constitutional morality wholesale. Rather, if anything it compels us to consider seriously the moral claims which give reason to political life, and to strive harder to achieve the outcomes which best fit our fundamental moral principles.⁷⁰

That the terms of these moral principles are inherently contestable may in fact be an asset to, rather than a burden upon, liberal theory. Debating the meanings of justice, democracy, fairness and equality is itself a core function of both liberal and democratic practice. Argument over the scope and content of moral principles is a part of the development of a robust liberal regime.⁷¹ Equality, for example, does not have to be an uncontested term to be a meaningful social concept, and one to which appeals are evidently made in the course of social and political life. Such moral principles will forever be subject to agonistic philosophical and political debate, but this does not bar their coherent use within moral discourse, and therefore in constitutional theory.

It is clear that liberal states must make claims to moral principles as the basis of their constitutional order, and therefore their claims to obedience.⁷² It is demonstrable that they do in fact make these appeals to moral grounds which, though subject to variation and contestable definition, are identifiable within sources of constitutional morality. The laws and policies of the state are only intelligible if they flow consistently from these principles: this is what constitutional morality in effect demands.⁷³ It is now possible to examine the constitutional morality of Hong Kong under this framework, and identify the core difficulties in establishing its axiological foundations.

B. The dichotomous constitutional morality of Hong Kong

It can be demonstrated that there is an innate incoherence in the constitutional moral principles embodied in the constitutional settlement – indeed, plural settlements – of Hong Kong.

The first observation is that Hong Kong is not itself a sovereign state but a Special Administrative Region of the PRC, and one might argue that taking this liberal (and predominantly, democratic) state model to analyse Hong Kong's constitutional settlement

⁶⁷ Simmons (n 21); Delmas (n 36), 7

⁶⁸ *ibid*

⁶⁹ Lakin, S.J. 'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution' (2008) 28 *Oxford Journal of Legal Studies* (4) 709-734, 723-725

⁷⁰ Delmas (n 36), 161-166

⁷¹ Perry, M.J. 'What is the Constitution?' in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 114-119

⁷² Michelman, F.I. 'Constitutional Authorship' in Alexander, L. (ed) *Constitutionalism* (Cambridge University Press, Cambridge 1998), 76-82

⁷³ Raz (n 2)

would be misplaced and perhaps even unacceptably Eurocentric.⁷⁴ One might therefore take the view that the foregoing state-centric liberal theories simply do not apply to Hong Kong. A response to this may well be to agree: with the caveat that, this being so, Hong Kong cannot make coherent claims to the same *liberal or democratic* justifications for obedience, and so finding justifiable moral reasons for obedience to law would no doubt be even more difficult to achieve.⁷⁵

This paper however proceeds on an alternative response. Hong Kong does have sufficient (if highly contingent) autonomy, and (as shall be demonstrated presently) makes sufficient *appeals* to these Western liberal and democratic principles that, for the purposes of governance, it operates as the immediate autonomous government of the area, and makes claims to obedience to its laws similar to those of a liberal democratic regime.⁷⁶ With autonomy over currency, border control, economic policy, criminal justice and many other policies except for military defence and centralised foreign policy, Hong Kong has autonomy almost unheard of in any other administrative region in the world.⁷⁷ As a regime, it therefore operates in the immediate place of the “state” in the dynamics of constitutional morality and legitimacy claims.⁷⁸ That Hong Kong is not itself a sovereign state is nonetheless highly significant, as will be made clear presently.

With regard first to constitutional morality, then, a clear incoherence exists in a) the constitutional settlement of Hong Kong itself, and b) the moral principles embodied therein.

On the first point, the paradoxes of the Basic Law and its creation have been the subject of much attention since well before its enactment.⁷⁹ The Basic Law is an almost unique constitutional document in not being a “constitution” in a traditional Western sense.⁸⁰ It is a “basic law” from the National People’s Congress of the PRC, and subject to the Constitution of the PRC.⁸¹

The compatibility of the Basic Law with the Constitution of the PRC was declared by an Interpretation of the NPCSC: to that extent one might argue that the Basic Law, as compatible and subordinate law, is ultimately subsumed by the Constitution of the PRC, and does not stand in juxtaposition to it as a separate constitutional settlement.⁸² There is

⁷⁴ See for example Morris, R.J. ‘Forcing the Dance: Interpreting the Hong Kong Basic Law Dialectically’ in Fu, H., Harris, L. and Young, S.N.M. (eds) *Interpreting Hong Kong’s Basic Law: The Struggle for Coherence* (Palgrave Macmillan, New York 2007)

⁷⁵ Davis, M.C. ‘Interpreting Constitutionalism and Democratization in Hong Kong’ in Fu, H., Harris, L. and Young, S.N.M. (eds) *Interpreting Hong Kong’s Basic Law: The Struggle for Coherence* (Palgrave Macmillan, New York 2007)

⁷⁶ Holliday, I.; Ngok, M.; Yep, R. ‘A High Degree of Autonomy? Hong Kong Special Administrative Region, 1997–2002’ (2002) 73 *Political Quarterly* (4) 455-464; Hsin-Chi, K.; Siu-Kai, L. *op cit* (n 11); Wang, Z. ‘China’s Decision on Universal Suffrage in Hong Kong and Its Significance’ (2011) *Hong Kong Journal* [Online] [Accessed 25/10/2019] Available at: https://web.archive.org/web/20110624000902/http://www.hkjournal.org/PDF/2008_summer/1.pdf

⁷⁷ Gittings (n 10)

