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CONFUCIAN DEMOCRACY AND CONSTITUTIONALISM



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THE HONG KONG JOURNAL OF LAW AND PUBLIC AFFAIRS (HKJLPA)

The Hong Kong Journal of Law and Public Affairs (HKJLPA) is the first student-edited law and political science journal in all of Asia, established by the Government and Laws Committee, Politics and Public Administration Association ^{SSS} HKUSU (GLC) with full support from the Bachelor of Social Sciences (Government and Laws) and Bachelor of Laws Programme (BSocSc (Govt&Laws) & LLB / Government and Laws / GLaws) at The University of Hong Kong in 2018.

The Journal publishes articles in both English and Traditional Chinese from researchers, teachers, practitioners, and students all over the world. It accepts submissions in all areas broadly related to the intersection between law and politics, including but not limited to comparative constitutional law and politics, international law and relations, jurisprudence and political philosophy, and administrative law and public administration.

As the GLC's in-house flagship publication, the Journal is committed to promoting a stronger understanding of cutting-edge issues that lie at the nexus of law and politics at the international and domestic levels, and to offering a robust platform for the exploration of ideas that will guide how societies are organised and governed.

THE INAUGURAL VOLUME: CONFUCIAN DEMOCRACY AND CONSTITUTIONALISM

The Inaugural Volume of the Hong Kong Journal of Law and Public Affairs will be published in Fall 2019, in celebration of the 20th anniversary of the Government and Laws Programme at The University of Hong Kong.

The theme of the inaugural volume is "Confucian Democracy and Constitutionalism". For decades, scholars and practitioners have been theorizing and debating possible models for Western political institutions such as representative democracy and constitutionalism to operate in East Asian countries in which the traditional Confucian culture is deeply embedded within. This interdisciplinary study features essays from leading political science, philosophy and legal scholars that engage these theories and debates through investigating multiple East Asian jurisdictions such as China, Vietnam and Korea to further illuminate our understanding on the Region's political and constitutional future.

This inaugural volume also features a review of the GLC's initiatives over the past year, including various forums, visits to legal and political institutions and career events.

CONFUCIAN DEMOCRACY AND CONSTITUTIONALISM

A publication by



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The Government and Laws Committee, Politics and Public Administration Association sss HKUSU was established in April 2018 with a rich historical heritage and is the official student community of the BSocSc (Govt & Laws) & LLB Programme at The University of Hong Kong.

GLC was born out of a strategic vision to become the Region's first-ever non-partisan, student-driven think tank specialising in law and politics. Bringing together current students, alumni, and professors, it is committed to promoting a stronger understanding of cutting-edge legal-political issues at the international and domestic levels. To this end GLC offers a robust platform for the dissemination of legal and political knowledge to students and the general public alike.

The GLC maintains close partnerships with the GLaws Programme and the Department of Politics and Public Administration and communicates GLaws students' views to the University. It also delivers tailor-made services to GLaws students such as mentorship schemes, career workshops, and examination support.

The GLC has organised a range of exciting initiatives, including face-to-face meetings between students and prominent practitioners of government and laws such as leaders of the European Union, Hong Kong Bar Association and the Department of Justice, forums on a range of internationally prominent issues such as Brexit and visits to legal and political institutions such as the Court of Final Appeal. GLC also publishes the Hong Kong Journal of Law and Public Affairs and Public Jurist, which has quickly established itself as a leading student magazine on law and public affairs in the entire Region.

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FOREWORD AND INTRODUCTION



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Inaugural Volume 2019

FOREWORD

Professor Ian Holliday

Vice President and Pro-Vice-Chancellor (Teaching & Learning), The University of Hong Kong

The *Hong Kong Journal of Law and Public Affairs* is an ambitious attempt by undergraduate students at the University of Hong Kong to establish a forum for analysis and debate of the interaction between law and politics. Capitalizing on its situation on one of the region's leading global campuses, the journal aims to do so chiefly from an East Asian perspective. Inspired by its location in one of the region's great global cities, it reflects the renowned East-West culture of Hong Kong.

In an age of narrowing horizons, the journal's mandate, avowedly interdisciplinary and cross-cultural, is clearly very welcome. Moreover, the roster of leading international scholars brought together for this Inaugural Volume is highly impressive. Above all, the vision articulated, and the necessary hard work undertaken, by the editorial team, ably led by third-year Government and Laws student Trevor T. W. Wan, is altogether admirable. The journal is already marked for success.

The theme of the Inaugural Volume, 'Confucian Democracy and Constitutionalism', addresses questions that have informed and animated the relationship between law and politics for thousands of years of East Asian history. Part I presents a set of interdisciplinary scholarly perspectives on the core theme. Part II reports on a roundtable discussion, held at the National University of Singapore, of Sungmoon Kim's public reason Confucianism and, more widely, of democratic perfectionism and constitutionalism in East Asia. In drawing inspiration from a venerable tradition that retains a pivotal place within the region, however, the volume looks chiefly not to the past, but rather to the present and future. The positions taken and the conclusions reached speak ultimately to the crisis facing democracy the world over.

This confident starts augurs well for a journal that seeks both to expose undergraduate students to cutting-edge contemporary research, and to enhance global engagement with legal and political themes long resonant in East Asia and still significant today. At a time when core pillars of international politics are facing challenges of a depth and magnitude not witnessed for decades, it provides an important forum for examination of legal and political issues within and beyond a vibrant and important region.

All of us at the University of Hong Kong are fully supportive of HKJLPA and the student team that brought it into being. We wish the journal well and hope it will garner committed support from students and scholars throughout the world who share its interest in law and politics and wish to keep abreast of contemporary East Asian debate.

September 2019



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Inaugural Volume 2019

INTRODUCTION: Confucian Democracy and Constitutionalism

Mr. Trevor T. W. Wan

Editor-in-Chief, Hong Kong Journal of Law and Public Affairs
Undergraduate Representative, Board of Studies for the BSocSc (Govt&Laws) & LLB Programme, Senate, The University of Hong Kong
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The study of legal and public affairs has become all the more important in this day and age with an increasingly complex network of legal regulations governing various aspects of life supplemented by an administrative framework. The natural consequence is that an informed, if not thorough, understanding of how they work becomes indispensable for almost everyone. The Hong Kong Journal of Law and Public Affairs (HKJLPA) was born out of the Government and Laws Committee's (GLC) devotion to offering a robust platform for the dissemination of legal and political science knowledge to students and the general public alike.

Although the HKJLPA is still in its infancy, it has already established a global outlook with contributors coming from prestigious institutions all over the world. It would be an understatement calling the production process simple, but this does not deter the editorial team from striving to transform the HKJLPA into one of the leading student-edited law and political science journals in all of Asia.

The theme of the inaugural volume is "Confucian Democracy and Constitutionalism". This echoes with an increasingly diverse academic literature exploring the possibility of grounding western-style political and constitutional systems in the historically Confucian East Asia. Another feature of this inaugural volume is that it draws on multidisciplinary perspectives, with contributors coming from the fields of political theory, philosophy, history and legal theory alike. Comparative and multidisciplinary study is the future of many academic fields, and a thorough understanding of the law and politics of Confucian political theory can grant us a unique opportunity to grasp a nuanced prediction on the

future of many East Asian countries.

Furthermore, this inaugural volume also includes the Chronicles of the GLC over the past academic year since its establishment. The difficult and joyous moments are recounted in the section, showing the various exciting initiatives that would not have been possible without the dedication of Government and Laws students, alumni, guests and teachers. Last but not least, there is a short introduction to the HKU Government and Laws Programme.

Part I: Interdisciplinary Perspectives on Confucian Democracy and Constitutionalism

This section draws on insights from political philosophy, religious studies and legal theory to explore different dimensions of Confucian Democracy and Constitutionalism. Professor Daniel A. Bell argues that China's political system can be built and improved on the current meritocratic system and summarises his vision for a "China Model" – meritocracy at the top, experimentation in the middle, and democracy at the bottom as a viable form of political system that can be evolved in the context of China. Dr. Chengyi Peng examines the extant literature and enunciates the crucial differences between two constitutional traditions – Confucian constitutionalism and Liberal constitutionalism and evaluates the critical implications of the differences. Dr. Marie Adele Carrai explores how the recent formulations of Confucian tradition in the context of political science, law and economic systems etc. have made Confucianism "invented traditions" and cautions the risk of divorcing from the past and its context. Professor Patrick Mendis explores how the key evolutionary processes regarding the revival of Confucian morality in China and the resurgence of Christian evangelicalism in the United States of America can shape the nature of the China-US bilateral relationship.

Part II: Centre for Asian Legal Studies, National University of Singapore Faculty of Law Roundtable Discussion on Public Reason Confucianism

This section features a roundtable discussion on Public Reason Confucianism: Democratic Perfectionism and Constitutional in East Asia written by Professor Sungmoon Kim held by the Centre for Asian Legal Studies (CALS) at the National University of Singapore Faculty of Law. Bringing together scholars from comparative philosophy and comparative constitutional law, the roundtable both evaluates the arguments of Professor Kim and contributes to the wider scholarship of Confucian Democracy and Constitutionalism.

Dr. Dan W. Puchniak introduces the roundtable and notes two prominent features of the roundtable, namely its interdisciplinary nature that transcends the fields of comparative philosophy and comparative constitutional law and the opportunity for mainstreaming Asian perspectives. Professor Bryan William Van Norden locates Professor Kim's work in the broader framework of contemporary political philosophies which is marked by the distinction between liberalism and perfectionism and between meritocracy and democracy and raises three queries regarding the book. Dr. Hui-Chieh Loy discusses Chapters 5 and 6 of Professor Kim's book in which the differences between civic virtue and moral virtue are explored and a form of "political equality understood in terms of equal moral opportunity to become a public official" to justify the right to political participation is derived. Dr. Loy raises two specific questions which concern the distinction between moral and civic virtue in the Confucian ethical tradition and the reason for grounding the right to political participation in the Mencian conception of moral equality. Dr. Jaclyn L. Neo

explores the perfectionist elements in Public Reason Confucianism and explains the three requirements that Public Reason Confucianism imposes on constitutional law including dynamism, adaptiveness and being contingent. Professor Andrew Harding comments on Professor Kim's discussion of the 2005 constitutional case "The Daughter's Rebellion" and tries to evaluate the study in terms of value pluralism and the relationship between law and society etc. Professor Sungmoon Kim concludes the roundtable by responding to the four commentators.

Chronicles of the Government and Laws Committee

The HKJLPA also serves as the yearbook of the GLC and reviews all the achievements of the GLC over the past year. The birth of HKJLPA is a direct result of the establishment of the GLC which aims to transform itself into a regional academic powerhouse, as such the HKJLPA plays a pivotal role in the overall strategic vision of the GLC among other initiatives. This section recounts all these initiatives to form a broader picture of the GLC's ceaseless work. This section both textually and graphically illustrates the motto, history, crest, establishment, host partners and initiatives etc. of the GLC. It looks at how the GLC endeavours to transform itself into an academic powerhouse, deliver student-tailored services, connect our alumni and produce public impact. A list of publications published by the GLC is also available in this section.

HKU Government and Laws Programme

A brief overview of the Government and Laws Programme is provided, including the aim and features of the programme.

Note of Thanks

The HKJLPA Editorial Board and the GLC would like to thank all the authors for their kind contribution to this inaugural volume. Their insights and analysis have undoubtedly made this volume impactful to the academic debates which are certain to grow in vibrancy in the years ahead. We must also express our deepest gratitude, especially to Professor Joseph C. W. Chan, GLC's Emeritus Honorary President and an expert in Confucian Democracy who has inspired this volume, Professor Ian Holliday, Vice President and Pro-Vice-Chancellor (Teaching & Learning) at The University of Hong Kong and an eminent political scientist who has kindly authored the foreword and Dr. Ngoc Son Bui, our Honorary Editorial Board Advisor who has facilitated the publication of the roundtable on Public Reason Confucianism. Without their help, it is certain that this volume will not be as interesting as it can be. Last but not least, we must thank all our readers and supporters of the GLC, whom we hope will find joy in reading the journal.

Without further ado, I proudly present you – Hong Kong Journal of Law and Public Affairs Inaugural Volume 2019: Confucian Democracy and Constitutionalism.

PART I

INTERDISCIPLINARY PERSPECTIVES ON CONFUCIAN DEMOCRACY AND CONSTITUTIONALISM



Chinese Democracy Isn't Inevitable Can a political system be democratically legitimate without being democratic?

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Professor Daniel A. Bell

Daniel A. Bell is Dean of the School of Political Science and Public Administration at Shandong University and Professor at Tsinghua University (Schwarzman College and Department of Philosophy). He is the author of numerous books including *The China Model: Political Meritocracy and the Limits of Democracy* (2015), *The Spirit of Cities: Why the Identity of a City Matters in a Global Age* [coauthored with Avner de-Shalit] (2011), *China's New Confucianism: Politics and Everyday Life in a Changing Society* (2010), *Beyond Liberal Democracy: Political Thinking for an East Asian Context* (2006), and *East Meets West: Human Rights and Democracy in East Asia* (2000), all published by Princeton University Press.

The flaws in China's political system are obvious. The government doesn't even make a pretense of holding national elections and punishes those who openly call for multiparty rule. The press is heavily censored and the Internet is blocked. Top leaders are unconstrained by the rule of law. Even more worrisome, repression has been ramped up since Xi Jinping took power in 2012, suggesting that the regime is increasingly worried about its legitimacy.

Some China experts - most recently David Shambaugh of George Washington University - interpret these ominous signs as evidence that the Chinese political system is on the verge of collapse. But such an outcome is highly unlikely in the near future. The Communist Party is firmly in power, its top leader is popular, and no political alternative currently claims widespread support. And what would happen if the Party's power did indeed crumble? The most likely result, in my view, would be rule by a populist strongman backed by elements of the country's security and military forces. The new ruler might seek to buttress his legitimacy by launching military adventures abroad. President Xi would look tame by comparison.

A more realistic and, arguably, desirable outcome would involve political change that builds on the advantages of the current system. But what exactly are the good parts of the Chinese political model? And how can they be advanced without repression? I believe the model can be improved in a more open political environment and, eventually, put before the people in a popular referendum.

Chinese authorities have thus far shown no interest in instituting electoral democracy for top leaders. But that's not the only shape political reform can take. In China, such change over the past three decades has been informed by three principles: the lower the level of government, the more democratic the political system; the optimal space for experimentation with new practices and institutions is in between the lowest and highest levels of government; and the higher the level of government, the more meritocratic the political system.

The Chinese government introduced village elections in the late 1980s to maintain social order and combat corruption among local leaders; by 2008, more than 900 million Chinese villagers had exercised the right to vote. Voters don't choose among political parties; instead, they directly nominate candidates and vote by secret ballot for a committee of candidates who serve three-year terms. Turnout has generally been high, and the conduct of elections has improved over time.

The Chinese government has good reason to favor democratic elections at the local level. In small communities, people are more knowledgeable about the ability and virtue of the leaders they choose. At the local level relative to the national level, policy issues are more straightforward, generating a sense of community is easier, and mistakes are less costly.

In cities and provinces, the Chinese government tinkers with economic and social reform and then applies successes to the rest of the country, while detecting problems and making adjustments to policies as they spread elsewhere. This experimentation takes several forms, the most high-profile of which is the Shenzhen Special Economic Zone, which tested controversial market-oriented policies that were then extended across China. More recently, the government has tested initiatives that defy common assumptions about authoritarian rule, including recruiting non-state groups to provide healthcare for the elderly and protect the rights of workers. Acutely aware of the costs of its "economic growth above all" development model, the government encourages municipalities to experiment with more diverse indices for assessing the performance of government officials: Hangzhou, for example, prioritizes environmental sustainability, and Chengdu narrowing the income gap between rural and urban residents.

It's a form of experimentation that is made easier by China's flexible constitutional system, which doesn't enshrine a strict division of powers between different levels of government. Political stability at the national level ensures that successful trials can be replicated elsewhere in China. In a democratic system with parties that alternate in power, there is no assurance that promising new ventures will be maintained or expanded, which in turn means less incentive to experiment and innovate in the policy arena.

The top of the China model is characterized by political meritocracy - the idea that high-level officials should be selected and promoted on the basis of ability and virtue. The ideal was institutionalized in imperial China by means of an elaborate examination system that dates to the Sui dynasty in the sixth and seventh centuries. These examinations were abolished in 1905 - precipitating the end of the imperial system as a whole - but they have been reestablished over the last three decades. Aspiring government officials normally must pass public-service examinations - IQ-like tests with some ideological content - with thousands of applicants competing for each entry-level spot. They must perform lower levels of government, with more rigorous evaluations at every step, to move further up the chain of political command. Top leaders must also accumulate decades of diverse administrative experience, with only a tiny proportion reaching the commanding heights of

government. For example, Xi's four-decade-long ascent to the presidency involved 16 major promotions through county, city, and province levels, and then the Central Committee, the Politburo, and the top spot in the Standing Committee of the Politburo, with reviews at each stage to assess his leadership abilities. Arguably, the Chinese political system is the most competitive in the world today.