⁷⁸ Hsin-Chi, K.; Siu-Kai, L. *op cit* (n 11)

⁷⁹ Ghai, Y. ‘The past and the future of Hong Kong’s constitution’ (1991) 128 *The China Quarterly* 794-813, 804

⁸⁰ Zhang Youyu, ‘The Reasons for and Basic Principles in Formulating the Hong Kong Special Administrative Region Basic Law, and its Essential Contents and Mode of Expression’ (1988) 2 *Journal of Chinese Law* (5) 7–8

⁸¹ See, for example, the White Paper from the Information Office of the State Council, *The Practice of the “One Country, Two Systems Policy” in the Hong Kong Special Administrative Region* (10 June 2014), part V(2); Chen, A. *An Introduction to the Legal System of the People’s Republic of China* (4th edn LexisNexis 2011)

⁸² *Decision of the NPC on the Basic Law of the Hong Kong SAR of the PRC* (4 April 1990)

nonetheless a great deal of opinion to the contrary. The Basic Law does itself have “all the hallmarks of a constitution,” as it both defines the powers of various governmental organs, and enshrines certain civil and human rights.⁸³ Considered to be the superior law of the jurisdiction, the Court of Final Appeal has described the Basic Law as both a national law, and as the only de facto and de jure constitution of Hong Kong.⁸⁴ There are, therefore, clear contradictions to be reconciled within the “one country, two systems” hybrid governance dynamic with regard to the Basic Law. This constitutional settlement, though the only directly applicable constitutional settlement used by Hong Kong courts, operates with an autonomy entirely contingent upon the PRC’s own very distinct constitutional regime.⁸⁵ There remains as such a fundamental incoherence as to the source, or indeed sources, to which one would turn in order even to identify the constitutional morality of Hong Kong.⁸⁶

Even presuming – as the Court of Final Appeal does – the local primacy of the Basic Law over the jurisdiction, the second difficulty with the constitutional morality of Hong Kong remains unresolved, namely the moral principles it embodies. At first glance, the Basic Law, as a source of constitutional moral principles, very clearly states moral principles of importance to Hong Kong as a liberal regime. The principle of democratic governance, for example, is explicitly stated as a principle within the Basic Law, with equal universal suffrage codified as a principle to which the region aspires, subject to the principle of gradual and orderly progress.⁸⁷ This aspirational democratic principle is however a highly contested concept. Since its inception the democratic spirit of the Basic Law has been subject to scrutiny, particularly in the context of historical British colonial rule and its absence of democratic legitimacy. Some have described the “mirage” of Hong Kong’s democracy as being more rhetorical than substantive.⁸⁸ Recently the difficulty of the Basic Law’s dependency on gradual democratic change, which has been stymied somewhat by NPC decisions with relation to changing the electoral processes for the Legislative Council and the Chief Executive, has led to greater concern that the promise of democracy has been continuously disappointed.⁸⁹ Moreover, and most fundamentally, there is a dissonance between the stated regional constitutional morality of democratic legitimacy, and the fundamentally different approach to democracy adopted by the PRC.⁹⁰ Where these explicit and unambiguous local claims to democratic legitimacy have been found wanting by Hong Kong residents before, particularly due to perceived resistance from the PRC and its institutions, it has created significant tensions amongst a frustrated public that accuses the regime of abandoning democratic principles on pressure from central authorities.⁹¹

⁸³ Gittings (n 10), 46

⁸⁴ *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4

⁸⁵ Hsin-Chi, K.; Siu-Kai, L. *op cit* (n 11)

⁸⁶ For a discussion on the competing monist and pluralist approaches, see Chan, C. ‘Reconceptualising the Relationship between the Mainland Chinese Legal System and the Hong Kong Legal System’ (2011) 6 *Asian Journal of Comparative Law* (1) 1-30

⁸⁷ Articles 45 and 68 of HKBL

⁸⁸ Grant, J. ‘Hong Kong’s democratic mirage’ 17 *Asian Studies Review* (1) 37-43

⁸⁹ NPCSC, *The Decision of the Standing Committee of the National People’s Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016* (31 August 2014); NPCSC, *Decision of the Standing Committee of the NPC on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong SAR in the Year 2007 and for Forming the Legislative Council of the Hong Kong SAR in the Year 2008* (26 April 2004)

⁹⁰ Harris, L. ‘China’s Constitution’ in Fu, H., Harris, L. and Young, S.N.M. (eds) *Interpreting Hong Kong’s Basic Law: The Struggle for Coherence* (Palgrave Macmillan, New York 2007)

⁹¹ Hsin-Chi, K.; Siu-Kai, L. *op cit* (n 11); *Ghaiop cit* (n 78), 811

One can see similar difficulties with other constitutional moral principles enshrined in the Basic Law. For example, autonomy and self-determination are explicitly exalted throughout the document, especially with relation to Articles 5 and 8.⁹² Socially and politically, pride in the idiosyncratic, capitalist, metropolitan cultural identity of Hong Kong as a liberal regime informs this regional conceptualisation of autonomy. A wider principle of economic and political liberty underlies it, one might argue, which encapsulates the liberality of Hong Kong's constitutional morality *per liberal regime*.⁹³ One difficulty is that the term "autonomy" evades clear definition, both within the Basic Law itself and across the wider literature.⁹⁴ Indeed, other provisions make clear that these principles exist in an uncomfortable tension, being inextricably linked with, and subject to, PRC constitutional legitimation and political power.⁹⁵ The Chinese constitutional system is not *federated*, with regional autonomy being primary but for that which is federated to the national level: instead it is generally considered to be *unitary*, with central authority being primary but for that which is delegated to regions.⁹⁶ The constitutional settlement of the Basic Law, and the autonomy it protects and enshrines, is ultimately granted by a national law. It is a subordinate autonomy.⁹⁷ Other typically liberal constitutional moral principles proudly espoused by the Hong Kong regime, such as the rule of law and human rights, are of course subject to similar conflicts as a direct result of this contingent autonomy.⁹⁸