Once leaders reach the pinnacle of political power, they can plan for the long term and make decisions that take into account the interests of all relevant stakeholders, including future generations and people living outside the country; leaders serve 10-year terms and assume (and do their best to guarantee) that the same party will be in power decades into the future. Collective leadership, in the form of the Politburo's seven-member Standing Committee, ensures that no one leader with outlandish and uninformed views can set wrongheaded policies (such as the disastrous Great Leap Forward when Mao, and only Mao, decided on national policies).

China's meritocratic process is best suited for a one-party state. In a multiparty system, there is no assurance that strong performance at lower levels of government will be rewarded at higher levels. There's also less of an incentive to train officials in high-level governance since key personnel change with election cycles. Leaders who need to worry about the next election are more likely to make decisions influenced by short-term political considerations than their counterparts in China. Democratically elected leaders are more vulnerable to the lobbying of powerful special interests, and the interests of non-voters affected by government policies - future generations, for instance - are likely to be sacrificed if they conflict with the interests of voters and campaign funders. Such leaders spend a lot of their time raising money and giving the same campaign speech again and again. In contrast, meritocratically selected leaders are judged by what they do, not what they say.

Of course, there remains a large gap between the China model as an ideal and the political reality. Even when village-level elections are free and fair, for instance, access to power does not always (or even usually) translate into the exercise of power; the authority of elected representatives is checked by village Party secretaries and township governments.

In the case of policy experimentation in cities and provinces, the problem is that central political authorities decide what works and what doesn't, and they often lack the motivation to do political battle on behalf of innovations that threaten powerful groups. Public pressure can neutralize this challenge; pilot programs for rural healthcare reforms beginning in the 1980s were only scaled up nationally after the SARS epidemic in 2003 triggered widespread criticism. The government could further defuse the issue by tasking an advisory body of independent experts in the social sciences with evaluating politically sensitive experiments in different parts of the country.

Political meritocracy at the top is only desirable if leaders are selected and promoted on the basis of superior ability and virtue. In practice, however, "princelings" often dominate: several of China's leaders, including the president, are the descendants of prominent and influential Communist officials. Still, the princelings began their rise before the institutionalization of examinations for public officials in the early 1990s, and they were initially elevated not to maintain the status quo, but because of their relatively high levels of education and reformist leanings.

Few doubt the intellectual caliber of China's most senior officials. The deeper

question concerns their virtue: Are they really dedicated to serving the public good? China's immense pollution problem, for example, raises doubts about their commitment to the long-term interests of those inside and outside the country. But Chinese leaders made a reasonable choice from the late 1970s until recently to prioritize poverty reduction and economic growth in a poor country, and the government now puts more emphasis on environmental sustainability. President Xi and President Obama recently pledged to cut greenhouse-gas emissions over the next two decades. Who is more likely to stick to that pledge? The United States may set aside its promise if the Republicans win the presidency in 2016. No such worries in China, unless the political system collapses.

The stake in the heart of the China model is corruption. In a meritocratic system, corruption - the abuse of public office for private gain - is particularly toxic because leaders derive their legitimacy in part, if not in full, from being seen as virtuous and public-spirited. In a democracy, it's primarily up to the people to get rid of corrupt officials, but a meritocracy must rely instead on such means as independent supervisory institutions, harsh penalties for graft, and higher salaries for public officials. The overall level of corruption in China has exploded over the last three decades, and it has become a more visible political problem in the past few years due to the glare of social media and more conspicuous consumption by political elites. Recognizing this grave threat, Xi has made combating corruption the government's top priority.

If the China model has such promise, what explains the government's need to resort to political repression? The more immediate reason is Xi's anti-corruption campaign, the longest and most systematic in Chinese history. Whatever the abuses and political biases of the campaign, it is necessary to cleanse the system. But those leading the initiative have made real enemies, which in turn has led those leaders to curb civil and political rights more aggressively.

The other explanation is longer term. The government is fully aware that the kind of economic modernization it has embraced was followed in South Korea and Taiwan by electoral democracy, and recent pro-democracy protests in Hong Kong only exacerbated worries in official circles that mainland China will be next.

I think these fears are exaggerated. Political meritocracy has deep roots in China, and surveys consistently show majorities in support of "guardianship discourse," or empowering capable politicians who will assume responsibility for the good of society, over liberal democratic discourse that privileges procedural arrangements to secure people's rights to participate in politics and choose their leaders. One might respond that such political preferences will change with education, but my own students at Tsinghua University - one of China's most selective universities - usually come out in favor of meritocracy following extensive deliberation about the pros and cons of elections for top leaders versus mechanisms such as examinations and assessments of past performance.

That said, there is an equally strong demand in China for "Western" values such as freedom of speech, government transparency, and rule of law, and these demands will only grow stronger as China modernizes. At some point in the future, the government will have to choose between a more open society and Tiananmen Square-style repression to preserve stability. How can the government open up without establishing the kind of electoral democracy that would threaten to wreck its carefully constructed meritocratic system?

One solution is for the government to call a referendum and ask the people to

vote “yes” in favor of the China model with more freedoms of speech and association but without the right to vote for top leaders and the freedom to form political parties that explicitly challenge one-party rule. The referendum would have to be carried out freely and fairly to be seen as legitimate, and it could specify a time period - say, 50 years - for the outcome of the vote to be in effect. Should the China model win out, that would be long enough to provide stability for the recruitment and training of meritocratically selected leaders without binding the people to perpetual meritocratic rule.

A victory for the China model would help provide democratic legitimacy to the system. Critics inside and outside the country who allege that the Chinese regime is fundamentally unstable or illegitimate because it lacks popular support would be silenced by the people, not the government. And the government could do what it’s supposed to do: serve the people rather than repress them. Of course, the Communist Party would be taking a major risk by organising such a referendum; after all, it could lose. The people could vote for electoral democracy and the Communist Party could be transformed into a regular political party, albeit with superior organisational strength. This might not be a disaster for the Party, but it would be bad for political meritocracy. Party members would have to campaign for victory every few years instead of training leaders for the long term.

The Chinese people are proud of partaking in a civilization that stretches back several thousand years. Nobody disputes the idea that China should maintain, and build on, its great cultural achievements in realms ranging from cuisine to martial arts to medicine. So why not build on its great tradition of political meritocracy? That tradition, of course, needs to prove adaptable and viable in the modern world. As I see it, the system has shown real potential and should set the standard for further political reform. But at some point, the model must also be endorsed by the Chinese people.

© 2015. Daniel A. Bell, as first published in The Atlantic

This article has been adapted from Daniel A. Bell’s book, *The China Model: Political Meritocracy and the Limits of Democracy*.



A Comparison of Confucian and Liberal Constitutionalisms and Its Implications

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For a relatively long period of time, it has been widely thought that Confucianism and constitutionalism are incompatible, even antithetical (Chen, 2007; Chaihark, 2003; Zhang, 2001). For example, Confucianism is usually associated with authoritarianism, the rule of man instead of the rule of law, collectivism, hierarchical role-based order, over-emphasis on obligation, and so on, while constitutionalism is founded on the rule of law, individual rights, equality, and so on (Bao, 1998; Chen, 2007; Davis, 1998; Ginsburg, 2002). This view is a prominent feature of Chinese thought from the New Cultural Movement of the early 20th century to the "Asian Values" debates of recent decades. Even today, it still holds some currency among many intellectuals both in and outside China. However, in recent years, some intellectuals are breaking off the yoke of this dominant view by exploring constitutional resources within Confucianism and challenging previous conceptual frameworks (Chaibong, 2001; Chaihark, 2003; Chaihark, 2009; Peng, 2019). As some scholars have well reviewed and sorted out, there are three main approaches to the issue of Confucian Constitutionalism in contemporary academia, namely the institutional approach, the ritualistic approach, and the religious approach.¹ As a result, we can see that a Confucian Constitutionalism paradigm is emerging. This article seeks to develop from the existent literature and examine the crucial differences between the Confucian and liberal constitutionalisms as well as the implications.

1 This categorization into three groups is certainly not exhaustive and there are surely other voices as well; however, these three approaches seem to represent well the dominant trends of investigations on the issue of Confucian constitutionalism. See Peng, Chengyi. *Chinese Constitutionalism in A Global Context*. UK: Routledge, 2019.

I. Conceptual and Methodological Clarifications

Before delving into the discussion, several important issues should be clarified at the onset. First of all, we should not subscribe to a liberal conception of constitutionalism *a priori*. As a result, I will adopt Larry Backer's more neutral vision of constitutionalism here:

(1) a system of classification, (2) the core object of which is to define the characteristics of constitutions (those documents organising political power within an institutional apparatus), (3) to be used to determine the legitimacy of the constitutional system as conceived or as implemented, (4) based on rule of law as the fundamental postulate of government (that government be established and operated in a way that limits the ability of individuals to use government power for personal welfare maximizing ends),² and (5) grounded on a metric of substantive values derived from a source beyond the control of any individual. (p. 679)

Secondly, it is not the case that Confucian constitutionalism does not seek to constrain the state and society at large as liberal constitutionalism does, but that they have very different targets as well as strategies. For liberal constitutionalism, its primary target is the public power and the officials who utilize it, or what is traditionally called the rulers. Its primary strategy is through the rule of positive law, which applies to the officials and the common people alike, though tilting towards the protection of the individual who is usually on the weaker side. Consequently, the court plays a paramount role in the constitutional order. For Confucian constitutionalism, its primary target is the common people, or the ruled, because they, being more susceptible to strikes of passion, have the tendency to get rid of even legitimate rulers and together they are always superior in strength than the latter. This echoes Aristotle's insight that it is difficult for the many to be outstanding in virtue by nature, but proficient "particularly regarding military virtue, as this arises in a multitude" (*Politics*, 3.7.4). Confucian constitutionalism's primary strategy is through the rule of rituals, which applies to the officials and the common people alike, though tilting towards the protection of the officials who are usually on the weaker side from this perspective. Accordingly, the Confucians who have the exclusive privilege of interpreting the rituals play a paramount role in the constitutional order, though their endeavor has been to primarily entrench the authority of the rulers for cultivating moderate characters of the common people.

Thirdly, there are striking parallels between the Confucian and liberal constitutional frameworks despite some crucial distinctions. For example, none of the most autonomous bodies within the constitutional frameworks, namely the courts and the Confucian college (*taixue* 太学) are directly elected. Nevertheless, they assume the crucial role of supervising the state and society at large. To some extent, they could well be regarded as having assumed the role of vanguard of the society, or otherwise they should have not been rendered such privileges. They in fact also assume the function of defining and shaping the norms of the state and society as well. Here, in fact, comes their crucial differences. From the perspective of Confucian constitutionalism, the vanguard part of liberal constitutionalism is actually quite myopic, because it is mainly preoccupied with codified laws and individual rights only. Nevertheless, it resonates well with the masses who are preoccupied with these things as well. There is no need to repeat liberal constitutionalism's critiques of the Confucians, such as their irresponsiveness to the demands of individuals.

2 While Backer uses the notion "rule of law" in the conventional sense referring to the rule of positive laws, his explication in the bracket seems not to exclude moral laws or natural laws as long as they could be successfully internalized, so my approach will have a broad definition of rule of law in order not to exclude any constitutional blueprints *a priori*.

Nevertheless, the Confucians may well regard their distance and autonomy from the masses as a direct result of their vanguard nature.

However, these defining features also have profound implications. As we can see, while liberal constitutionalism has been quite subtle and successful in curbing the potential abuse of the public power by the rulers, it ignores the threat of the abusive usage of power by the masses as a whole themselves. Theoretically, there is nothing that could limit the masses, who could even change the constitution with a supermajority vote. The reliance on the rule of law would not cultivate people's moderation and shape their characters and may actually inflate them with certain arrogance and fanaticism.³ These characteristics may not be detected easily during peaceful times when everything goes well, but there is a potential that they may erupt when things dear to them are at stake, and is particularly shown in their attitudes towards outsiders who do not seem to enjoy the same protection of rule of law as insiders. One example might be the hard-core liberal's difficulty in tolerating violations of their norms such as human rights abuses both at home and abroad. As for Confucian constitutionalism, despite all its harshness and idiocy, its vanguard part does serve as a constraint on the masses, who out of habituation may become more "submissive" but nevertheless less arrogant and fanatic. Just as Newton has analyzed through constitutionalism *sub specie Spinozae*, liberal constitutionalism basically operates with similar logic compared to imperialism, which means its expansion is unstoppable. In Jiang Qing's words, the biggest problem with liberal constitutionalism is the predominance of the legitimacy of the masses (*minyihexingyichongduda* 民意合法性一重獨大).

After clarifying some key issues, we can then draw a preliminary comparison of the two as shown in Table 1 below. It is also worth pointing out that the comparison here is a preliminary one in order to sketch the big picture without being entangled in the details. This actually echoes with the Ancient Chinese wisdom that "to first establish the big picture and then the details would not deviate much" (先立乎其大者，則其小者不能奪也), as well as the prevalence of partiality or half-truth problem (*bi* 蔽). Ancient Chinese sages have not only described the prevalence, the root causes, harms, and dangers of partiality, but also prescribed solutions to the problem. As Zhuangzi points out, the problem with the myriad schools is not so much that they are invalid but that they are partial, just as the faculties of ears, eyes, noses, and mouths, all of which provide certain valid insights and have their individual merits, but cannot communicate with each other (天下多得一察焉以自好。譬如耳目鼻口，皆有所明，不能相通) ("All Under Heaven" of *Zhuangzi* 《莊子 - 天下篇》). Xunzi also devotes a whole chapter "Resolving Partiality" (*Jiebi* 《解蔽》) analyzing the causes and the dangers of the problem of "partiality" and offering the solutions.⁴ This seems to go against the Western academic tradition, which seeks to focus on the small picture rather than the big picture. Nevertheless, given our task here is an inter-paradigm debate, we should not subscribe to the rules of the Western paradigm consciously or unconsciously, but choose whichever rules that could help to resolve the problems.

3 This is from the perspectives of Confucian constitutionalism, and the advocates of liberal constitutionalism may strongly disagree on this.

4 It is worth pointing out that this is actually where Xunzi transcends Gadamer, since Xunzi contends that the Way offers the ultimate objective "criteria," while Gadamer is suspicious of any such absolute truth. Zhuangzi also holds a similar absolutist view as he contends that "non-action could serve as the ultimate criteria of rights and wrongs" (*wuweikeyidingshifei* 唯無為可以定是非) ("The Ultimate Joy" chapter of *Zhuangzi* 《莊子 - 至樂篇》).

II. A Preliminary Comparison of Confucian and Liberal Constitutionalisms

As we can see from Table 1 below, the two constitutional paradigms are quite different regarding their constitution status, regime types, power structures, locations of sovereignty, roles of judiciary, trumping values, main governance methods, primary target, as well as their ontology and epistemologies. It is beyond the scope of this work to elaborate in detail each of these differences; nevertheless, as we will see, their respective strengths and weaknesses are largely derived from these differences. It is also worth pointing out that, just as everything exceeding its limit tends to have the opposite effect, so are the respective virtues of the two constitutional paradigms, which could also be transformed into their vices. Below let's have a look at the primary virtues and vices of each paradigm.

	Liberal Constitutionalism	Confucian Constitutionalism
Constitutional status	Concrete and judicialized	Vague and unjudicialized
Regime type	Liberal democracy	Authoritarian monarchy
Power structure	Polyarchy ⁵	Hierarchy
Sovereignty	People in name but individuals in reality	Heaven in name but Confucians in reality
Judiciary	Independent and strong	Subordinate and weak
Trumping value	Freedom and equality ⁶	Virtue and harmony
Main governance method	Rule of law	Rule of ritual
Primary target	External constraints of individuals	Internal constraints of individuals
Ontology	Individualistic and disparate world	Holistic and relational world
Epistemology	Rationalism	Intuitionism ⁷

Table 1 A preliminary comparison of liberal and Confucian constitutionalisms

The greatest virtue but also the biggest vice of liberal constitutionalism concerns its elevation of the individuals to the status of the sovereign. This may sound contradictory at first, but as I shall explain below, this is not the case. I regard the *de facto* sovereignty of the individual as the "soul" of liberal constitutionalism, which accordingly translates to the constitutional status of being concrete and judicialized (*sifahua* 司法化的), the regime type of liberal democracy, the power structure of polyarchy, the trumping value of freedom and equality, the independent and strong judiciary, the entrenchment of rule of law, the primary target of external fetters, the perception of an individualistic and disparate world, as well as the prevalence of rationalism, and so on of liberal constitutionalism are all serving this "soul."

The virtue of this paradigm is its perfecting of the external environment for the individual to be free, which also represents the *teleos* of humanity. This teleological view of human history is well articulated by Nietzsche (1998):

⁵ For a good elaboration on this, see Zhou (2005).