These internal paradoxes threaten the axiomatic coherence necessary for legitimacy claims to be effective – or at least, they do if one presumes that the Basic Law's liberal democratic constitutional morality has parity with the Chinese constitutional morality. Conversely, some theorists have taken a very strong view on the subordination of liberal democratic norms within the Hong Kong system. Morris, for one, would say that the democratic and liberal principles enshrined – to the extent they are so enshrined – in the Basic Law, will always be aberrations of the PRC's underlying constitutional morality.⁹⁹ He argues that from a Kelsenian perspective, the Grundnorm – the fundamental normative fact that underlies all normative claims within a system – is to be found not in the Basic Law but in the Constitution of the PRC.¹⁰⁰ This being so, one would have to say that in truth the Basic Law's constitutional morality is alien to the fundamental Chinese constitutional morality and, being subordinate to it, should be removed or altered so as to be coherent with the latter. Alternatively, one can treat both normative systems as being equally applicable, but in conflict: in which case there is a moral cross-purpose in the moral axioms claimed to be in

⁹² Ghai (n 78), 806

⁹³ Fu, H., Harris, L. and Young, S.N.M. (eds) 'Introduction' in *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (Palgrave Macmillan, New York 2007)

⁹⁴ Gittings (n 10), 3

⁹⁵ For example, Articles 1, 2, 7 and 11 of the Basic Law make very clear the PRC's claims over the HKSAR both politically and constitutionally.

⁹⁶ Xianfa, Z. *Chinese Constitutional Law* (Xu Chongde ed., 3rd ed. 2006), c.f. Zhu, G. 'The composite state of China under "one country, multiple systems": theoretical construction and methodological considerations' (2012) 10 *International Journal of Constitutional Law* (1) 272-297

⁹⁷ Gittings (n 10), 66-67

⁹⁸ For broad overviews of the conflicts between the rule of law and the protection of human rights espoused by the HKSAR, against the political pressures applied from the Mainland, see respectively Gittings (n 10), 153-218; 263-302

⁹⁹ Morris (n 73), 97-98

¹⁰⁰ See also Wacks, R. *Hong Kong, China and 1997: essays in legal theory* (Hong Kong University Press, Hong Kong 1993)

play.¹⁰¹ Notably, Benny Tai considers Hong Kong to have its own distinct constitutional existence, which should resist the “encroachment” of the hostile Mainland constitutionality.¹⁰² This creates other difficulties for the coherence of the legitimacy claims made under a purported liberal regime that fails to live up to its promises.¹⁰³

It therefore becomes difficult to establish which moral principles, from whichever constitutional settlement, truly determine the constitutional morality of Hong Kong. As we shall see, even if one presumes the constitutional primacy of the Basic Law in the region and its commitment to human rights, the rule of law, democratic development and regional autonomy under a liberal polity, this incoherence will directly impact the legitimacy claims of the regime regarding the Bill, and potentially many more laws in the future.

The next section looks to the second stage of the argument for obedience: that is, that a regime’s claims to legitimacy purportedly follow from its starting moral axioms. Only once this is understood can one understand obedience, and therefore by contrast (should these moral claims fail) disobedience and protests in a purported liberal regime. We will then be able to see how legitimacy claims appear troublesome in the case of Hong Kong.

V. Legitimacy claims

Legitimacy is generally understood to mean a particular type of moral or political authority.¹⁰⁴ Largely it signifies the moral authority of a state or regime to generate obligations on morally autonomous subjects, including obligations to obey laws.¹⁰⁵ These are instances of “political obligations,” which arise without the consent of the citizen individually.¹⁰⁶ If the state and its laws are deemed to be legitimate, then they have normative force notwithstanding the fact that the individual citizen may have reservations as to their content.¹⁰⁷ Simply put, a good moral argument based on a good moral principle inspires an obligation in rational citizens to obey. If on the other hand a legitimacy deficit is perceived by these citizens, the same moral authority claimed by the state may not have full normative effect – that is to say, may not prove morally binding on its subjects. This can lead citizens to reject the law in question, to disobey or to protest, or even attempt to overthrow the government.

One can apply moral logic to assess the internal coherence of states’ moral claims to authority, by reference to their fundamental moral principles and norms.¹⁰⁸ One begins with a moral reason for action, or the moral principle to which an appeal is made, such as fairness, found in the regime’s constitutional morality. This is the axiom in the moral reasoning: the premise upon which the moral reasoning is based. Subsequent argument must remain

¹⁰¹ Chan, J. ‘Civil Liberties, Rule of Law and Human Rights: The Hong Kong Special Administrative Region in Its First Four Years’ in Lau, S. (ed) *The First Tung Chee-hwa Administration: The First Five Years of the Hong Kong Special Administrative Region* (Chinese University of Hong Kong, Hong Kong 2002)

¹⁰² Tai, B. ‘Hong Kong No More: From Semi-democracy to Semi-authoritarianism’ (2018) 4 *Contemporary Chinese Political Economy and Strategic Relations: An International Journal* (2) 395-430

¹⁰³ Tai, B. ‘Challenges to the Rule of Law in a Semi-authoritarian Hong Kong’ (2020) 29 *Social and Legal Studies* (1) 110-128

¹⁰⁴ e.g. Raz (n 18)

¹⁰⁵ Sevel, M. ‘Obeying the Law’ (2018) 24 *Legal Theory* (3) 191-215

¹⁰⁶ Simmons (n 21)

¹⁰⁷ Raz (n 18)

¹⁰⁸ Weber, M. *Economy and Society* (Bedminster Press, New York 1968); McCarthy, T. (tr) Habermas, J. *The Theory of Communicative Action Polity*, Cambridge 1984)

consistent with that principle in order to be intelligible and coherent. If for example one treats as axiomatic the equality of human persons, a law or policy of discriminatory segregation would be inconsistent with the axioms posited. Analogous reasoning was used to justify civil disobedience during the Civil Rights movement, and in Black Lives Matter protests in recent years.¹⁰⁹ Provided that the argument remains internally consistent, and the actions of the state remain coherent with its legitimating constitutional principles, the rational-normative logic remains intact and is justifiable according to its own rationale.¹¹⁰

A. Overview of the legitimacy claims heuristic

Given that claims to legitimate authority depend upon contestable moral axioms, and that no law or society can be expected to attain absolute conditions of perfect equality, democracy, justice or fairness – and therefore, perfect legitimacy – the most that can realistically be expected is for states to demonstrate the “legitimation-worthiness” of their claims.¹¹¹ The “legitimacy claims” of governments will essentially be normative arguments, using constitutional moral principles as axioms, and demonstrating that their laws and policies are coherent with those axioms.¹¹² Sultany, from whose work the term is derived, presents the phrase “legitimacy claim” in *Law and Revolution*, but uses this language less as a term of art than as a broader description of state attempts to make a claim for obedience generally. It is now suggested that as a rational-normative heuristic, “legitimacy claims” should be understood as a framework for conceptualising the logical order of claims to legitimacy. For the purpose of this paper, I define a legitimacy claim as a claim made by a state relating to its moral authority to impose obligations on morally autonomous subjects without their consent.

One or more moral constitutional principles are presented as axiomatic, and the state presents an argument for obedience as a normatively defensible, rational behaviour on the part of a morally autonomous subject because the legitimacy claim is consistent and appeals to a suitable moral principle.¹¹³ A legitimacy claim therefore comprises three components: firstly, a constitutional moral axiom to which the state makes claim; secondly, a posited law that purports to be consistent with the aims of that moral axiom; and thirdly, a requirement of obedience should the law be consistent with the moral axiom as a reason for action.

Moral principles, and their applicability as reasons for action, will vary between subjects and contexts, but a regime’s claims to moral authority are only ever intelligible if they are in pursuit of aims consistent with the moral principles included within that regime’s constitutional morality.¹¹⁴ One should examine the coherence of the claims made by states – accepting their moral grounds as reasons for action *prima facie* but instead questioning the coherence and consistency of their calls for obedience to laws made under those moral principles. When interrogating the rigour of state claims to authority, we pass over the existential problem of moral relativism regarding principles, and instead can focus on the merits of the state’s claims with reference to its own stated principles.¹¹⁵ The internal

¹⁰⁹ Washington, J.M. (ed) King, M.L. Jr. *Testament of Hope: The Essential Writings and Speeches of Martin Luther King Jr.* (Harper Collins, New York 2003)

¹¹⁰ Harris, J.W. *op cit* (n 43), 13; Raz (n 2)

¹¹¹ Michelman (n 71) 70-74

¹¹² Sultany, N. *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford University Press, New York 2017), 127

¹¹³ That a moral ground is a reason for action, that compliance with the state’s laws will achieve the aims of that reason, and that therefore compliance is morally obligatory, is crucial to Raz’s explanation of how liberal states can generate obligations of obedience on autonomous subjects: Raz (n 61), 27

¹¹⁴ *ibid*, 140-144

¹¹⁵ Harris, J.W. *op cit* (n 43)

consistency of the moral argument is the main focus of examination. The rational-normative concept of legitimacy explains why morally autonomous subjects would be obligated to follow state laws, but without defined moral principles being recognised as authoritative, there would be unacceptable moral subjectivity regarding the moral grounds which would render a law legitimate or illegitimate.¹¹⁶ However, by framing claims to authority as “legitimacy claims,” based on already-positing moral principles, one tests these claims to obedience by the constitutional morality posited by the state, holding it to its own moral standards.

This method of assessing the legitimacy-worthiness of state claims, by holding their laws to the moral standards used for their legitimation, reflects discourses across protest movements in sociological literature.¹¹⁷ Protest movements frequently cite moral principles raised by the regime itself and espoused by the wider political community, and highlight inconsistencies in regime claims for obedience in problematic laws. The Civil Rights movement is a strong example of this in action: the United States constitutional claims to legitimacy, famously founded upon the principle that all men are created equal, was found wanting by demonstrators in the Jim Crow and segregationist laws of certain states.¹¹⁸

Protest might be conceptualised as a response to incoherent state legitimacy claims, and as a non-institutionalised forum of redress for these failures.¹¹⁹ In this way, protest can be framed as a claim to those very moral grounds posited by the state.¹²⁰ It has been recognised that protest acts as a form of moral dialogue, in that it facilitates the exchange of moral arguments between citizens and state.¹²¹ Protest movements can and do consider claims to legitimacy using such rational-normative logics. Further, protest can itself act as a legitimacy counterclaim. This means it can present both a critique of the state’s moral reasoning, and an argument that the protest itself is morally rational and justified on the same grounds of constitutional morality.¹²²

The foregoing sections, though general in nature and not specific to Hong Kong, are crucial if one is to understand the crisis of constitutional morality underlying the political turbulence in Hong Kong in 2019. Only by understanding that liberal theory depends upon coherent constitutional morality, and consistent legitimacy claims to those moral principles in state law and policy, can one understand that Hong Kong suffers from a constitutional incoherence that will inevitably lead to legitimation failures and protests for the foreseeable future.