⁶ It is not that liberal constitutionalism does not seek to promote virtue, but that virtue is not their primary

The task of breeding an animal that is permitted to promise includes, as condition and preparation, the more specific task of first *making* man to a certain degree necessary, uniform, like among like, regular, and accordingly predictable. The enormous work of what I have called "morality of custom" (cf. *Daybreak* 9, 14, 16) – the true work of man on himself for the longest part of the duration of the human race, his entire *prehistoric* work, has in this its meaning, its great justification – however much hardness, tyranny, mindlessness, and idiocy may be inherent in it: with the help of the morality of custom and the social straightjacket man was *made* truly calculable. If on the other hand, we place ourselves at the end of the enormous process, where the tree finally produces its fruit, where society and its morality of custom finally brings to light that *to which* it was only the means: then we will find as the ripest fruit on its tree the *sovereign individual*, the individual resembling only himself, free again from the morality of custom, autonomous and supermoral (for "autonomous" and "moral" are mutually exclusive), in short, the human being with his own independent long will, the human being who *is permitted to promise* – and in him a proud consciousness, twitching in all his muscles, of *what* has finally been achieved and become flesh in him, a true consciousness of power and freedom, a feeling of the completion of man himself. (II: 2)

From this passage, we can observe that the aspirations of liberal constitutionalism match those of the end stage of human history well, which perhaps underlies the natural appeals of liberal constitutionalism to people everywhere. This also echoes Tocqueville's insight that the effort to stop the liberal democratic trend would end up in vain just like resisting almighty God himself. Indeed, one might be awed by the subtlety as well as delicacy of liberal constitutionalism both in its theoretical and institutional dimensions. The achievements of Western countries certainly have reinforced the appeal of liberal constitutionalism throughout the world as well.

The vice of liberal constitutionalism, however, is also related to the elevation of the individual to the "sovereign" status and is well revealed in Nietzsche's passage. As we can see, Nietzsche's vision of the "sovereign individual" as the "the ripest fruit" actually requires enormous work of cultivation through the aid of society and the "morality of custom." As the Chinese idiom says well, it takes 10 years to grow a tree but 100 years to cultivate an individual (*shinianshumu, bainianshuren* 十年树木, 百年树人), the lengthy duration as well as enormous work required for fruit-bearing thus should not be ignored. Nevertheless, this aspect seems to be the "shorter slab" (*duanban* 短板) of liberal constitutionalism "wooden barrel." Various works, such as Sungmoon Kim (2009), Dennehy (2007), Kupperman (2004), and Warren (1989), and so on have all shed light on this. Philip Ivanhoe's (2000) thorough exploration of the Confucian tactics of self-cultivation may well render support to this reading as well. It should be acknowledged that external freedom provided by liberal constitutionalism is indispensable for the flourishing of humanity, but it is also clear that successful cultivation of the virtuous characters seems to be a vital prerequisite. The problem with liberal constitutionalism, to use Marx's words, is then that it exalts the individual man "as *sovereign* and supreme," when he is still a man

in his uncivilized and unsocial aspect, in his fortuitous existence and just as he is, corrupted by the entire organisation of our society, lost and alienated from himself, oppressed by inhuman relations and elements – in a word, man who is not yet an

concern or they have very different understandings of the notion.

7 The terminologies for the two distinctive epistemological traditions are taken from Wu Qiong (2006, p. 17), who has translated Spengler's *The Decline of the West* into Chinese. On intuitionism in ancient Chinese thought as well as its adoption in legislation, see Du Daoming (2003) and Chen Guangxiu (2009) respectively.

actual species-being. (p. 13)⁸

To put it metaphorically, we could well regard the internal character as the essential root (*ben* 本) and the external free environment just as the trivial branches (*mo* 末). From the perspective of Confucian constitutionalism, the biggest vice of liberal constitutionalism is thus its “pursuit of the branches at the cost of the roots” (*she ben zhu mo* 舍本逐末), or “inverting the orders of the branches and the roots” (*ben mo dao zhi* 本末倒置). This fatal vice of liberal constitutionalism certainly has good historical reasons and is perhaps a necessary trade-off for its achievements in perfecting the “branches,” though with profound implications. As we will see, Confucian constitutionalism’s virtue and vice seem to be just the opposite of liberal constitutionalism.

For Confucian constitutionalism, its greatest virtue may well be its capacity to penetrate into the individual and cultivate their moral character. This “soul” is actually manifested in all three layers of Confucian constitutionalism structure that have been sorted out, namely the institutions, the rituals, and the religious core. There is perhaps no need to go over the unique advantages of ritualistic constitutionalism and religious constitutionalism for virtue cultivation. Even for the legal dimension of Confucian constitutionalism, its distinctive feature, when compared with other forms of jurisprudence, is actually also its educational functions, which is well elaborated in Zhang’s (2010) article on Chinese jurisprudence. Bearing this in mind, we can better understand the differences between Confucian constitutionalism and liberal constitutionalism as shown earlier in Table 1. For example, the status of the constitution in Confucian constitutionalism is vague and unjudicialized because it does not seek to provide the individual the kind of “psychological comfort” rendered by liberal constitutionalism but endeavors to entrench a hierarchical political structure that enables moral sages to perform their “civilizational” (*wenming huacheng* 文明化成) duties. Seen from this perspective, the constitution of Confucian constitutionalism could well be regarded as a meta-constitution, which is well elaborated by Rousseau (1987):

It is not engraved on marble or bronze, but in the hearts of citizens. It is the true constitution of the state. Every day it takes on new forces. When other laws grow old and die away, it revives and replaces them, preserves a people in the spirit of its institution and imperceptibly substitutes the force of habit for that of authority. I am speaking of mores, customs, and especially of opinion, a part of the law unknown to our political theorists but one on which depends the success of all the others; a part with which the great legislator secretly occupies himself, though he seems to confine himself to the particular regulations that are merely the arching of the vault, whereas mores, slower to arise, form in the end its immovable keystone. (p. 172)

The vice of Confucian constitutionalism, however, is also quite clear. First of all, it certainly leaves more room for the abusive use of public power given its preoccupation with “soul-craft.” Second, if Spinoza is correct that the *cupiditas*, or the desires of the people, are indeed the eternal driving force of history, Confucian constitutionalism’s endeavor to constrain their desires may well lead to a lack of strength and vitality. This may be manifested in the neo-Confucian eras of the Song and Ming dynasties in Chinese history, when the prevalent norm was to “preserve the heavenly principle and annihilate the humanly desires” (*cun tianli mie renyu* 存天理灭人欲). This feature of Confucian

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People influenced by liberal constitutionalism may rebut Marx’s accusation here, largely due to their very different perceptions of the reality as well as diverging conceptions of the criteria.

constitutionalism would also render it unpopular among the masses, hence lacking popular support in contemporary societies. Third, Confucian constitutionalism may become static, hence hindering the development of human history. This is indeed one of the main problems that liberals in the West, such as John Stuart Mill, have with the Chinese tradition. Recalling Nietzsche's teleological description of human history, we certainly should not forget that the "morality of custom and the social straightjacket" are only the means rather than the end. Furthermore, freedom will only be genuine when there are choices to make, rendering the need of an externally free environment.

The respective virtue and vice of liberal and Confucian constitutionalisms are thus clear. To borrow from the ancient Chinese sage Zhuangzi's vivid metaphor, we may well regard both of them as not good at nourishing-life (养生 yangsheng), for "the one good at nourishing life is like a herder of sheep – he watches for stragglers and whips them up" (善養生者，若牧羊然，視其後者而鞭之). Just as Zhuangzi further elaborates:

In Lu there was Shan Bao – he lived among the cliffs, drank only water, and didn't go after gain like other people. He went along like that for seventy years and still had the complexion of a little child. Unfortunately, he met a hungry tiger who killed him and ate him up. Then there was Zhang Yi – there wasn't one of the great families and fancy mansions that he didn't rush off to visit. He went along like that for forty years, and then he developed an internal fever, and died. Shan Bao looked after what was on the inside and the tiger ate up from outside. Zhang Yi looked after what was on the outside and the sickness attacked him from inside. Both these men failed to give a lash to the stragglers.

("Dasheng" chapter of *Zhuangzi*)

魯有單豹者，岩居而水飲，不與民共利，行年七十而猶有嬰兒之色，不幸遇餓虎，餓虎殺而食之。有張毅者，高門、懸薄，無不走也，行年四十而有內熱之病以死。豹養其內而虎食其外，毅養其外而病攻其內，此二子者，皆不鞭其後者也。

(《莊子 - 達生》)

From an outsider's perspective, Confucian constitutionalism is like the Shan Bao in the anecdote, who largely lives a solitary life and is concerned more with internal transformation than external strength. As a result, he is vulnerable to external attacks just as manifested in the humiliation of China's recent history. On the other hand, Zhang Yi is like liberal constitutionalism, which produces all kinds of "party-animal" who would ultimately be plagued by some "internal fevers" due to lack of moderation as well as self-cultivations.⁹ The rampant spread of populism today in the Western developed countries may well be a necessary consequence of such shortcomings.

III. The Implications of the Crucial Differences

As we can see, the Confucian constitutionalism actually embodies certain vital superiority over the liberal constitutionalism with fatal consequences, which will be briefly discussed below.

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It is perhaps worth directing one's attention to Thucydides' similar description of the "internal fevers" plaguing the democratic Athens during the Peloponnesian War.

A. *The liberal confusion of human emancipation and political emancipation*

The most prominent flaw of liberal constitutionalism is its confusion of human emancipation with political emancipation. I will borrow Mark Warren and Marx's insights here to render support to this reading. Mark Warren provides a subtle and insightful critique of liberal constitutionalism's dissimulating ideology within the liberal tradition itself. For Warren (1989), even though the republican vision of liberal constitutionalism deeply influenced by the Greek philosophers does seek to constitute a public space for the individuals to flourish, it fails to identify the social conditions necessary to redeem these promises that have been utilized to justify it. Warren (1989) calls this a "dissimulating ideology" because it justifies "situations by misidentifying them, often by equating a single social relation with an ideal, and then abstracting this from the totality of social relations necessary to its realization" (p. 514). In Warren's view, the power of liberal constitutionalism particularly relies on its promises of transforming politics from a process of coercion to one of reason, and allowing the individuals to flourish under liberal constitutional protections and guarantees. However, it assumes that individuality and autonomy would flourish only if political power was limited, without realizing that the growing "social power," which "operates on the full range of needs, relations, and attributes that constitute persons" could equally "corrupt" or "distort" the natural development of the individuals (p. 523).¹⁰

This is actually why Marx criticizes liberal constitutionalism for conflating political emancipation with human emancipation (Warren, 1989, p. 523). To understand it, we should first acquire a firm grasp of Marx's notions of religion and emancipation, two very important concepts of Marx's philosophy. As we can see below, for both concepts, Marx actually has two visions: the first being political emancipation which is conventionally understood as stemming from religion and the second being human emancipation which stems from Marx's unique understanding of "religiosity."

Thus, Marx distinguishes between political emancipation and human emancipation. As shown in Figure 1, political emancipation and human emancipation are located at different stages of human history.

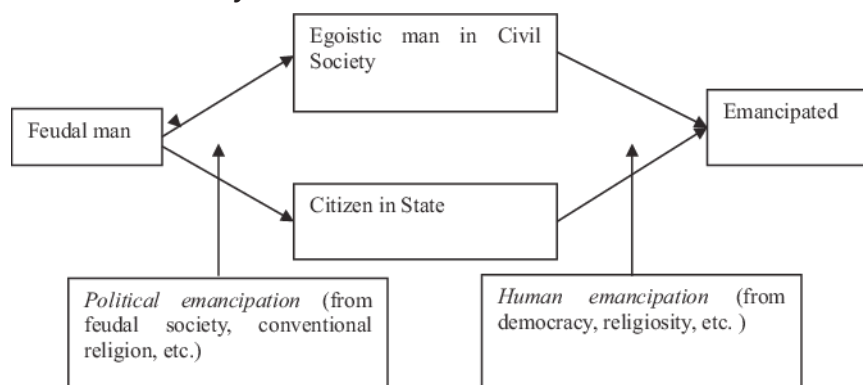


Figure 1 Marx's two visions of emancipation and religion in history

For Marx, "political emancipation is a reduction of man, on the one hand to a member of civil society, and *independent* and *egoistic* individual, and on the other hand, to a *citizen*, to a moral person" (46). This is so, because in the feudal society, there is no civil society and individual in a strict sense, or at least not in the way we understand them today. As Laura Janara nicely phrases it, "[T]he individual life – if 'the individual' can even be imagined in this context – is not autonomous but is, rather, one small node in a larger,

seemingly eternal, societal, and historical web of relations" (556). For Marx, this web determines "the relation of the individual to the *state as a whole*; that is, his *political situation*, or in other words, his separation and exclusion from the other elements of society" (44). Because of this alienation, Marx thinks that the feudal individuals are in fact excluded from the body of the state, since "the state as a whole and its consciousness, will, and activity ... necessarily appeared as the *private* affair of a ruler and his servants, separated from the people" (45). However, because "the elements of civil life such as property, the family, and types of occupation had been raised, in the form of lordship, caste, and guilds, to elements of political life," Marx points out that the old civil society retains "a *directly* political character" "at least in the feudal sense" (44). In other words, the political character of the feudal society has reached its civil society, but not to its individuals. As we will see, the political revolution changes everything.

According to Marx, the political revolution is also the revolution of civil society (44). It "shattered everything – estates, corporations, guilds, privileges – which expressed the separation of the people from community life" and "made state affairs the affairs of the people, and the political state a matter of general concern" (45). To borrow Janara's nice wording, this revolution "atomizes the individual, signifying release from a highly organised hierarchy into a world of flux" (557). This "swirling disintegration" (Janara, 557), according to Marx, on one hand "dissolved civil society into its basic elements" and on the other hand "set free the political spirit which had, so to speak, been dissolved, fragmented, and lost in the various culs-de-sac of feudal society" (45). While the political spirit liberated from civil society was reassembled and made of the general concern of the people, Marx points out that "[T]he bonds which had restrained the egoistic spirit of civil society were [also] removed along with the political yoke" (45). As a result, the feudal man becomes an egoistic individual of civil society and the citizen of the state at the same time. If the political revolution also brought an end to the state religion in the public sphere, Marx contends, it would not mean that the people would be truly emancipated from religion. In other words, he was not freed from religion, but only received religious liberty (45). According to Marx, the true human emancipation from religion

will only be complete when the real, individual man has absorbed into himself the abstract citizen; when as an individual man, in his everyday life ... he has become a *species-being*; and when he has recognized and organised his own powers (*force propres*) as *social* powers so that he no longer separates this social power from himself as *political* power. (46)

To understand this, we need to understand Marx's vision of religion.

It would seem that Marx has two visions of religion: one is the conventionally understood paradigm of religion and another is a unique vision of religion developed on his own. Most of the time when Marx discusses political emancipation from religion, he is using religion in the first vision, the one held by Bruno Bauer. This vision has no difference from today's conventional understanding of religion, such as Christianity, Judaism, etc. When Marx is talking about human emancipation, as well as the reasons why the separation of the state from religion does not liberate people from religion, he transitions to the second vision. According to Marx, "[R]eligion is the generalized theory of this world, its encyclopedic compendium, its logic in popular form, its spiritualistic point d'honneur, its enthusiasm, its moral sanction, its solemn complement, its general ground of consolation and justification" (28). It is "the self-consciousness and self-regard of man who has either not yet found or has already lost himself" (Marx 28). To know one's true human nature is thus the sole criteria for one's evasion of religiosity. However, since religion is "the

fantastic realization of the human essence inasmuch as the human essence possesses no true reality" (Marx, 28), it would seem that, for Marx, few, perhaps only those who have experienced the emptiness of human nature and attained enlightenment as the Buddha, would escape the "opium" of religion. This is also shown in Marx's analysis of the double existence of man: celestial, communal, and terrestrial, personal (34).¹¹ As long as people are trapped in "the dualism between individual life and species-life, between the life of civil society and political life," in Marx's view, they would remain religious (39). Understanding this, we then could understand why, for Marx, human emancipation would not be complete until the "sensuous, individual, and immediate existence" of the "egoistic man" in civil society and the "abstract, artificial," "allegorical, moral" existence of the "species-being" in the political state are united, as shown earlier in Figure 1.

B. Risk of fascism re-emerging

Since Marx's solution of a proletariat revolution did not occur in the West, the evolution of the West since then has been a downward spiral towards the abyss of demise. This is well captured by Milbank and Pabst, whose insights are worthy of close review here. First of all, Milbank and Pabst (2015) point out that the left and right in Western politics represent two versions of liberalism that are seemingly opposite to each other but actually are in a tacit, secret alliance in engendering illiberalism that they ascribe to non-liberal positions. The two liberalisms may seem to be opposite to each other, since the left version appeals to the state for protection from the forces of market fundamentalism that the right champions, while the right version defends conservative values of family and the nation against multiculturalism and emancipation that the left celebrates. However, just as Milbank and Pabst (2015) rightly observe, far from representing genuine alternatives to each other, the two versions of liberalism are actually mutually reinforcing in the sense of fusing economic-political individualism with bureaucratic-managerial collectivism and social-cultural atomization. This may well be seen in the convergence of policies by the left and right parties throughout the Western world in the past decades. In Milbank and Pabst's words,

They have now more explicitly fused to proffer the shared creed of the left that recently embraced economic neo-liberalism together with an impersonal statism, and the right that has openly espoused cultural liberalism in scorn of its own natural constituency.