¹¹⁶ Sultany (n 111), 6-7

¹¹⁷ Elsbach, K.D. and Sutton, R.I. (1992) ‘Acquiring Organizational Legitimacy Through Illegitimate Actions: A Marriage of Institutional and Impression Management Theories’ (1992) 10 *The Academy of Management Journal* 35 (4) 699 – 738

¹¹⁸ See for example Washington (n 108)

¹¹⁹ Della Porta, D. ‘Political Economy and Social Movement Studies: The Class Basis of Anti-Austerity Protests’ (2017) 17 *Anthropological Theory* (4) 453-473; Scheuerman, W.E. ‘Recent Theories of Civil Disobedience: an Anti-legalistic Turn?’ (2015) 23 *The Journal of Political Philosophy* (4) 427-449

¹²⁰ Brownlee, K. *Conscience and conviction: the case for civil disobedience* (Oxford University Press, Oxford 2012); Daase, C. and Deitelhoff, N. ‘Opposition and Dissidence: Tow Modes of Resistance Against International Rule’ (2019) 15 *International Political Theory*, Special Issue, (1) 11-30

¹²¹ Ganesh, S and Zoller, H.M. ‘Dialogue, Activism and Democratic Social Change’ (2012) 22 *Communication Theory* (1) 66-91; Brownlee, K. ‘The Communicative Aspects of Civil Disobedience and Lawful Punishment’ (2006) 1 *Criminal Law and Philosophy* (2) 179-192

¹²² Klein, G.R. and Regan, P.M. ‘Dynamics of Political Protests’ (2018) 72 *International Organization* (2) 485 – 521

B. Hong Kong's legitimacy claim dissonance

Hong Kong's aforementioned incoherence in constitutional morality has direct impact on the coherence of its legitimacy claims, as can be evidenced not only in theoretical terms but also in the case of protests against the Bill. With relation to the 2019 protests, we see this legitimacy claim heuristic operate in practice.

The facts relating to the Bill's contents and reception need not be restated here at great length.¹²³ In short, the Bill proposed the introduction of a new special surrender arrangement so as to be rid of restrictions against extraditing suspects from Hong Kong to other regions of the PRC, thereby empowering the Chief Executive as the sole decision-maker in determining case-based arrangements. This would be despite the other PRC regions having lower standards of human rights protections and rights of due process.¹²⁴ Human rights groups and journalists also highlighted the potential chilling effect this could have on freedom of speech and journalistic independence within Hong Kong – concerns which were not allayed by the Executive during months of deliberations.¹²⁵ As the Hong Kong Bar Association observed in April 2019:

The concerns over the significant differences between the judicial and criminal justice systems practised in Hong Kong and the Mainland in terms of protection of fundamental human rights have not been answered by the HKSAR Government.¹²⁶

For political opponents of the Bill, it was not simply that it proved unpopular on its substantive content: it was considered an aberration, incompatible with the human rights and liberal democratic legitimacy of Hong Kong. Amnesty International called it “the final straw” in a series of moves that have sought to undermine human rights protections in the region.¹²⁷ The Civil Human Rights Front, the group which helped organise key protests, was quoted by the Hong Kong Free Press as saying that approximately two million people attended protests in June 2019.¹²⁸ Resistance to the Bill came precisely from the fact that it failed to meet the principles which residents of Hong Kong saw as fundamental to their governance.

As such, we see in action the precise manner in which the Bill presents as a failed legitimacy claim. Regarding constitutional-moral axioms, there was confusion as to the moral principles to which claim was made by the Executive. Before the Bill was shelved, Carrie Lam had emphasised that the Bill was not “made to measure” for Beijing – preserving the

¹²³ For a synopsis see BBC (n 16)

¹²⁴ Hong Kong Bar Association, ‘Observations of the Hong Kong Bar Association on the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019’ Citizen News Reader (2 April 2019) [Online] Available at: https://www.hkcnews.com/article/19529/bar_association-fugitives_bill-19529/observations-of-the-hong-kong-bar-association-on-the-fugitive-offenders-and-mutual-legal-assistance-in-criminal-matters-legislation-amendment-bill-2019 [Accessed 28/10/2019]

¹²⁵ Hong Kong Free Press, ‘New extradition law would enable China to capture journalists in Hong Kong, warns media watchdog’ Hong Kong Free Press (3 April 2019) [Online] Available at: <https://www.hongkongfp.com/2019/04/03/new-extradition-law-enable-china-capture-journalists-hong-kong-warns-media-watchdog/> [Accessed 28/10/2019]

¹²⁶ Hong Kong Bar Association (n 123)

¹²⁷ Amnesty International, Why Hong Kong's Extradition Bill was the final straw (26 September 2019) [Online] Available at: <https://www.amnesty.org/en/latest/news/2019/09/hong-kongs-extradition-bill-final-straw/> [Accessed 11/11/2019]

¹²⁸ Hong Kong Free Press, ‘Almost 2 million attended anti-extradition law demo, say organisers, as protesters bed in around gov't HQ’ (17 June 2019) [Online] Available at: <https://www.hongkongfp.com/2019/06/17/almost-2-million-attended-anti-extradition-law-demo-say-organisers-protesters-bed-around-govt-hq/> [Accessed 11/11/2019]

principle of regional autonomy – and that it was justifiable on grounds of due process and justice, and in preservation of the rule of law in handling particular criminal cases.¹²⁹ These are all direct appeals to the liberal principles of the Hong Kong regime. As such the axiological principles posited by the Executive were purportedly in keeping with the Hong Kong Basic Law and its regional, liberal constitutional morality, rather than that of the PRC.

However, it became clear that the coherence of the moral principles at play was far from established. For example, claims to autonomy made by the administration were questioned by many, given the *realpolitik* of Beijing's influence over the Hong Kong administration.¹³⁰ There has been widespread belief that the Bill was indeed pushed from Beijing, which would render that claim dubious at best.¹³¹ The other claimed principles of justice and due process, which seem central to the Basic Law and the regional constitutional morality, seemed defective in the Bill. It provided insufficient judicial oversight of an executive extradition decision, and could allow the safeguards of due process and human rights protections to be circumvented by executive action.¹³² As such, the posited reasons for the justifiability of the Bill were considered specious from the offset, and inconsistent with the liberal constitutional morality of the region.

Consequently, we can see the failure of the legitimacy claim itself. As a result of this axiological incoherence, the claim that the Bill was consistent with Hong Kong's constitutional morality was widely rejected. It was considered an aberration, an alien imposition from the PRC, and inconsistent with the political morality of Hong Kong's liberal regime.¹³³ In short, the Bill gave no good reasons to be accepted and obeyed.

In the absence of a strong legitimacy claim, protests against the Bill were widespread – numbering hundreds of thousands, if not millions, over the course of many months – and were vocal about the illegitimacy of the proposed Bill.¹³⁴ The dialogic nature of protest *per* counterclaim has been observed by political theorists for many years. Charles Tilly concluded during his analysis of political violence that collective protest is a “kind of conversation,” reflective of the socio-political context of the regime in question.¹³⁵ More recently, Gilman-Opalsky has theorised that even violent protest and riot are the vocalisations of a “philosophy from below.”¹³⁶ For these liberal, pro-democracy protesters, disobedience and protest can themselves act as a dialogic response to the perceived legitimacy deficit of the Bill.

The counterclaims regarding justice, the rule of law and autonomy then spread to broader legitimacy counterclaims regarding the principles of democratic governance underlying the Bill. It became clear that the effect of the Bill, and its being pushed by the Chief Executive without a satisfactory democratic mandate, was also considered to be

¹²⁹ South China Morning Post, ‘Extradition bill not made to measure for mainland China and won't be abandoned, Hong Kong leader Carrie Lam says’ (1 April 2019) [Online] Available at: <https://www.scmp.com/news/hong-kong/politics/article/3004067/extradition-bill-not-made-measure-mainland-china-and-wont> [Accessed 11/11/2019]

¹³⁰ Wu, A.M. ‘HK leaders must avert rule-of-law decline’ *The Sunday Times* (7 July 2019) [Online] Available at: <http://news.nus.edu.sg/sites/default/files/resources/news/2019/2019-07/2019-07-07/HK-st-7jul-pB7.pdf> [Accessed 11/11/2019]

¹³¹ Amnesty International (n 126)

¹³² Hong Kong Bar Association (n 123)

¹³³ Hong Kong Free Press (n 124)

¹³⁴ Hong Kong Free Press (n 127)

¹³⁵ Tilly, C. *The Politics of Collective Violence* (Oxford University Press, New York 2003), 6

¹³⁶ Gilman-Opalsky, R. *Specters of Revolt* (Repeater, London 2016), 26

inconsistent with the principles of liberal democratic governance that many considered necessary for the legitimate authority of the administration to operate.¹³⁷ Its claim to obedience relied upon a practical conception of authority, that is, to the underlying illiberal, nondemocratic settlement and the political supremacy of the PRC: it could not support the legitimacy of the law on Hong Kong's more liberal, democratic settlement, nor on the moral constitutionality underpinning it.¹³⁸ As such the Bill presented a poor legitimacy claim regarding its democratic justifiability.

This is fundamentally how the protests outgrew the original, narrow contention over the Bill, and became a much wider counterclaim to a perceived legitimacy failure from the Chief Executive and the Hong Kong administration at large.¹³⁹ The Bill's legitimacy deficit proved itself to be based upon the more fundamental deficits in the administration's legitimacy, derived from a lack of democratic mandate and the perceived subversive influence of the PRC. Protesters began to claim that the Bill was a mere side-effect of a more fundamental failure to effect the democratic constitutional moral principles enshrined in the Basic Law and Hong Kong's regional constitutional morality. Legitimacy counterclaims were made regarding the overall democratic accountability within Hong Kong, similarly to how demands for greater democratic reform were made under the earlier Umbrella Movement.¹⁴⁰ This is important because it demonstrates that democracy, however defined and however nascent it may be, is sincerely treated as a fundamental moral constitutional principle by many thousands of Hong Kong residents.¹⁴¹ Pro-democracy demonstrations, demands for universal suffrage and electoral reform, and even appeals to assistance from Washington D.C. and London, evidenced a claim on the part of many protesters that the constitutional morality of Hong Kong suffers from a fatal incoherence under the influence of the PRC. This incoherence acts to the detriment of the democratic principles to which the residents of Hong Kong aspire.¹⁴²

As such protesters were seen to refer to discourses over democracy and other liberal constitutional moral principles in their protest dialogue, while the Executive failed to do so coherently.¹⁴³ One sees therefore in the Bill, and its protest by the residents of Hong Kong, the dynamics of a failed legitimacy claim and a powerful counterclaim by demonstrators. The regime cannot on the one hand make appeals to legitimacy based on local democratic-liberal constitutional norms, whilst also failing to adhere to those moral imperatives (and making appeal instead to the separate constitutional normative system of the PRC), without accusations of hypocrisy or moral incoherence.