(Milbank & Pabst, 2015)

The illiberalism is then naturally engendered and would lead to meta-crisis of the West. Just as some scholars point out, most people habituated in such a cultural matrix would only have the mere illusion of freedom since they would be separated from moral virtue, which is crucial for the nation to sustain its commitment to freedom and equality for all (Dennehy, 2007). Illiberalism is the necessary result largely because the economic and political liberalism advocated by the right have been eroding the social bonds and civic ties on which vibrant democracies and healthy market economies ultimately depend for trust and cooperation, while the cultural and social liberalism held by the left, including some modes of middle-class feminism, has been carelessly underwriting the new cult of market choice in default of its supposedly radical commitments (Milbank

¹¹ This may shed some light for the receptivity of Marxism into Chinese culture, as one distinguishing idea of the latter is the inseparability of the human and divine, or the terrestrial and the celestial.

& Pabst, 2015). "Since in theory and practice liberalism goes against the grain of humanity and the universe we inhabit," Milbank and Pabst (2015) conclude that "we are facing not merely a cyclical crisis (linked, for example, to economic boom and bust or the decline of representative government), nor even just a systemic crisis of capitalism and democracy, but rather a meta-crisis," which is "the tendency at once to abstract from reality and to reduce everything to its bare materiality, leaving an irreducible aporia between human will and artifice, on the one hand, and unalterable laws of nature and history, on the other."

This meta-crisis as manifested in the wider gap between the abstract and the material may actually echo the insights of Marx as elaborated earlier. To put it in metaphorical terms, liberal constitutionalism has straitjacketed people's heads into the cloud, forcing them to see, hear, and contemplate only what Marx calls the "abstract, artificial," "allegorical, moral" world, while leaving their bodies on the rotting ground, which is the "sensuous, individual, and immediate existence" of the "egoistic man" in civil society. This divergence is also well shown in the latest development of capitalism. Just as Milbank and Pabst (2015) point out, contemporary capitalism subjects the real economy of productive activities to relentless commodification and speculation, while at the same time separating symbolic significance from material basis, which is seen increasingly as just an object for arbitrary division, consumption, and destruction. As a result, it renders ecological damage constitutive of our fundamental economic processes. It is for this reason that the authors draw the conclusion the liberalism delves its tombs:

Thus, liberalism undoes itself and, in so doing, it erodes the polity it claims to save from extremes on both the left and the right. After all, the liberal focus on abstract, general standards (such as subjective rights, commercial contracts or formal, procedural justice) is parasitic upon a culture of universal principles and particular practices of virtue that this obsessive and rigid focus undermines, cutting off the branch on which it sits.

(Milbank & Pabst, 2015)

Clearly, the meta-crisis of Western constitutionalism is bound to occur, as long as it confuses political emancipation with human emancipation and the gap between the two gets wider. When that happens, it would not be surprising for fascism to resurface on earth. In fact, we are already witnessing the widespread emergence of an unhealthy populism in the West, which is a direct result of liberal constitutionalism. This is because the lack of human emancipation would necessarily lead to a corrupted mass that is at risk of being manipulated by demagogues under certain conditions. When life is so miserable that is not worthy of living anymore, it will signal the time for the demise of the West. The omnipresent symbolic violence, leading to all kinds of perversions of democracy as Pierre Bourdieu has discovered, certainly would contribute to such a dim future (Topper, 2001).

C. Turn to the Confucians for wisdom

However, the alternative constitutional paradigm of Confucian constitutionalism seems to be free from these problems. The defining feature of Confucian constitutionalism, for example, lies with its ritualistic and religious dimensions. The rituals in Confucian constitutionalism play an important constitutional function in not only constraining power, but also cultivating virtue. The "religious dimension" of Confucian constitutionalism is also different from the theocratic constitutionalism seen in other parts of the world. It is because the religious aspect of Confucianism differs from that of conventional religions of

the West, such as Islamism or Judaism. In fact, the Confucian constitutionalism may well be qualified to be the institutional arrangement Spinoza prescribes for enlightening the mass.

Therefore, with liberal constitutionalism manifesting more and more of its fatal flaws and unsustainability, the theoretical significance of the Confucian constitutionalism, especially its virtue cultivation aspect, will become clearer. In fact, many scholars have contended that Confucianism provides the sources for an illiberal democracy that could serve as a good alternative to that of liberalism (Ackerly, 2005). Scott Newton (2006) also points out that the mystical doctrine of separation of powers has been fetishized so that other legitimate democratic forms of government such as conciliar democracy have been obscured or prevented from consideration (p. 335). Similarly, while lying at the very heart of the operational legitimacy of the liberal constitutional order, the electoral formulas of Western democracies have been strangely neglected and ignored, leading to very "unscientific" and crude results that are susceptible to manipulation (Newton, 2006, 336).

To sum up, as soon as we do not subscribe to a liberal conception of constitutionalism *a priori*, we can see that there is an alternative Confucian constitutionalism that is equally legitimate. In fact, there have been quite some explorations of constitutionalism resources in the Confucian tradition and this article seeks to examine its virtue and vices in comparison to the ones exhibited by liberal constitutionalism. Given the inter-paradigm debate here, there are several clarifications regarding the conception as well as methodology at the beginning and the comparison between the two must also be sketchy. Nevertheless, as we have seen, there are crucial differences between the two with fatal consequences. With the Confucian constitutionalism as a mirror, the advantages and shortcomings of liberal constitutionalism are thus easier to perceive. The biggest virtue of liberal constitutionalism is its subtle and sophisticated endeavor for perfecting the external environment for the individual to flourish; however, its fatal vice is to pursue this goal too hastily, hence committing the mistake of "pursuing the branches at the cost of the root." In Marx's view, liberal constitutionalism confuses political emancipation with human emancipation, and the consequences might well be the re-emergence of fascism in the future. The wide-spread resurgence of populism in the West today may well point towards this trend. In contrast, Confucian constitutionalism seeks to shape the moderate character of the ruled, hence may not have the same problems of the liberal constitutionalism. The vice of it, however, is the lack of vitality, hence power for self-protection. Despite this, Confucian constitutionalism may well provide insight and wisdom for contemporaries to learn and solve current crises of humanity.

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Confucian Constitutionalism and Democracy and the Risk of Inventing Traditions

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Traditions which appear or claim to be old are often quite recent in origin and sometimes invented¹.

Confucian thought and the philosophical and religious traditions it gave rise to are probably among history's most abused ones. It has been used to justify the most disparate things. For instance, since the beginning of China's New Cultural Movement in the early 20th century, many Chinese intellectuals have considered Confucianism to be an impediment to democracy and progress in the liberal sense.² Yet it has also been considered a facilitator and mender of democracy, liberalism, and constitutionalism.³ Contradictory labels

1 Hobsbawm, Eric. "Introduction: inventing traditions." *The invention of tradition* 1, no. 6 (1983), p. 1.

2 Among the authors that have discussed the relationship between Confucian culture and Confucianism see: Bao, Wanchao, "Rujiao yu Xinjiao-Bainian Xianzheng Jianshe de Bentu Qingjie yu Wenhua Dikang" 儒教與新教：百年憲政建設的本土情結與文化抵抗 (Confucianism and Protestantism: The Native Complex and Cultural Resistance of Constitutional Construction in the Past Century). *Beida Falü Pinglun* 大法律評論 (*Peking University Law Review*) 1.2 (1998): 505-75; Hahm, Chaihark. "Constitutionalism, Confucian civic virtue, and ritual propriety." *Confucianism for the modern world* (2003): 31-53; Chen, Albert HY. "Is Confucianism compatible with liberal constitutional democracy?." *Journal of Chinese Philosophy* 34, no. 2 (2007): 195-216; Davis, Michael C. "Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values"(1998)." *Harvard Human Rights Journal* 11: 109-47; Ginsburg, Tom. "Confucian constitutionalism? The emergence of constitutional review in Korea and Taiwan." *Law & Social Inquiry* 27, no. 4 (2002): 763-799; Hucker, Charles O. "Confucianism and the Chinese censorial system." *Confucianism in action* (1959): 182-208;

3 See for instance Bell, Daniel A. *China's new Confucianism: Politics and everyday life in a changing society*.

incorporating Confucianism have mushroomed in recent decades: Confucian democracy, Confucian authoritarianism, Confucian human rights, Confucian constitutionalism, Confucian liberalism, Confucian Marxism, Confucian capitalism, and the list goes on. Confucius has been so overused that his thought has not only lost the authority it was previously able to bestow on political and legal theory - the risk is that Confucian tradition ultimately loses any meaning at all.

Recent theories and debates about Confucian democracy and constitutionalism - attempts to seek out democratic and constitutional concepts and practices within the vast Confucian tradition - have emerged in part because of a need to find new paradigms to orient Asian countries within the present and possibly mend democratic and constitutional systems' shortcomings, but also in part to sanction with perpetuity and the authority of the past the transformations that have characterized Asian legal and political institutions in the past century. Often, the value in finding a tradition of 'Confucian democracy' or 'Confucian constitutionalism' is one that serves the present - particularly the current need to legitimize and boost current institutions, or sometimes to justify rectifying them from within. Constitutionalism and democracy are among the categories that matter in the current legal and political world, and this is the reason why scholars often attempt to find precedents of constitutional or democratic practices and ideas in other spaces and temporalities. However, while ideas and practices related to modern definitions of democracy and constitutionalism, themselves being contested concepts, were not completely absent in the past and in other cultural traditions, they were either less important when compared to other social, political and moral values and institutions that better served the needs of a particular society or they were expressed in forms different from what we observe today.

In this sense, recent formulations of Confucian democracy or constitutionalism could easily fall into the category of 'invented tradition.' British historians Eric Hobsbawm and Terence Ranger coined the term in 1983 to refer to 'a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behavior by repetition, which automatically implies continuity with the past.'⁴ This phenomenon, according to the authors, is quite evident in the modern development of nation and nationalism, characterized in many places by the creation of a cultural continuity with a fixed and reassuring past that provides not only a foundation for national unity, but also a sense of 'invariance' that contrasts with the perennial changes and transformations of modernity.⁵ Without going into the merits of Hobsbawm and Ranger's work, the notion of invented traditions can be useful

Princeton University Press, 2010; Bell, Daniel, Daniel A. Bell, and Hahm Chaibong, eds. *Confucianism for the modern world*. Cambridge University Press, 2003; Liang Ying 梁鷹, 認清我國依憲治國、依憲執政與西方憲政的本質區別 *Ren Qing woguo yi zianzhiguo, yi xian zhizheng de benzhi qubie*, 1 求是 Qishi (2015); Zhao, Dingxin. *The Confucian-Legalist State: a new theory of Chinese history*. Oxford University Press, 2015; Chen, Ming 陳明. "Rujia Sixiang yu Xianzheng Zhuyi Shishuo" (儒家思想與憲政主義試說) (On Confucianism and Constitutionalism). *Hunan Daxue Xuebao* 湖南大學學報 (*Journal of Hunan University*) 22, no. 6 (2008): 17-20; Jiang, Qing. *A Confucian constitutional order: How China's ancient past can shape its political future*. Vol. 4. Princeton University Press, 2013; Hahm, Chaihark. "Ritual and Constitutionalism: Disputing the Ruler's Legitimacy in a Confucian Polity." *The American Journal of Comparative Law* 57, no. 1 (2009): 135-204; Son, Bui Ngoc. "Confucian Constitutionalism in Imperial Vietnam." *NTU L. Rev.* 8 (2013): 373; Hosen, Nadirsyah. "Religious Pluralism, Inclusive Secularism, and Democratic Constitutionalism." In *Muslim Secular Democracy*, pp. 211-232. Palgrave Macmillan, New York, 2013; Kim, Sungmoon. "Confucian constitutionalism: Mencius and Xunzi on virtue, ritual, and royal transmission." *The Review of Politics* 73, no. 3 (2011): 371-399; Song, Jaeyoon. "The Zhou Li and Constitutionalism: A Southern Song Political Theory." *Journal of Chinese Philosophy* 36, no. 3 (2009): 424-438; Ham, Chae-hak. "Confucian constitutionalism." 2000; Ginsburg, Tom. "Constitutionalism: East Asian Antecedents." *Chi.-Kent L. Rev.* 88 (2012): 11.

4 Hobsbawm, Eric. "Introduction: inventing traditions." *The invention of tradition* 1, no. 6 (1983), p. 1.

5 Ibid.

when looking at recent theoretical and historical reconstructions of Confucianism aimed at proving the existence of conceptual categories and practices of constitutionalism and democracy in pre-modern Asian countries.

History is alone a source of authority and reconstructed or invented traditions can sanction, through historical precedents, an imagined political and philosophical continuity that supports a desire to change or a resistance to innovation or a transformation that has already taken place. Modern Chinese history, and Modern Asian history more broadly, have been shattered by wars and profound and rapid transformations. Few polities have experienced such dramatic and radical changes in the course of a single century. Even today, in just forty years, China has risen from a poor and underdeveloped country to become a global power. In moments of crisis and transformation, political scientists and jurists 'mine the past in search of precedent and custom,'⁶ looking back into the past for precedents that support their theories and for conceptual keys and frameworks enabling better understandings of the present and orientations for the future. Many characterizations of 'Confucianism' as an ethical or religious tradition defining Chinese or Asian modern political and legal reality are often anachronistic or newly constructed, if not invented, to serve specific present purposes.

When looking at the scholars that have written histories or theories about Confucian democracy and constitutionalism, we can identify at least two kinds of people that pose different sets of questions and adopt differing methodologies: jurists and political scientists on the one hand, and historians on the other. Most scholars discussing Confucian democracy and constitutionalism - Jiang Qing, Yao Zhongqiu, Sungmoon, Bui Ngoc Son, Tan Sor-hoon, and Hyo-Dong Lee, Tom Ginsburg, to name just a few⁷ - are jurists and political scientists who delve into the past for functional reasons, usually to better understand the present and the ongoing evolution of international and domestic systems. In this context, history serves purposes dictated by current trends and dominant concepts, in our specific case, democracy and constitutionalism.⁸ That model is countered by the work of historians, who are usually interested in the past for its own sake and contextualize key constitutional or democratic concepts within historical, philosophical, and social developments. This for instance is the case of Qu Tongzu, Liang Zhiping, Karen Turner, Thomas Metzger, but also of Albert Chen, who looked at the history of constitutionalism in China since the Later Qing period, without relying on the invention of an existing 'Confucian constitutional tradition.'⁹ Employing the categories developed by Michael Kammen, we

6 Kalman, Laura. "Border Patrol: Reflections on the Turn to History in Legal Scholarship." *Fordham L. Rev.* 66 (1997): 87.

7 Son, Bui Ngoc. *Confucian Constitutionalism in East Asia*. Routledge, 2016; Yao, Zhongqiu. *Ru Jia Xian Zheng Lun = On Confucian Constitutionalism*. City University of Hong Kong Press, 2016; Jiang, et al. *A Confucian constitutional order: How China's ancient past can shape its political future*. Vol. 4. Princeton University Press, 2013; Kim, Sungmoon. "Confucian constitutionalism: Mencius and Xunzi on virtue, ritual, and royal transmission." *The Review of Politics* 73, no. 3 (2011): 371-399; Kim, Sungmoon. "A pluralist reconstruction of Confucian democracy." *Dao* 11, no. 3 (2012): 315-336; Kim, Sungmoon. *Democracy after Virtue: Toward Pragmatic Confucian Democracy*, Oxford University Press, 2018; Tan, Sor-hoon. *Confucian democracy: A Deweyan reconstruction*. SUNY Press, 2003; Lee, Hyo-Dong. "Confucian Democracy and a Pluralistic Li-Ki Metaphysics." *Religions* 9, no. 11 (2018): 325; Teng-hui, Lee. "Confucian democracy: Modernization, culture, and the state in East Asia." *Harvard International Review* (1999): 16-18.

8 Michael Kammen, *Selvages & Biases: The Fabric of History in American Culture*, Cornell University Press, 1987: 116-17.