¹³⁷ Hong Kong Free Press 'Democrats decry 'coup' as pro-Beijing lawmaker seeks to take over vetting of China extradition bill' *Hong Kong Free Press* (6 May 2019) [Online] Available at: <https://www.hongkongfp.com/2019/05/06/democrats-decry-coup-pro-beijing-lawmaker-seeks-take-vetting-china-extradition-bill/> [Accessed 28/10/2019]

¹³⁸ The Guardian 'China says Hong Kong violence "totally intolerable"' (2 July 2019) [Online] Available at: <https://www.theguardian.com/world/2019/jul/02/chinese-media-calls-for-zero-tolerance-after-violent-hong-kong-protest> [Accessed 2 July 2019]

¹³⁹ BBC (n 16)

¹⁴⁰ Ho, P.S.Y., Jackson, S., Kong, S.S.T. 'Speaking against Silence: Finding a Voice in Hong Kong Chinese Families through the Umbrella Movement' (2018) 52 *Sociology* (5) 966-982

¹⁴¹ Hong Kong Free Press (n 137)

¹⁴² BBC, 'Hong Kong Protesters Appeal to Trump for Help' (8 September 2019) [Online] Available at: <https://www.bbc.co.uk/news/world-asia-china-49625233> [Accessed 28/10/2019]

¹⁴³ A similar dynamic occurred with relation to conflicting ideological political-moral norms in 2000: Ku, A. 'Negotiating the space of civil autonomy in Hong Kong: Power, discourses and dramaturgical representations' (2004) 179 *China Quarterly*, Sep. 647-66; and in 2014: Young, S.N.M. 'Hong Kong: universal suffrage, constitutional reform and the Occupy Central protests' (2015) *Public Law* Jan 158-160

Two final caveats should be given before the ultimate conclusion is reached. Firstly, conceptually one must distinguish two outcomes that were inspired by the anti-Bill protests: namely, a) protests and democratic dialogue about broader perceived legitimacy failures, and b) violent responses. Despite coverage equating the two as synonymous, with wider protest participation being considered conceptually inseparable to opportunistic and unprincipled rioting, the Bill was not merely a catalyst for escalating protest violence.¹⁴⁴ It was a microcosm of a much more fundamental normative conflict between the liberal democratic constitutional morality aspired to within the Basic Law, and the superordinate normative regime of the PRC. A similar process might – very broadly – be observed with relation to the *gilets jaunes* protests in France extending beyond demonstration against fuel duties, and into a wider protest dialogue against neoliberal governance and socioeconomic inequalities.¹⁴⁵ In both cases, it is important not to conflate falsely the widening of legitimacy-claim critiques with widening protest violence: they may correlate but they are conceptually distinct. With relation to Hong Kong, the anti-Bill protests were inevitably going to highlight the constitutional morality dichotomy underpinning the region. It was these dichotomies and deficits that led to the drafting of the Bill in the first place. For as long as these distinct normative systems claim authority simultaneously, they will continue to operate in tension.¹⁴⁶

The second caveat relates to the very question whether Hong Kong is a “liberal democracy” for the purposes of liberal democratic theory. The foregoing demonstrates that Hong Kong presents itself and makes claims based on being an autonomous regime. Its principles of private property, human rights and due process set it apart from the PRC as a liberal regime. It is more contestable whether it meets its aspirations of being a democratic regime such as to make coherent claims to obedience from morally autonomous citizens on that precise basis.¹⁴⁷ However, as previously discussed, the Basic Law explicitly codifies principles of democratic governance, and liberal principles such as human rights, due process, and personal property: principles which enjoy a great deal of support from Hong Kong residents. It may well be that the administration of Hong Kong makes separate claims to legitimacy founded in a constitutional morality separate and distinct from those of a liberal democracy.¹⁴⁸ However, it does make claims as a democratic, liberal regime, and it does present claims to legitimacy and obedience based on these moral claims: with great support from its residents who, indeed, wish to see the legitimacy of the regime strengthened by more robust democratic participation.¹⁴⁹ For as long as Hong Kong cites universal suffrage and democratic accountability in its constitutional settlement, while failing to live up to these principles in practice, it shall do so with the aforementioned axiological difficulties and, consequently, the risk of principled and rational protest.

¹⁴⁴ The Guardian (137)

¹⁴⁵ Willsher, K. ‘Macron seeks to turn 'anger into solutions' in open letter to France’ *The Guardian* (13 January 2019) [Online] Available at: <https://www.theguardian.com/world/2019/jan/13/macron-seeks-to-turn-anger-into-solutions-in-open-letter-to-france> [Accessed 15 March 2018]

¹⁴⁶ Chan (n 100)

¹⁴⁷ Generally it is considered that in “practical effect” the autonomous liberal governance under the Basic Law is accepted as fact: Gittings (n 10), 2

¹⁴⁸ Morris (n 73), 97-98

¹⁴⁹ Tai, B. (n 102)

VI. Conclusion: continued constitutional incoherence?

It has been demonstrated that liberal democratic regimes make claims to authority based on certain constitutional moral principles. They use these as axioms in legitimacy claims, or claims to obedience, from subjects who are otherwise morally autonomous. Hong Kong is therefore an interesting case: for either its legitimacy claims are mired in unsolvable axiological conflicts regarding its dichotomous constitutional moralities, or it can only make claims based on the constitutional morality of the PRC.¹⁵⁰ In neither case is it clear that the government of Hong Kong can claim liberal democratic constitutional moral reasons for obedience to its laws.

It is hoped that this research can help political leaders and activists in Hong Kong to convey more clearly the constitutional framing of their competing legitimacy claims, ideally with a view to encouraging more peaceful and coherent dialogue. It may also prove significant for framing analyses of protests in other jurisdictions, under the heuristics of constitutional morality and legitimacy claims, which may assist not only academic commentators but also politicians and social movements who hope for clearer, more peaceful dialogue with protest movements worldwide.

Worryingly for Hong Kong, however, the underlying, non-democratic foundations of the PRC regime will continue to belie the democratic moral constitutionality to which appeal is made regionally. Numerous political factors compound the accusations of illegitimacy. Oxfam has reported that income inequality in Hong Kong is at its worst in 45 years: were it a sovereign state, it would be amongst the ten most unequal in the world.¹⁵¹ Arguably the capitalist settlement of Hong Kong was always destined to be limited in its democratic aspirations. In a 1988 interview, Milton Friedman suggested that it was indeed imperative that universal suffrage and democratic institutions be subordinate to the free market capitalist structures of Hong Kong's laissez-faire governance, for the sake of its 'economic freedom.'¹⁵² The former Chief Executive, Leung Chun-ying, echoed these sentiments to the effect that universal and equal suffrage would allow poorer residents to demand redistributive and welfarist policies, undermining the dominant neoliberal capitalist economic system.¹⁵³

Given the constitutional crises already seen in its first few decades, it seems inevitable that there will be future conflicts between Hong Kong's regional constitutional settlement and the interests of the PRC in the near future. The overwhelming majority of these earlier protests – the Umbrella Movement, urban development protests, and more besides – were founded upon deeper root issues which will continue to grow beneath the surface.¹⁵⁴ The flawed legitimacy claims of many contentious laws and policies are derived entirely from a knotted and incoherent constitutional morality.

¹⁵⁰ *ibid.*

¹⁵¹ Oxfam, *Hong Kong Inequality Report* (2018)

¹⁵² Slobodian, Q. 'Democracy doesn't matter to the defenders of 'economic freedom'' *The Guardian* (11 November 2019) [Online] Available at: <https://www.theguardian.com/commentisfree/2019/nov/11/democracy-defenders-economic-freedom-neoliberalism>

¹⁵³ Bradsher K., Buckley C. 'Hong Kong leader confirms unbending stance on elections' *New York Times* (20 October 2014) [Online] Available at: <https://www.nytimes.com/2014/10/21/world/asia/leung-chun-ying-hong-kong-china-protests.html>

¹⁵⁴ Ho, P.S.Y.; Jackson, S.; Kong, S.S-T. *op cit* (139); Lejano, R.; Chui, E.; Lam, T.; Wong, J. 'Collective Action as Narrativity and Praxis: Theory and Application of Hong Kong's Urban Protest Movements' (2018) 33 *Public Policy and Administration* (3) 260-289

In a 1993 interview with former governor Chris Patten, it was intimated that attempts at democratic reform, in the run-up to the handover and the Joint Declaration, were getting “nowhere fast” due to the recalcitrance of Beijing.¹⁵⁵ For some, progress since the handover has been similarly torturous. Although these things take time to thoroughly institutionalise, under the principle of gradual and orderly progress, attempts to introduce greater democratic accountability have been directly impeded by the NPCSC intervention in recent years.¹⁵⁶ The frustrated pace of democratisation has been sorely felt by activists within the protest movement, who ask to see the realisation of universal suffrage and the protection of human rights soon: just how soon is now a question of extreme importance, given the panic of escalating violence throughout 2019. This is without even considering the concerns of a post-2047 Hong Kong settlement, which will pose even more questions about coherence and the sustainability of such claims to democratic legitimacy.¹⁵⁷ As such we should anticipate that, for the foreseeable future, there will continue to be laws which highlight these incoherent legitimacy claims, which will betray an incoherent constitutional morality: and these will go hand in glove with legitimacy counterclaims by protesters not only on the proposed laws in question, but, just as the recent anti-Bill protests have shown, the divisive and divided constitutional foundations of Hong Kong itself.

For any future conflict between the realist approach from the Mainland, and the liberal constitutional moral claims made by the Basic Law, as long as protesters make appeals to those liberal democratic principles, there will continue to be rational grounds for dissent. Either Hong Kong needs to discover another compelling moral constitutional rationale which gives good moral reason for obedience, or it must attain greater coherence in its claims as a liberal democratic regime.

¹⁵⁵ BBC, *Interview with Chris Patten* (24 June 1993) [Online] Available at: <http://www.bbc.co.uk/otr/intext92-93/Patten24.4.93.html> [Accessed 21/10/2020]

¹⁵⁶ NPCSC (n 88)

¹⁵⁷ Chan, J. *op cit* (n 100); cf Chan, K. ‘Taking Stock of ‘One Country, Two Systems’’ in Wong, Y. (ed) *One Country, Two Systems in Crisis: Hong Kong's Transformation since the Handover* (Lexington Books, Lanham MD 2008)