9 Twitchett, D. C. "T'ung-Tsu Ch'Ü: Law and society in traditional China. Paris, La Haye: Mouton & Co., 1961." *Bulletin of the School of Oriental and African Studies* 25, no. 2 (1962): 394-395; Metzger, Thomas A. *The internal organisation of Ch'ing bureaucracy: legal, normative, and communication aspects*. Vol. 7. Harvard Univ Pr, 1973; Turner, Karen. "War, punishment, and the law of nature in early Chinese concepts of the state." *Harvard Journal of Asiatic Studies* 53, no. 2 (1993): 285-324; Song, *supra* note 4, at 425; Chen,

could say that political scientists and jurists' methods and approaches have to do with 'usable past', while historians focus on the 'pastness of the past', that is, on 'accept[ing] the past on its own terms' rather than translating it 'into our own contemporary frame of reference.'¹⁰

Both these approaches to Confucianism and Asian tradition have positive aspects and limitations. A dogmatism can pervade the work of political scientists and jurists looking for Confucian democracy and constitutionalism, because the history and theories they elaborate are based on belief in continuity between past and present and the imposition of categories that belong to the present to the past.¹¹ At the time of Confucius, neither 'democracy' or 'constitutionalism' as we know them as systems today existed. Although certain democratic and constitutionalist principles were present in Asian countries and together with other important principles served the need of past societies, both traditions as they are currently defined found their modern origins in specific institutions of Western countries and took on different articulations as they gradually globalized. Looking for these specific categories in other Asian spaces and times often limits the understanding of the complex and rich legal, social and political traditions in Asia. These jurists' and political scientists' work often involve a lack of proper historical contextualization; concepts from the ancient past are simply taken and used to support a particular theory. This is true of Jiang Qing, for instance: He takes bits and pieces of Confucian tradition to construct his theory, essentially an invented tradition of Confucian constitutionalism.¹² Insufficient consultation of primary material and limited use of secondary historical sources make such contributions fascinating but historically flawed. While the histories they offer can be rich and provide inspiring insights, they risk detachment from history because their objective is to justify the present or theorize political and social constructions for the future. Historians, on the other hand, tend to contextualize Confucian thought in specific temporal, social, cultural, and spatial contexts, and their accounts are provisional. They oppose the idea of a useable past and instead focus on its 'pastness.' In other words, they look for what a specific idea or practice meant to the people that lived in that particular time, regardless of its significance or practical use for the present.¹³ For example, various authors have looked at certain aspects of constitutionalism, in particular censorship and power-checking mechanisms, in Ancient China, giving proper contextualization within a specific time and place and without necessarily inventing a tradition of Asian constitutionalism.¹⁴

Albert HY. "Constitutions, Constitutionalism and the Case of Modern China." University of Hong Kong Faculty of Law Research Paper No. 2017/023. Available at SSRN: <https://ssrn.com/abstract=3027562> or <http://dx.doi.org/10.2139/ssrn.3027562>; Zhiping, Liang. "Explicating law: a comparative perspective of Chinese and Western legal culture." *J. Chinese. L.* 3 (1989): 55.

10 Michael Kammen, *Selvages & Biases: The Fabric of History in American Culture*, Cornell University Press, 1987: 116–17; see also Vadi, Valentina. "International law and its histories: Methodological risks and opportunities." *Harv. Int'l LJ* 58 (2017).

11 Schaberg, David. "1. The Zhouli As Constitutional Text." In *Statecraft and Classical Learning*, pp. 31–63. BRILL, 2010; Zhang, Qianfan. "Chuantong yu Xiandai: Lun 'Li' de Xianfaxue Dingxing" 傳統與現代：論“禮”的憲法學定性 (Tradition and Modern: On the Constitutional Nature of Li). *Jinling Falü Pinglun* 金陵法律評論 (*Journal of Jinling Law*) (2001) 1: 119–27; Kalman, Laura. "Border Patrol: Reflections on the Turn to History in Legal Scholarship." *Fordham L. Rev.* 66 (1997): 87, p.124.

12 See Jiang Qing.

13 Skinner, Quentin. "Meaning and Understanding in the History of Ideas." *History and theory* 8, no. 1 (1969): 3–53; Kalman, Laura. "Border Patrol: Reflections on the Turn to History in Legal Scholarship." *Fordham L. Rev.* 66 (1997): 87, p.114.

14 Ni, Libao. "Zhongguo Gudai Jiancha Zhidu yu Quanli Zhiheng Jizhi" 中國古代監察制度與權力製衡機制 (The Censorship System and Power Checking Mechanism in Ancient China). *Xinjiang Daxue Xuebao* 新疆大學學報 (*Xinjiang University Journal*) (1996) 24.2: 64–65; Qiu, Yongming. "Zhongguo Gudai Jiancha Zhidushi" 中國古代監察制度史 (The History of Ancient Chinese Censorate System). Shanghai: Shanghai Renmin Chubanshe (2006). Sun, Jiping, & Feng Yong. "Zhongguo Chuantong Guanliao Zhengzhi zhong de Quanli Zhiyue Jizhi" 中國傳

Historians look for historical truth and use empirical methods to gather information from continually emerging new archives, painstakingly reshaping historical interpretation of past events.¹⁵ Yet an excessive emphasis on history, contextualization, and fetishizing archives can obscure the legal and political significance of such traditions for the present. In this sense, as Anne Orford has argued, anachronism still plays an important role in the making of history of international law, and this can be extended also in the history of constitutionalism in the Asian context.¹⁶

This begs the question of whether we should prefer historians' exploration of Confucius or political scientists' and jurists' functional interpretations. While Confucian constitutionalism and democracy risk becoming invented traditions, Confucianism as a tradition, including a legal tradition, is important and real; its legacy is very much alive today in Asian countries and it can help rethink some aspects of current legal and political institutions. These different methods answer different questions and one method is not definitively better than the other. It is important to identify the best method for the particular research questions one wants to answer. These approaches can co-exist and they actually benefit from interdisciplinary, as long as there is an awareness about the methodology used and how one of the expertise of the two groups of scholars can complement each other.¹⁷ It should also be said that using Confucius in a completely non-historical way is ultimately dangerous, especially given how easily Confucian ideas can be used as an instrument of power. When reconstructing or inventing theories or histories of Confucian democracy and constitutionalism, it is thus important to maintain a genuine curiosity for the past itself, without fetishizing it, and to try to contextualize such ideas as historians do, in order to be aware of the historical, political and social circumstances in which they emerged.

統官僚政治中的權力製約機制 (The Power Checking Mechanism in Ancient Chinese Bureaucratic Politics). Beijing: Beijing Daxue Chubanshe (2010); Wang, Xiaotian. "Zhongguo Gudai Jiancha Zhidushi Yanjiu de Jige Wenti" 中國古代監察制度史研究的幾個問題 (A Few Issues on the Study of Ancient Chinese Censorate History). *Qiusuo* 求索 (Explorations) (2004) 12: 233–37. See also Song, Jaeyoon. "The Zhouli 《周禮》 and Constitutionalism: A Southern Song Political Theory." *Journal of Chinese Philosophy* (2009): 36.3, 424–38.

15 Steven Wilf, Law/Text/Past, 1 *UC Irvine L. Rev.* 543, 533 (2011), 549; Anne Orford, On International Legal Method, 1 *London Rev. Int'l L.* 166, 171 (2013)

16 Anne Orford, On International Legal Method, 1 *London Rev. Int'l L.* 166, 171 (2013).

17 Vadi, Valentina. "International law and its histories: Methodological risks and opportunities." *Harv. Int'l LJ* 58 (2017): 311; Kalman, Laura. "Border Patrol: Reflections on the Turn to History in Legal Scholarship." *Fordham L. Rev.* 66 (1997): 87, p.124.



The Battle for the Global Future The Christians in America and the Confucians in China?

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Abstract

With the new leaderships in Beijing and Washington, the course of history seems to have changed with President Xi Jinping and President Donald Trump. The emerging governing philosophies reflect the revival of Confucian morality in China and the resurgence of Christian evangelicalism in America. In this comparative analysis, the paper explores the key elements of these evolutionary processes that would shape the nature of the most important bilateral relationship in the world.

I. Confucian Democracy?

In October 2017, the Communist Party of China (CPC) enshrined¹ its Constitution with "President Xi Jinping's Thought on Socialism with Chinese Characteristics for a New Era" at the 19th Party Congress. After abolishing the presidential term-limit, President Xi now leads the nation with Marxist and Confucian ideas for the "Grand Course" of cultural and national revival to regain² its "rightful place as a global power."

1 Chris Buckley, 'Xi Jinping Thought Explained: A New Ideology for a New Era' *The New York Times* (New York, 27 February 2018) A8

2 Chris Buckley and Keith Bradsher, 'China Moves to Let Xi Stay in Power by Abolishing Term Limit' *The New York Times* (New York, 26 February 2018) A1

The stealth strategy is becoming clear to the self-assured 90-million strong CPC for having over 370,000 Chinese students enrolled in American universities and more than 110 million tourists gallivanting every corner of the world, including Antarctica - a popular but expensive destination. By 2020, more than 75 percent of China's urban consumers will earn³ \$9,000 to \$34,000 a year. China's middle class is expected⁴ to expand from 430 million today to 780 million by the middle of 2020's. The growing middle class is generally viewed⁵ as a "source of potential instability" but the CPC has shown "extraordinary resilience" and "impressive ability to recreate itself" while searching for a credible alternative to democracy.

In fact, the CPC is repeatedly proving⁶ its "resilience." The culturally-confident China is now pursuing its "China Dream" with the Belt and Road Initiative (BRI) while establishing a Confucian democracy⁷. For President Xi, Confucian democracy is a far better "China model" than America's liberal democracy. With his grand plan, the Chinese government has already infiltrated⁸ American colleges and universities with more than 100 Confucius Institutes and over 500 Confucius Classrooms in K-12 schools "to enhance its own image" across the United States. The National Association of Scholars in April 2018 reported⁹ that China has "shrouded Confucius Institutes in secrecy" as part of Beijing's "soft power" strategy. Xi's "New Era" has now signaled a historic landmark in China's long-march for wealth and power. Beijing is, for the first time in history, emerging as a global superpower. Long before President Bill Clinton, however, American policymakers had growing confidence that China would eventually become a liberal democracy - led by the shepherds of Washington.

What went wrong with the American vision of democracy for China?

Without genuinely understanding the collective mindset of the Chinese experience, the continuing worldview of China through the American experience is myopic. And this myopia has misled the policymakers and strategists in the United States.

II. Past is the Future

The American mindset gradually evolved with Chairman Mao Zedong's death in 1976 and the rise of China's next paramount leader Deng Xiaoping. He began an experiment with the historic opening-up and trade liberalization policy. Like the American experiment tested at its founding by Alexander Hamilton, Deng emulated¹⁰ an entrepreneurial Hamiltonian

3 Dominic Barton, Yougang Chen, and Amy Jin, 'Mapping China's middle class' (*McKinsey & Company*, June 2013) <<https://www.mckinsey.com/industries/retail/our-insights/mapping-chinas-middle-class>>

4 Salvatore Babones, 'China's Middle Class Is Pulling Up the Ladder Behind Itself' (*Foreign Policy*, 1 February 2018) <<https://foreignpolicy.com/2018/02/01/chinas-middle-class-is-pulling-up-the-ladder-behind-itself/>>

5 Rosie Blau, 'The new class war' (*The Economist*, 7 July 2016) <https://www.economist.com/special-report/2016/07/07/the-new-class-war?FEATURE_ARTICLES_V1=0>

6 Tianjian Shi and Jie Lu, 'The Meanings of Democracy: The Shadow of Confucianism.' (2010) 21 *Journal of Democracy* 4, 123 <<https://muse.jhu.edu/>>

7 Patrick Mendis, 'Here Is Why China May Be Moving towards 'Confucian Democracy'' (*The National Interest*, 7 November 2017) <<https://nationalinterest.org/feature/here-why-china-may-be-moving-towards-confucian-democracy-23091>>

8 'How Many Confucius Institutes Are in the United States?' (*National Association of Scholars*, 9 April 2018) <https://www.nas.org/blogs/dicta/how_many_confucius_institutes_are_in_the_united_states>

9 'Outsourced to China: Confucius Institutes and Soft Power in American Higher Education' (*National Association of Scholars*, April 2018)

10 Patrick Mendis, 'Trump's 'America first' and Xi Jinping's 'China first': how different are they?' (*South China Morning Post*, 14 April 2017) <<https://www.scmp.com/comment/insight-opinion/article/2087354/trumps-america-first-and-xi-jinpings-china-first-how>>

America with a strong manufacturing sector and a centralized government that supported the export-led development while developing a powerful navy to protect its growing trade relations.

To create a new vision of “trade for peace”¹¹, the young republic severed its mercantilist trade relations with the former European colonists and dispatched its first trading ship, *the Empress of China*, from New York Harbor to Canton (now Guangzhou) on President George Washington’s birthday in 1784. The historic event was purpose-driven to win a rightful place for the new nation in international commerce. The growing commercial intercourse had created a mutually-admiring bond between the United States and the Qing Dynasty (1644-1911).

Celebrating the second-century of Sino-American trade relations in 1984, President Ronald Reagan remarked¹² at the Great Hall of the People in Beijing that “personal dinner settings used by our first three Presidents - George Washington, John Adams, and Thomas Jefferson - were of Chinese origin, evidence of our Founding Fathers’ attraction for your country.” The president also reminded the audience that former President Ulysses S. Grant also visited China a little over century ago (1789), saying¹³, “the population is industrious, frugal, intelligent, and quick to learn.” Reagan then concluded¹⁴, “America and China are both great nations. And we have a special responsibility to preserve world peace The future is ours to build.”

III. The Rebirth of Trade

Similar to how the United States was ushered into the nineteenth century, the Beijing leadership also concentrated on the development and growth strategy as China headed toward the twenty-first century. The economic impacts of Deng’s Hamiltonian-like strategies were collectively called “Peaceful Rise”¹⁵ and China’s gross domestic product grew more than seven folds with an average annual growth rate of over nine percent from 1980 to 2001.

In the intervening years, the Clinton White House expected that China would continue to pursue the American experience and granted the pathway to membership in the World Trade Organisation (WTO). As part of other post-WWII Bretton Woods institutions, the WTO - the successor to GATT - is an American project that extends its own founding self-image for rule-based global governance and trade. At its birth, the United States was designed¹⁶ to be a “commercial republic” that would unite the original 13 former colonies - and later 50 states - through the powerful Commerce Clause of the United States Constitution. The WTO is a strategic device of the American constitutional framework¹⁷ “to regulate commerce with foreign nations” and to unite the world - the

11 Patrick Mendis, *Trade for Peace: How the DNA of America, Freemasonry, and Providence Created a New World Order with Nobody in Charge* (iUniverse, 2009)

12 Ronald Reagan, ‘Remarks to Chinese Community Leaders in Beijing, China’ (Remarks to Chinese Community Leaders in Beijing, China, Beijing, 27 April 1984) <<https://www.presidency.ucsb.edu/documents/remarks-chinese-community-leaders-beijing-china>>

13 Ibid.

14 Ibid.

15 Bijian, Zheng, ‘China’s Peaceful Rise: Speeches of Zheng Bijian 1997-2004.’ (*The Brookings Institution*, 2005) <<https://www.brookings.edu/wp-content/uploads/2012/04/20050616bijianlunch.pdf>>

16 Mendis, Patrick, *Commercial Providence: The Secret Destiny of the American Empire* (University Press of America, 2010)

17 Annotation 28, Article I, Constitution of the United States

final embodiment of the American experience for a global nation.

In "The End of History," American State Department official Francis Fukuyama also declared¹⁸ that the "final form of human government" had arrived and convinced¹⁹ the world that the free-market liberal democracy had won after the collapse of *glasnost* and *perestroika* in the former Soviet Union. American policymakers were then persuaded that the Chinese membership in the WTO was the right strategy to sustain the American-led liberal world order.

Intertwined by increasingly complex trade and investment regimes since then, China is now commanding a greater role as an emerging economic superpower over the United States. Harvard University Professor Graham Allison has concluded²⁰ that "China has already surpassed the United States on each of 25 indicators of economic performance" except in the military expenditure. Reacting to this reality, China-bashing²¹ has become the norm in presidential elections. To pander to his electorate, presidential candidate Donald Trump had also criticized²² China. As the president, however, Trump is now openly working with his counterpart President Xi Jinping to "Make America Great Again" by making enormous concessions to safeguard²³ his family business interests in China and elsewhere while congressional leaders oppose them, especially the controversial ZTE incident²⁴ that has national security and military implications.

China has a long-term grand vision in President Xi's more assertive "China Dream"²⁵ plan with benchmarks to "Make China Great Again" after the Century of Humiliation. This is a drastic departure from Deng's Peaceful Rise policy. The China Dream with the BRI is being implemented to build a "moderately prosperous society" by doubling China's 2010 per capita gross domestic product to \$10,000 when Beijing celebrates the 100th anniversary of the CPC in 2021. The second benchmark is targeted at becoming a "fully developed, rich, and powerful" nation by the 100th anniversary of the People's Republic of China (PRC) in 2049.

IV. The Resilience of Confucians

China exists on history, especially remembering²⁶ the epic betrayal by the United States at the Versailles Peace Treaty in 1919 that would result in the May Fourth Movement. It was the bitter undercurrent that remains in the historical context of Sino-American relations

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- 18 Francis Fukuyama, 'The End of History?' (*The National Interest*, Summer 1989) <<http://kropfpolisci.com/exceptionalism.fukuyama.pdf>>
 - 19 James Atlas, 'What Is Fukuyama Saying? And to Whom Is He Saying It?' (*The New York Times Magazine*, 22 October 1989) <<https://www.nytimes.com/1989/10/22/magazine/what-is-fukuyama-saying-and-to-whom-is-he-saying-it.html>>
 - 20 Graham Allison, 'America second? Yes, and China's lead is only growing' (*The Boston Globe*, 22 May 2017)
 - 21 Patrick Mendis, 'China-bashing rhetoric like Romney's is counterproductive' (*Minn Post*, 23 October 2012) <<https://www.minnpost.com/community-voices/2012/10/china-bashing-rhetoric-romneys-counterproductive/>>
 - 22 Andy Wong, 'Donald Trump Talked a Lot About China at the Debate. Here's What China Thought About That' (*Time*, 27 September 2016) <<https://time.com/4509121/china-presidential-debate-hillary-clinton-donald-trump/>>
 - 23 Tom Brenner, 'Ivanka Trump Wins China Trademarks, Then Her Father Vows to Save ZTE' *The New York Times* (*New York*, 29 May 2018) B3
 - 24 Patrick Mendis, 'The Problem with America's "Transactional" Presidency', (*China US Focus*, 9 June 2018) <<https://www.chinausfocus.com/finance-economy/the-problem-with-americas-transactional-presidency>>
 - 25 Patrick Mendis, *Peaceful War: How the Chinese Dream and the American Destiny Create a New Pacific World Order*, (University Press of America, 2013)
 - 26 Patrick Mendis, 'To Understand China, Go to a French Château', (*China US Focus*, 7 June 2017) <<https://www.chinausfocus.com/foreign-policy/to-understand-china-go-to-a-frenchchateau/>>

to this day. With their increasing wealth, there comes power. With that power comes the ability to pursue their own national identity, having cherished their Confucian heritage and imperial governance.

Mencius (372-289 BC), a Confucian philosopher, said²⁷ "the people are the most important element [in a country]; the Spirits of the land and grain are the next; the ruler is the lightest." The inference²⁸ of this Confucian social contract is not that the people rule, but their welfare is vital to good governance. That is, the legitimacy of policies come from good governance, not the process by which it comes to power. In America, government accountability for the people is often associated with periodic democratic elections. In Confucian governance, however, the rulers are compelled to protect the interests and needs of the people for their long-term survival. In the *Federalist Papers* on the administration of government, Alexander Hamilton also argued²⁹ that "the last is necessary to enable the people . . . to prolong the utility of his talents and virtues, and to secure the government the advantage of permanency in a wise system of administration." With the extension of his term-limit, President Xi could overcome the vested interests for the needed reforms and continue the national initiatives. The permanency of leadership has its own benefits but the quality of leaders - especially with ethical and moral reasoning abilities and humility - is imperative for both nations.

Unlike the increasingly costly American elections, China has its own hidden intra-party democratic and consultative processes for the selection of leaders, policy formulation, and response to the welfare of its citizens. Despite all the negative press in America, the National People's Congress (NPC) continuously scrutinizes the performance of its leaders; the Politburo also needs to have consensus for policy changes; the citizens are actively engaged in governance through social media for which national, provincial, and local officials are swiftly responsive from natural disasters to corruption. Recently, the NPC eliminated the electronic voting system in favor of secret paper-ballot to accommodate the dissenting voices. The party - guided by Confucian ethics - is the heart and soul of China. The success of "strengthening the party's overall leadership is the core issue," said³⁰ Liu He, vice premier for economic policy, in March 2018.

In America, when the Congress is gridlocked on issues, policymakers often resorted to the appointed bipartisan commissions to find solutions to national problems, ranging from deficit-reduction to military realignment. The regular and periodic elections, which serve as a democratic feedback device to check the public accountability, have been politically polarized through the complicated processes of gerrymandered congressional districts, the campaign finance acts, and the landmark *Citizens United v. Federal Election Commission* law. Whatever the mechanisms used, as Mencius and Hamilton agreed, the processes of government accountability to the people are simply the means to justify the ends. Irrespective of whether they are Chinese or American, the results have been consequential in the identity politics of ideologies.

27 Legge, James, *The Chinese Classics: The life and works of Mencius* (Vol. 2) (Trübner & Company, 1875)

28 'China's Confucian Democracy', (*Wilson Quarterly*, Winter 2011) <<https://wilsonquarterly.com/quarterly/winter-2011-the-seven-million/chinas-confucian-democracy/>>

29 'The Federalist Paper: No. 72' (*Yale Law School The Avalon Project*) <https://avalon.law.yale.edu/18th_century/fed72.asp>

30 Lucy Hornby, 'China's Liu He takes broad economic role as vice-premier' *Financial Times* (London, 19 March 2018) <<https://www.ft.com/content/ceea03f4-2a85-11e8-9b4b-bc4b9f08f381>>

V. Intelligent Design by Christians

For over millennia - except the period of Chairman Mao's Cultural Revolution - the Confucian identity has competed and complemented each other with Buddhism and Daoist traditions, establishing the unity of opposites. In fact, Buddhist and Daoist monks interacted with itinerant merchants in ancient China by trading goods and by mutually reinforcing their collective economic well-being with spiritual development and heavenly blessings throughout its Silk Road civilization³¹ since the Han Dynasty (206 BC - 220 AD). Even more important, the Chinese people exchanged knowledge systems from the Indian, Persian, and European civilizations for their philosophical advancement.

To rejuvenate China's national culture, President Xi has continued to integrate the "foreign" Marxist elements that would practically advance the national progress with amalgamated philosophies - like the imported³² Buddhism and now Marxism assimilating³³ into a "China model." Such pragmatism would give the overriding role for evolving Confucian ethos to accommodate the harmonious co-existence by the tolerance and acceptance of other world traditions and philosophies. Wang Yang, chairman of the Chinese People's Political Consultative Conference (CPPCC) - the leading advisory body - recently acknowledged³⁴ that the "Cultural Revolution eliminated a large part of both the essence and the dregs of traditional culture on the mainland." As adaptive and quick learners as the Chinese, the simmering "culture war" among various interest groups - whether liberal or conservative - seems to be secondary to the primary goal of China's harmonious national identity.

Similar to China's purposeful revival of "Confucian identity," the United States has a long history of striving for a "Christian identity." Having learned the European experience of religious persecution, American Christians have come to view religious freedom to protect themselves from other faith traditions that emanate from various ethnic and cultural origins like the Buddhists, the Hindus, and especially the Muslims from the Arab nations in the Middle East. After his reflective works on the Hispanic Challenge³⁵ and white nativism in America, Harvard political scientist Samuel Huntington had finally realized³⁶ that he was wrong about "Americans as an exceptional people united not by blood but by creed." Huntington, the author of *The Clash of Civilizations*³⁷, has long argued about the challenges to the American identity - starting from the Revolutionary War that produced the "American people" to the "American nation" after the Civil War.

31 Patrick Mendis, 'How the "Crown Jewel" of China's Belt and Road Initiative Harkens Back to Ancient Glory' (*China US Focus*, 11 April 2018) <<https://www.chinausfocus.com/culture-history/how-the-crown-jewel-of-chinas-belt-and-road-initiative-harkens-back-to-ancient-glory>>

32 Patrick Mendis, 'China's quest for soft power: where Confucius has failed, the Buddha may succeed' (*South China Morning Post*, 1 June 2018) <<https://www.scmp.com/comment/insight-opinion/article/2148798/chinas-quest-soft-power-where-confucius-has-failed-buddha>>

33 Patrick Mendis, 'Why Xi Jinping's China model is about both material and spiritual rejuvenation' (*South China Morning Post*, 29 October 2017) <<https://www.scmp.com/comment/insight-opinion/article/2117126/why-xi-jinpings-china-model-about-both-material-and>>

34 Jun Mai, 'Top Chinese Communist Party cadre criticises Cultural Revolution for damage to tradition' (*South China Morning Post*, 7 June 2018) <<https://www.scmp.com/news/china/policies-politics/article/2149715/top-chinese-communist-party-cadre-criticises-cultural>>

35 Samuel P. Huntington, 'The Hispanic Challenge' (*Foreign Policy*, March / April 2004) <<http://learning.hccs.edu/faculty/ahmed.shagroni/american-government-2301/readings-for-group-discussion-projects/group-two/the-hispanic-challenge-samuel-huntington/view>>

36 Carlos Lozada, 'Samuel Huntington, a prophet for the Trump era' (*The Washington Post*, 18 July 2017) <https://www.washingtonpost.com/news/book-party/wp/2017/07/18/samuel-huntington-a-prophet-for-the-trump-era/?noredirect=on&utm_term=.17bdc00d66e6>

37 Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster, 2011)

The 9/11 attacks by Osama bin Laden ended³⁸ "America's [soul] search." In retrospect, it is not Huntington's clash of civilizations that would challenge the American creed but the causation of clashes "within" the United States that would eventually destroy the myth of American exceptionalism. The underlying white nationalism and nativist policies - like the Indian Removal Act of 1830, the Chinese Exclusion Act of 1882, and the 1942 Executive Order of the Internment Camps of Japanese Americans - have been amplified with the gradual rise of the Religious Right, an evangelical movement also known as Christian Right. It has given a religious but political impetus to polarize the American electorate and to endanger the national identity, *E pluribus Unum*, "out of many, one." Begun as a separatist evangelical subculture, Christian evangelicals and fundamentalists engaged³⁹ "in the politics and culture wars of the 1920s" and "re-emerged as a political force in the form of the Religious Right of the 1970s."

In his book, *God's Own Party*, Daniel Williams unveiled⁴⁰ the secret strategy that Christian evangelicals have come to see in the Republican Party. They have used the party as the vehicle through which they could reclaim America as a Christian nation. In 1976, the Reverend Jerry Falwell, a pioneer among televangelists and founder of Liberty University, proclaimed⁴¹ that the United States was "intended to be a Christian nation by our founding fathers" and he then paved⁴² "the way for the emergence of a Republican Party that is incapable of compromise." The party that is now synonymous with conservative evangelicals - who associated with the Christian fundamentalist movement of the Intelligent Design⁴³ creationism as opposed to Charles Darwin's scientific theory of evolution - has begun to wage a "culture war" in the name of religious liberty. Supporting faith-based initiatives, they adamantly opposed the policy initiatives of the Democratic Party leaders and worked against the evidence-based science behind climate change, environmental degradation, and even human conception and abortion.

Adding to all this, there has also been continuing tensions but largely subtle racial and religious undertones that had prevailed during the eight years of the Obama White House (2009-17). In the 2016 presidential election, even though his Democratic opponent Hillary Clinton⁴⁴ had won by almost three million popular votes, the Electoral College ushered Donald Trump into the presidency with over 80 percent of White conservative Christians; and the policies championed⁴⁵ by the president and his evangelical Christian electorate are at the forefront to achieve their long-standing goals. For them, American democratic ideals and moral values are seemingly inconsequential compared to the final victory, as these conservative Christian leaders had desired⁴⁵ "to see an America that embraces Judeo-Christian values again" with continuing policy successes. For example, their initiatives entailed the introduction of new anti-immigration policies (particularly against the Muslims and the Hispanics), the support of pro-life guidelines in government-wide programs, the

38 *Supra* note 35

39 Michael J. McVicar, 'The religious right in America' (*Oxford Research Encyclopedia of Religion*, 2016) <<https://oxfordre.com/religion/view/10.1093/acrefore/9780199340378.001.0001/acrefore-9780199340378-e-97>>

40 Daniel K. Williams, *God's Own Party: The Making of the Christian Right*, (Oxford University Press, 2010)

41 Michael Sean Winters, 'How the Ghost of Jerry Falwell Conquered the Republican Party' (*The New Republic*, 2012) <<https://newrepublic.com/article/101296/falwell-gop-winters>>

42 *Ibid.*

43 Robert Shedinger, 'Intelligent Design-It's not just for evangelicals' (*Luther College*, 16 April 2015) <https://www.luther.edu/religion/departments/news/?story_id=620836>

44 Michelle Boorstein, 'Donald Trump's 'spiritual adviser' claims God elevated him to presidency' (*Independent*, 11 September 2017) <<https://www.independent.co.uk/news/world/americas/donald-trump-god-president-spiritual-advisor-obama-clinton-christian-orlando-religion-politics-paula-a7938856.html>>

45 David Brody, 'In Donald Trump, Evangelicals Have Found Their President' (*The New York Times*, 24 February 2018) <<https://www.nytimes.com/2018/02/24/opinion/sunday/donald-trump-evangelicals-president.html>>

appointment of “traditional” judges to the courts, the suppression of voting rights, the diplomatic move of the American embassy to Jerusalem, and other religious liberty issues like school prayers, gay rights, and even the right to bear arms and gun control.

The undercurrent “culture war” within the American polity and the Chinese nation-state has a complex stream of converging and diverging racial and religious forces. All Christians and Confucians have equally been vulnerable to these types of human tendencies for the group “self-identity” of economic and political power. Yet the two republics have varied political and ideological experiences throughout the course of history. Like Xi’ rejuvenation of the Chinese nation, Trump has now changed⁴⁶ the nature of his Republican Party and American democracy with the support of conservative evangelical Christians to “Make America Great Again,” which harkens back to the resembling of the Andrew Jackson presidency. Historian Harry Watson writes⁴⁷ that the Jacksonian “vision of the ‘people’ had no room for people of color Jackson’s populism was thus a Trojan horse for pro-slavery, pro-states-rights interests. He was a wealthy slaveholder himself, with no qualms about African-American bondage and deep hostility to abolitionism. He ignored the early movement for women’s rights, and his infamous policy of Indian removal partly stemmed from demands by his [white Christian] ‘base’ for plentiful free land.” Departing from the founding vision of a global nation, Old Hickory was the first populist and anti-establishment president (after four Virginians and two Massachusettsians). President Trump’s aides and associates have pushed⁴⁸ the notion that their mercurial leader is “a modern-day reincarnation of Andrew Jackson” as he has decided to keep a portrait of the seventh president in the Oval Office.

Although some parallel comparisons between the two presidents seem to exist, the Trump phenomenon is a manifestation of the unfolding realities of the globalizing American population and its demographic shift. Unlike the irrational fear of an endangered Confucian identity with Tibetan, Uighur, and other over 50 ethnic minority groups (only about eight percent of the 1.3 billion Chinese population), the Christian identity is a malicious insider threat that would further jeopardize the already divisive electorate in democratic governance than in a Confucian state that has the long tradition of accommodation and scientific rationale for human conduct. With the change of one-child policy based on the demographic calculus, China has continued its resettlement programs in Tibet, Xinjiang, and other western provinces through the BRI connectivity to keep the Han population (about 92 percent) a majority while modernizing the places of religious worship for largely Buddhist and Muslim communities.

In America, the increasing immigrant population - whether legal or undocumented - and other “culture war” issues have largely challenged⁴⁹ the white Christians within the democratic party politics. A wider range of racially, religiously, and economically diverse groups has a greater affinity with the cross-cutting identities of Democrats than the Republicans. The Republican Party is increasingly identified with ideologically-cohesive white

46 Patrick Mendis, ‘The Future of American “Trumpire” As If China Mattered’ (*China US Focus*, 11 April 2017) <<https://www.chinausfocus.com/foreign-policy/the-future-of-american-trumpire-as-if-china-mattered>>

47 Harry Watson, ‘Andrew Jackson, America’s Original Anti-Establishment Candidate’ (*Smithsonian.com*, 31 March 2016) <<https://www.smithsonianmag.com/history/andrew-jackson-americas-original-anti-establishment-candidate-180958621/>>

48 Peter Grier, ‘The (semi) secret history of Trump’s Andrew Jackson portrait’ (*The Christian Science Monitor*, 9 February 2017) <<https://www.csmonitor.com/USA/Politics/Decoder/2017/0209/The-semi-secret-history-of-Trump-s-Andrew-Jackson-portrait>>

49 C.K., ‘How Republicans embraced identity politics’ (*The Economist*, 22 March 2018) <<https://www.economist.com/democracy-in-america/2018/03/22/how-republicans-embraced-identity-politics>>

Christian evangelicals and wealthy individuals, whose worldviews are aligned more with Jacksonian-like policies. The evolving polarization by a divisive Christian identity is a recipe for a disastrous endgame to the "American identity" that the Founding Fathers deliberately addressed in the Bill of Rights. Among them, Thomas Jefferson - with his Enlightenment notion of the separation of church and state - advocated the enduring American principle embedded in the freedom of religion for the survival of the republic.

VI. The Religious Marketplace

Unlike the mutual enrichment of monks and merchants in ancient China, the American experience with the Pilgrims and colonists had given a different platform for the founding generation to birth a new "Roman republic" in the United States, knowing that a system of "Athenian democracy" would not be a viable option when slaves and women there were considered the property of white landlords. It took more than a century for the Women Suffrage and almost two centuries for African-Americans to exercise their "unalienable Rights" guaranteed by Thomas Jefferson. The Jeffersonian struggle - primarily the separation of church and state - is fundamental to the American identity, national progress, and the eventual idea of practicing democracy in the "Promised Land" of the Pilgrims.

Similar to the colonists' economic motives and Alexander Hamilton's devout faith in market forces governing free enterprises, Jefferson also devised the church-state doctrine to reconcile the religious forces in the marketplace of spiritual diversity and to compete with each other for the betterment of each religious faith of worships. Believers in markets and freedoms - as opposed to government authority - Hamilton was successful in creating an environment for economic firms to thrive on Wall Street while Jefferson upheld the view that religious liberty in various faith communities adheres to the basic principles of market forces. In all this, "American identity" - not the Christian identity - is like a computer that is run by the Jeffersonian software on the Hamiltonian hardware. In other words, the American bald eagle needs both the right and the left wings to soar in the air of freedom and to govern itself from "the shining city upon the hill."

As a perennial integrator, China has selectively decided only to utilize the Hamiltonian ingenuity as the foundation of their economic template to have emerged as a global superpower. Unlike the struggles of Native Americans, the Women Suffrage and the Civil Rights Movement in America, the Jeffersonian struggles in China - like the 1989 Tiananmen Square massacre and the 1999 Falun Gong nation-wide crackdown - failed. For its own cultural revival, President Xi wanted a distinctly Confucian software to run on a state-owned Hamiltonian system of enterprises. The Jeffersonian vision of religious liberty in China is not necessarily prohibited but guided by the party. For China's great religious awakening⁵⁰, the CPC has set up five "associations" for each of Buddhist, Catholic, Daoist, Muslim, and Protestant groups to run their own temples, churches, and mosques.

50 Ian Johnson, 'China's Great Awakening' (*Foreign Affairs*, 13 February 2017) <<https://www.foreignaffairs.com/articles/china/2017-02-13/chinas-great-awakening>>

VII. The Prosperity Gospel

Having seen the troubling American experience of religious liberty by the rise of conservative Christians who have found⁵¹ Trump as “their dream president,” China has now apparently validated its fear of religion as an internal threat to their cultural unity and national identity. For them, the scientific nature of Karl Marx’s analysis was correct when he said that religion is a drug prescribed by state power to make people submissive. This could well be related to the evangelical Christians who have long claimed to regain the political power as a Christian nation while alienating the rest of Americans. “Religion is the sigh of the oppressed creature,” Marx remarked⁵², “the heart of a heartless world, and the soul of soulless conditions. It is the opium of the people.” For Chairman Mao and President Xi, Marx was an objective prognosticator of human conditions and a great philosopher.

For conservative Christians, however, the godless materialism is a rational fear. They came⁵³ to “view communism [in China] and Soviet Russia as an existential threat [to America], and warned that the centralization of federal power might lead to a similar encroachment of godless materialism [of Karl Marx] in the United States.” Ironically, however, those Christian fundamentalists and evangelists have materially enriched themselves by preaching the Prosperity Gospel⁵⁴, an alternative adaptation of the Bible for self-glorification as God’s chosen few. For them, this dialectical process of the interplay of wealth, religion, and politics is their baptized version of American identity in their Christian nation, buttressed by a growing hostility towards science, ethnic diversity, secular culture, and globalization.

In *Das Kapital* (1867), Karl Marx and Friedrich Engels developed the notion of “dialectic materialism” from German philosopher Georg Hegel, who believed that all human and material behaviors were conditioned by the historical state of human consciousness whether they were political doctrines or religious ideologies. The current policy initiatives and political events unfolding with the Trump White House - like the Muslim travel ban, the Hispanic anti-immigrant policies, the white nationalism, and patriotic Christianity - are results of the evolving consciousness of fundamentalists and conservative Christians. Extolling the Confucian virtues at the 2565th anniversary of the ancient sage’s birth, President Xi had taken a different path of human consciousness by saying⁵⁵, “Diversity is a natural character of the universe” and the guiding light of modern China - and, it is “the only way to make the garden of world civilizations a vivid blaze of color.” As enlightened as the Founding Fathers, President Xi was echoing the American creed of a global nation. The inclusive idea is residing in the Jeffersonian notion of “Life, Liberty and the pursuit of Happiness” that has given three examples of the “unalienable rights” to all human beings by their Creator, for which the American government as well as the Communist Party are created to protect.

51 Sarah Pulliam Bailey, ‘Their dream president’: Trump just gave white evangelicals a big boost’ (*The Washington Post*, 4 May 2017) <https://www.washingtonpost.com/news/acts-of-faith/wp/2017/05/04/their-dream-president-trump-just-gave-white-evangelicals-a-big-boost/?utm_term=.f0852983d148>

52 ‘A Contribution to the Critique of Hegel’s Philosophy of Right: Introduction’ (*Marxists Internet Archive*) <<https://www.marxists.org/archive/marx/works/1843/critique-hpr/intro.htm>>

53 *Supra* note 39

54 Tara Isabella Burton, ‘The prosperity gospel, explained: Why Joel Osteen believes that prayer can make you rich’ (*Vox*, 1 September 2017) <<https://www.vox.com/identities/2017/9/1/15951874/prosperity-gospel-explained-why-joel-osteen-believes-prayer-can-make-you-rich-trump>>

55 Xi Jinping, ‘Xi Jinping’s Speech in Commemoration of the 2,565th Anniversary of Confucius’ Birth’, (*China US Focus*, 24 September 2014) <<http://library.chinausfocus.com/article-1534.html>>

VIII. Govern by Example

The CPC leaders are acutely aware of American history as much as their own historical evolution. As a thriving civilizational-state, their Confucian identity with harmony and order is still more desirable than the agonizing Jeffersonian struggles of America. China has great pride in their Confucian heritage; they believe China is an exceptional nation and that their DNA embedded in Confucian morality and ethics is far superior to that of the Christian morality displayed in the American political landscape. The American experience of "the Hamiltonian means to Jeffersonian ends" may, however, eventually come to China of their own accord and time.

In retrospect, President Woodrow Wilson's vision to "make the world safe for democracy" has not yet materialized but America's costly military expeditions have still continued in Afghanistan, Iraq, and elsewhere to promote democracy. Before democracy is exported as a refined American product, particularly to the deeply traditional and civilizational societies like China, it should be domesticated successfully at home. Confucius counselled⁵⁶, "It is not possible for one to teach others, while he cannot teach his own family. Therefore, the ruler, without going beyond his family, completes the lessons for the state." American policymakers and strategists are now compelled to study Chinese wisdom as the enlightened⁵⁷ Founding Fathers once did.

Benjamin Franklin - the American Confucius - famously warned⁵⁸ that "we must, indeed, all hang together or, most assuredly, we shall all hang separately." Despite the current divisive political environment, the bipartisan solutions to American challenges, as Senators Richard Lugar and Sam Nunn have demonstrated⁵⁹, are possible. For the next generation of wisdom-seeking leaders, the destiny is still an American choice for the bald eagle's lasting vitality.

56 Confucius, 'The Great Learning' (*The Internet Classics Archive*) <<http://classics.mit.edu/Confucius/learning.html>>

57 Patrick Mendis, 'Commerce is Destiny: Revival of Silk Road Civilization and Sino-American Relations' (*China International Studies*, January-February, 2017)

58 'Franklin's Contributions to the American Revolution as a Diplomat in France' (*History Valley Forge*) <<http://www.ushistory.org/valleyforge/history/franklin.html>>

59 David E. Hoffman, 'When bipartisanship was king' (*Foreign Policy*, 9 May 2012) <<https://foreignpolicy.com/2012/05/09/when-bipartisanship-was-king/>>

PART II

**CENTRE FOR ASIAN LEGAL
STUDIES, NATIONAL
UNIVERSITY OF SINGAPORE
FACULTY OF LAW
ROUNDTABLE DISCUSSION
ON PUBLIC REASON
CONFUCIANISM**

Public Reason Confucianism

Democratic Perfectionism and
Constitutionalism in East Asia

Sungmoon Kim



Public Reason Confucianism: Democratic Perfectionism and Constitutionalism in East Asia

Professor Sungmoon Kim
Professor of Political Theory
City University of Hong Kong

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The roundtable discussion, held by the Centre for Asian Legal Studies (CALS), Faculty of Law, National University of Singapore in May 2018, brought together scholars in two fields, namely comparative philosophy and comparative constitutional law, to discuss the book authored by Professor Sungmoon Kim titled *Public Reason Confucianism: Democratic Perfectionism and Constitutionalism in East Asia* (Cambridge University Press, 2016).

This book advances a Confucian political constitutional theory called Public Reason Confucianism, which calls for the active role of a democratic-constitutional state in promoting Confucian values (such as filial piety, respect for elders, social harmony, and ritual propriety), which according to the author has still remained in contemporary East Asia.

This roundtable features an introduction by the Director of CALS, four articles written by scholars of comparative philosophy and comparative constitutional law and a response by Professor Kim himself.

The Government and Laws Committee would like to express our sincerest gratitude to Dr. Ngoc Son Bui, Assistant Professor at Faculty of Law, Chinese University of Hong Kong and Convener of the Roundtable. His generous support is instrumental to the successful publication of this Roundtable in the Hong Kong Journal of Law and Public Affairs.

(Adapted from the website of the Faculty of Law, National University of Singapore)



Introduction

**Centre for Asian Legal Studies, National University of
Singapore Faculty of Law
Roundtable Discussion on Public Reason Confucianism**

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Dr. Dan W. Puchniak

Associate Professor and Director, Centre for Asian Legal Studies, National University of
Singapore Faculty of Law

I am excited about this roundtable primarily for two reasons. First, interdisciplinary work is incredibly important and greatly enriches legal scholarship and all other scholarship we engage in. The chance to consider the interface between comparative constitutional law and comparative philosophy is a terrific opportunity for such interdisciplinary research. Second, this roundtable provides the unique opportunity to add an “Asian perspective” to these two interesting areas of research. When we launched the Constitutional Law Research Cluster at the NUS Law Centre for Asian Legal Studies (CALS), we discussed whether to call it the “Asian Constitutional Law Cluster” or, more simply, the “Constitutional Law Cluster”. Ultimately, we decided to call it the “Constitutional Law Cluster” to emphasize that an account of comparative constitutional law, which excludes Asia, is incomplete. Stated differently, the Asian experience is essential to understanding constitutional law comparatively – it is not a sub-field, but an essential part of the mainstream. Although I am far less familiar with the field of comparative philosophy, I understand that Asian perspectives are woefully neglected in the field. I hope this roundtable will start the process of mainstreaming Asian perspectives into these important fields of scholarship and develop their richness through an interdisciplinary approach.



Kim's Confucian Democracy in Context

Centre for Asian Legal Studies, National University of
Singapore Faculty of Law
Roundtable Discussion on Public Reason Confucianism

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This article reviews Professor Sungmoon Kim's outstanding and well-received book, *Public Reason Confucianism*.¹ I shall begin by contextualizing Professor Kim's book, then discuss what is distinctive about his approach, and conclude with a few potential queries that might prompt further discussion.

The Context

When the last imperial dynasty of China, the Qing, collapsed in 1911, it was widely believed that Confucianism had also come to an end, both as a political philosophy and as a viable worldview. Thinkers in the New Culture and May Fourth Movements disagreed about the direction that China should take going forward. Some, such as Hu Shih (1891-1962), thought China ought to pursue a path of capitalistic democracy akin to that of the United States, the United Kingdom, France, and Japan during the Taisho Period. Others, like Chen Duxiu (1879-1942), believed that these countries had shown their true, imperialist nature by betraying China in the Treaty of Versailles, and that the worldwide economic collapse of the 1920's was evidence in favour of Marx's theory that capitalism would eventually self-destruct. Consequently, they favored modelling China's future on the newly founded Soviet Union. Although the two sides disagreed significantly with each other over China's future (and eventually went to war with one another), both sides agreed that China needed a "New Culture" and that the old culture of Confucianism would not be a part of it.

However, even after the fall of the Qing dynasty, a minority of intellectuals be-

I am grateful to Bui Ngoc Son for arranging the panel at which an early version of this essay was presented, and to Arthur Kuflik for reading and discussing an earlier draft of this essay with me.

1 Sungmoon Kim, *Public Reason Confucianism: Democratic Perfectionism and Constitutionalism in East Asia* (Cambridge University Press, 2016).

lieved that Confucianism could continue to contribute to Chinese political and philosophical thought, even while China embraced Western democracy, capitalism, and science. This movement eventually solidified into what is known as the New Confucian movement.² In Vietnam, leaders of the independence movement also actively worked on a synthesis of Western constitutionalism and Confucianism, as documented by Bui Ngoc Son.³

These efforts in China and Vietnam seemed increasingly quaint after the victory of communism in both countries. However, in the last few decades, the political relevance of Confucianism has grown, particularly in China. A major factor leading to this change has been the transformation in the Chinese government's attitude toward Confucianism. Mao Zedong (as a member of the May Fourth Generation) opposed Confucianism; Deng Xiaoping (as a survivor of Mao's Cultural Revolution) tolerated Confucianism; Xi Jinping (as leader of a huge nation that is no longer unified by faith in communism) openly embraces Confucianism.⁴ As I argue in my recent book, *Taking Back Philosophy: A Multicultural Manifesto*, Xi's embrace of Confucianism is partly opportunistic. But "the classics are classics for a reason, and if you tell young people to revere the classics, they just might take you seriously. ... thinkers in every generation have been inspired by these same traditions to think for themselves, challenge injustice, and fight for the well being of the common people, not just the elites."⁵ Thus, in the long run, Xi's support of Confucianism may backfire against his authoritarian rule.

One of the consequences of the new freedom to openly praise Confucianism is that Confucian political reform is on the table for discussion again. Jiang Qing ignited controversy with works like *A Confucian Constitutional Order* (2013).⁶ Jiang's proposals are very traditionalist - some might even say reactionary. He calls for the majority of positions in the legislative and executive branches of government to be reserved for Confucian scholars and direct descendants of Confucius. He also wants China to become a constitutional monarchy, with a new king. (Presumably, Jiang's model is the staid royal family of Japan, not the royal family of the United Kingdom, whose embarrassing antics provide reliable fodder for tabloids.) More moderate Confucian reforms have been defended by Professor Joseph Chan of Hong Kong University and Daniel Bell of Tsinghua University.⁷ Both argue that China should have a bicameral legislature, with a lower house whose members are elected by direct, popular vote, and an upper house whose members are appointed based on their qualifications as determined by the Confucian classics.

Let us situate these views in the spectrum of political philosophies. One of the fundamental distinctions among political theories is between those that are liberal as opposed to those that are perfectionist (or communitarian). A classic statement of the liberal political view was given by John Locke (1632-1704). Locke claimed that, before the institution of governments, humans in the "state of nature" had "perfect freedom to order their actions,

2 See John Makeham, *New Confucianism: A Critical Examination* (Palgrave Macmillan, 2003).

3 Bui Ngoc Son, *Confucian Constitutionalism in East Asia* (Routledge, 2016), 117-151.

4 See Fengzhi Zhang, ed., *Xi Jinping: How to Read Confucius and the Other Chinese Classics* (CN Times Books, 2015) for selections from Xi's speeches in which he quotes classical Chinese texts. The editor also supplies the original context for the texts quoted and his own interpretation.

5 Van Norden, *Taking Back Philosophy: A Multicultural Manifesto* (New York: Columbia University Press, 2017), 98. Bui Ngoc Son also points out that there are constitutionalist elements in both classical Confucian thought and the practice of imperial Confucianism (*Confucian Constitutionalism in East Asia*, op. cit.).

6 Jiang Qing, *A Confucian Constitutional Order*, ed. Daniel Bell et al. (Princeton University Press, 2016). This book is not available in Chinese, but Jiang has expounded similar ideas in 蒋庆, 政治哲学: 当代儒学之转向, 特质与发展 (Beijing: SDX and Harvard-Yenching Academic Library, 2003).

7 Joseph Chan, *Confucian Perfectionism* (Princeton University Press, 2015) and Daniel Bell, *The China Model* (Princeton University Press, 2016).

and dispose of their possessions and persons as they think fit..., without asking leave or depending upon the will of any other man."⁸ Humans in this situation had equal rights, given to them by God, and equal authority to act on those rights. However, humans agreed to relinquish some of their rights in exchange for the benefits obtained by submitting to government authority. As this suggests, liberal political thinkers typically conceptualize humans as inherently distinct individuals who are innately free. Consequently, one of the fundamental political problem is explaining how the exercise of coercive government authority over them can be justified.

John Rawls (1921-2002), who was perhaps the single most important political thinker in the English-speaking world during the 20th century, enunciated a classic liberal political principle: in a just society, "each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all."⁹ In other words, each person should have as much freedom as is consistent with the equal freedom of others. In addition, Rawls suggested that "the state is not to do anything intended to favor or promote any particular comprehensive doctrine rather than another...."¹⁰ By a "comprehensive doctrine," Rawls means the classic religious, spiritual, and philosophical views that provide "conceptions of what is of value in human life, and ideals of personal character"¹¹ Rawls gives a colourful example that can be used to illustrate this point. He asks us to imagine an otherwise intelligent and talented individual "whose only pleasure is to count blades of grass in various geometrically shaped areas such as park squares and well-trimmed lawns."¹² Rawls's position entails that the state does not have the authority to prohibit or actively discourage this choice: it is neither intrinsically better or worse than any other way of life from the perspective of state policy.

In later works like *Political Liberalism*, Rawls gave the following argument in favor of neutrality about comprehensive doctrines of the good. He notes that contemporary democracies are characterized by "a *diversity* of opposing and irreconcilable religious, philosophical, and moral doctrines."¹³ For example, some reasonable people are theists, who believe that the ultimate goal of life is to seek, to know, and to love God,¹⁴ while other reasonable people may subscribe to a comprehensive doctrine like that of Epicurus, a materialist who sees the goal of life as the moderate and sustainable pursuit of pleasure here on earth. People may sometimes be persuaded to change their opinion from one comprehensive doctrine to another, but "the diversity of reasonable religious, philosophical, and moral doctrines found in democratic societies is a permanent feature of the public culture and not a mere historical condition soon to pass away."¹⁵

In addition, reasonable people in a democracy are committed to *civility*, the principle that in political discussions we respect the reason of others by only presenting arguments and advocating policies that appeal to shared values. For example, I may believe in God, and I may take the existence of God as a premise in my personal reasoning and reasoning with other members of my spiritual community. However, I should not take the existence of God as a premise in public political discourse, because I have to argue with fellow citizens who include atheists. Finally, Rawls suggests that there is an important *asymmetry*

8 John Locke, *Second Treatise of Government*, Chapter 2, Section 4.

9 John Rawls, *A Theory of Justice* (Belknap/Harvard University Press, 1971), 250.

10 John Rawls, *Political Liberalism*, rev. ed. (Columbia University Press, 2003), 193.

11 Rawls, *Political Liberalism*, 13.

12 Rawls, *A Theory of Justice*, 432.

13 Rawls, *Political Liberalism*, 3-4. Emphasis mine.

14 Catechism of the Catholic Church, 1.

15 Rawls, *Political Liberalism*, 216-217.

between debates over comprehensive doctrines of the good and narrowly political discussions carried out in accordance with the principle of civility. Reasonable people can achieve un-coerced agreement on the best arrangements for political institutions, even though they cannot achieve a consensus on comprehensive doctrines. This leads to the classic liberal view that the state should remain neutral on comprehensive doctrines, but can nonetheless reasonably justify its policies to its citizens. In short: Diversity + Civility + Asymmetry = Liberalism. Rawls calls this sort of liberalism "political not metaphysical," because it is based on "public reason," reasons we can share with our fellow citizens, as opposed to reasoning about any comprehensive view regarding the metaphysical structure of the universe, human nature, or the human good.

In contrast to liberalism, perfectionist political theory is based on a comprehensive doctrine about the good life and why it is justified. For example, in the *Politics*, Aristotle says that a community is not just a group of people who live in one place to facilitate commerce and provide for common defense. Instead, "every community is established with a view to some good."¹⁶ Consequently, "political society exists for the sake of noble actions."¹⁷ The goal of society is to produce a virtuous person who is disposed to virtuous actions. Perfectionist theories can be distinguished by what they regard as the best kind of life and the best kind of actions. For example, one might have a perfectionist political theory that sees the goal of the state as creating and preserving citizens who are responsible Christians, or Muslims, or Jews, or Hindus.

A further contrast between liberal and perfectionist theories is over the degree of independence of the individual from the state. We saw that liberal political theory envisions humans (either literally or figuratively) as originally living independently from one another in a "state of nature," so that the central political issue becomes how to justify the coercive power of the state. In contrast, perfectionist views, like that of Aristotle, argue that "humans are by nature political animals,"¹⁸ meaning that humans innately require a society in order to live well. Consequently, for perfectionist political theories, there is no problem in justifying government authority per se. The issue is simply which kind of social and government authority is best.

Traditional Confucian political philosophy is perfectionist. This is famously expressed in the Classic section of the *Great Learning*, which depicts a chain of connections between individual moral cultivation and the well-being of the state as a whole: "The ancients who desired to enlighten the enlightened Virtue of the world would first put their states in order. Those who desired to put their states in order would first regulate their families. Those who desired to regulate their families would first cultivate their selves. ... Only after the self is cultivated is the family regulated. Only after the family is regulated is the state ordered. Only after the state is ordered is the world at peace."¹⁹ There are also Christian versions of political perfectionism. Although not well known in academic circles, Francis Schaefer (1912-1984) had a significant role in shaping right-wing Christian political philosophy, which led to the Christian Right as a powerful political force in the US.²⁰ For example, the politics of Mike Pence, the current Vice President of the US, may be considered a form of Christian political perfectionism.²¹

16 Aristotle, *Politics*, Book 1, Chapter 1.

17 Aristotle, *Politics*, Book 3, Chapter 9.

18 Aristotle, *Politics*, Book 1, Chapter 6.

19 Justin Tiwald and Bryan W. Van Norden, eds., *Readings in Later Chinese Philosophy* (Hackett Publishing, 2014), 188-189.

20 Francis A. Schaeffer, *A Christian Manifesto* (Wheaton, IL: Crossway Books, 1981).

21 McKay Coppins, "God's Plan for Mike Pence," *The Atlantic* (January/February, 2018), <https://www.theatlantic.com>.

Recently, some philosophers have suggested an intermediate position between liberalism and comprehensive perfectionism. Moderate perfectionism claims that there are some goods that are common to a variety of plausible candidates for flourishing lives, and the state may legitimately encourage people to pursue these goods, without favouring one particular comprehensive conception of what it is to live well. For example, the state might legitimately encourage among its citizens scientific literacy, habits of critical thinking, and an appreciation of the fine arts. These are goods that could be appreciated by people with very different comprehensive conceptions of value, including (to use our earlier examples) both the Epicurean and the theist. Amy Gutman and George Sher are noteworthy Western advocates of moderate perfectionism,²² while Joseph Chan defends a Confucian version of moderate perfectionism.²³

A different dimension along which we can distinguish political theories is meritocratic as opposed to democratic political systems. In a meritocratic political system, government is by a minority of the people who are chosen to rule because they are superior to most people in intelligence, or virtue, or both. One classic example of a meritocratic system is offered by Plato's *Republic*, which describes an ideal state governed by philosopher kings and queens, who rule over others because they have natural aptitude that has been cultivated through education and training; another example is the Confucian ideal of rule by virtuous and wise sage kings who govern with the benefit of their educated and noble ministers. As the preceding examples suggest, meritocracy naturally pairs with perfectionism. However, Joseph Raz is a noteworthy example of a contemporary philosopher who defends democratic government on the basis of perfectionist political theory.²⁴

A third option, identified by Aristotle, is a "mixed government" which combines meritocratic and democratic elements. It is often forgotten that the United States and the United Kingdom were once conceptualized as mixed governments. Up until 1913, US senators were not directly elected, but were appointed by state legislatures, with the intention that senators would be a more well informed and judicious body than the House of Representatives.²⁵ In addition, the House of Lords, although now generally considered to be "a ludicrous affront to the most basic ideas of democracy and accountability,"²⁶ is intended as the aristocratic (in the Aristotelian sense) complement to the House of Commons.

In current political discourse, no one favors (at least not explicitly) a purely meritocratic government. As Kim points out, even North Korea disingenuously styles itself "The Democratic People's Republic of Korea." The defensible choices in contemporary political discourse are between systems that are robustly democratic - like the contemporary US, Japan, South Korea, and Singapore - and mixed meritocratic-democratic systems, like those advocated by Chan and Bell. Even Jiang Qing argues for a democratically elected house, along with two meritocratic houses, in his ideal legislature. By combining these systems of government with the liberal-perfectionist spectrum, we get the typology shown in Table 1.

com/magazine/archive/2018/01/gods-plan-for-mike-pence/546569/

22 See, for example, Amy Gutman, *Democratic Education* (Princeton University Press, 1999), Amy Gutmann, "Rawls on the Relationship between Liberalism and Democracy," in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (Cambridge University Press, 2003), 168-199, and George Sher, *Beyond Neutrality: Perfectionism and Politics* (New York: Cambridge University Press, 1997).

23 Chan, *Confucian Perfectionism*, op. cit.

24 Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press, 1986).

25 Alexander Hamilton, James Madison, and John Jay, *The Federalist*, No. 62.

26 John Harris, "The Lords Is a Ludicrous Affront to Democracy and Accountability," *The Guardian* (28 October 2015), <https://www.theguardian.com/commentisfree/2015/oct/28/house-of-lords-democracy-accountability-reform>

	LIBERAL	MODERATE PERFECTIONIST	COMPREHENSIVE PERFECTIONIST
DEMOCRATIC	John Rawls	Amy Gutman George Sher	Joseph Raz Sungmoon Kim
MIXED (DEMOCRATIC-MERITOCRATIC)		Joseph Chan	Jiang Qing

Table 1

It is perhaps unavoidable that the box at the intersection of liberal and mixed-meritocratic systems is empty. In order to have any meritocratic system of government, one must endorse at least a partially comprehensive doctrine about what makes some people “better” at governing, and the assumption that there are such people violates one of the fundamental premises of liberal political theories. (More precisely, liberal political theory claims that we must, for the purposes of apportioning rights, treat humans as if they are equally adept at making political decisions.)

Sungmoon Kim’s Contribution

Table 1 also illustrates that Professor Kim has staked out a distinctive position by defending a robustly democratic political philosophy based on a comprehensive Confucian perfectionist view. He first defended this view, and established his international reputation, with the publication of his book *Confucian Democracy in East Asia*.²⁷ What Professor Kim advocates in his current book is Confucian, democratic, public reason perfectionism. It is democratic as opposed to meritocratic, in the sense that government should be by representatives elected by all citizens as opposed to government by a minority that is chosen based on merit. Part of the justification for a democracy as opposed to meritocracy is the fact that government involves the exercise of coercive power against the people, and coercive power can only be justified by the general consent of the people. In addition, Kim argues that any meritocratic or mixed meritocratic-democratic system is ultimately inconsistent and will tend to undermine its own democratic elements: simply put, if the people who are smart and virtuous know better, why should government have any democratic component at all?

At the same time, Professor Kim wants to argue against the Rawlsian notion of liberal neutrality, on the grounds that liberalism is not really neutral about the good life. Liberalism, if it is to be plausible, itself assumes at least a partial vision of what the good life is - namely, the good life is one in which humans are free, equal, and capable of participating in government - and this is not a neutral conception.

But what is ultimately Confucian about this approach? Professor Kim explains:

public reason Confucianism has two normative premises: (1) there is a valuable Confucian way of life that is distinct from (if not starkly opposed to) a liberal way of life; and (2) it is permissible for a state, one that is democratically controlled by its citizens, to promote or discourage some activities, ideas, or ways of life, based on the grounds of constellation of Confucian values such, but not limited to, filial piety, respect for elders, ancestor worship, ritual propriety, harmony within the family, and social harmony.²⁸

²⁷ Sungmoon Kim, *Confucian Democracy in East Asia: Theory and Practice* (Cambridge University Press, 2014).

²⁸ Kim, *Public Reason Confucianism*, 23.

In short, Professor Kim is advocating a democratic political system that is *perfectionist* because it is based upon a conception of what it is to live well. The fact that this conception of what it is to live well is a *Confucian* conception is what distinguishes Kim's position from that of Western democratic perfectionists like Raz. Moreover, Kim's political philosophy is primarily justified by an appeal to *public reason*: it is, to use Rawls's phrase, "political not metaphysical." Kim believes that it is possible to have public reason Confucianism in countries like South Korea where "Confucianism has historically prevailed" and now remains "in forms of mores, habits, moral sentiments, and rituals, with which people today are still deeply saturated."²⁹ Kim's position thus contrasts with Jiang's political philosophy, which is explicitly based on the tripartite Confucian cosmology of Heaven, Earth, and Humans. And Kim argues for a thoroughly *democratic* conception of Confucianism, as opposed to the mixed-meritocratic forms of Confucianism advocated by Jiang Qing, Joseph Chan, Daniel Bell, and others.

Concluding Remarks

In the preceding sections I have sketched how Professor Kim's work fits into the broader framework of contemporary political philosophies, and what is distinctive about his contribution. In this final section I shall raise some potential concerns about his conclusions. However, I want to stress that my remarks are more in the spirit of constructive engagement with Professor Kim's outstanding contribution to political theory.

First, I wonder whether Professor Kim has perhaps been too quick to dismiss some of the problems of democracy. It is worth pointing out that, for the second time within a century, democracies in the West are lurching towards xenophobia, racism, nationalism, and militarism. Grass-roots populist democratic movements have led to Brexit, the rise of far-right parties in France, the Netherlands, and Greece, and the actual electoral success of far-right parties in Poland, Hungary, and the US. (I would not classify the Republican party of most of the 20th century as "far-right," but even thoughtful contemporary US conservatives acknowledge that Trumpism has led the party to betray the values it once stood for.)³⁰

In addition, democracies sometimes suffer from the problem of unqualified rulers. Among the recent Presidents of the US are a B-movie actor (Ronald Reagan, who admitted on television that he forgot he had authorized trading weapons for the release of US hostages),³¹ a C-student (George W. Bush, who actually bragged that he "didn't learn a damn thing" in college),³² and a D-list celebrity (Donald Trump, who led multiple businesses to bankruptcy before finding success as the host of a game show on which celebrities compete at things like selling cupcakes). Perhaps it would be an improvement if the field of candidates for election to high office were first vetted by some meritocratic procedure prior to a popular vote to choose among them.

29 Kim, *Public Reason Confucianism*, 22-23. Kim is in line with contemporary research in seeing South Koreans as sharing many Confucian values even if they do not identify as Confucians. See, for example, Byong-ik Koh, "Confucianism in Contemporary Korea," in *Confucian Traditions in East Asian Modernity*, ed. Tu Wei-ming (Harvard University Press, 1996), and Kwang-ok Kim, "The Reproduction of Confucian Culture in Contemporary Korea: An Anthropological Study," in *Confucian Traditions in East Asian Modernity*, op. cit.

30 For an overview, see Matt K. Lewis, "Midterm Elections 2018: The Conservatives Who Want the GOP to Lose This Fall," *Daily Beast* (19 June 2018), <https://www.thedailybeast.com/midterm-elections-2018-the-conservatives-who-want-the-gop-to-lose-this-fall>.

31 President Ronald Reagan, Televised Speech from the Oval Office, 4 March 1987.

32 Jean Edward Smith, *Bush* (Simon and Schuster, 2016), 14.

I also wonder whether Professor Kim has too easily rejected the logic of a mixed political system. Aristotle has a wonderful analogy for such systems. He notes that the house builder is the best judge of how to make a house, but the head of the household is the best judge of whether the house has been well made. So, Aristotle suggests, we might think that one group of people are experts in making government policy, while another group are experts in whether government policy has achieved its goals.³³ For example, economists, diplomats, and generals are the experts at making economic, foreign, and military policy. However, at the end of the day, the real question is whether the average person is happy with the resulting economic and political policies or not. This suggests why a mixed government with both meritocratic and democratic aspects might be best.³⁴

Finally, I wonder if we need to address the question of what purpose popular elections actually serve. For example, Hillary Clinton won the popular vote in the 2016 US Presidential election; it is only due to the archaic Electoral College system that a game-show host was elected President of the United States that year.³⁵ Most countries do not have an Electoral College, but the US is not unusual among democracies in that more than a third of its eligible citizens do not even bother to vote.³⁶ Countries where voting is mandatory, like Singapore³⁷ and Australia,³⁸ have over 90% participation. However, these democracies are in the minority and there are legitimate questions about whether it is right to force citizens to vote. Is it really a better system in which those who feel like voting (or who are forced to vote) get to elect the rulers, than a system in which those who wish to vote get to voice their satisfaction or dissatisfaction with their way of life, which the experts then take into account in designing policy?³⁹

These reflections do not detract from the fact that Professor Kim has produced a genuinely outstanding book, and he has only solidified his reputation as one of the leading political thinkers in the world today, particularly, but not only, in the area of Confucian political theory. I thank him very much for writing this extremely provocative and insightful book.

33 Aristotle, *Politics*, Book 3, Chapter 11.

34 Arthur Kuflik observed, in conversation, that to some extent the US currently has a "mixed" form of government, since generals, diplomats, federal judges, and members of the Federal Reserve are appointed, not elected.

35 There are also discussions about eliminating or rendering more democratic the Electoral College system. See, for example, Arnold Barnett and Edward Kaplan, "How to Cure the Electoral College" (16 December 2016), <http://www.latimes.com/opinion/op-ed/la-oe-barnett-kaplan-cure-electoral-college-20161216-story.html>

36 Michael D. Regan, "What Does Voter Turnout Tell Us about the 2016 Election" (20 November 2016), <https://www.pbs.org/newshour/politics/voter-turnout-2016-elections>

37 "Singapore Election: Governing Party Secures Decisive Win" (12 September 2015), <https://www.bbc.com/news/world-asia-34205869>

38 Katie Beck, "Australia Election: Why Is Voting Mandatory?" (27 August 2013), <http://www.bbc.com/news/world-asia-23810381>

39 Jamie Kelly helpfully summarizes some of the weaknesses of democratic decision making in *Framing Democracy: A Behavioral Approach to Democratic Theory* (Princeton, 2012).



Comments on Part III: Civic Virtue
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Roundtable Discussion on Public Reason Confucianism

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The third part of Sungmoon Kim's *Public Reason Confucianism: Democratic Perfectionism and Constitutionalism in East Asia* is divided into two chapters.¹

Chapter 5 considers the "implications of public reason Confucianism's perfectionist interest in democratic pluralism for civic virtue" (171). The specific concern relates to exploiting the potential tensions between "virtues pertaining to human beings" and "virtues pertaining to political agents", which are already embedded within Classical Confucian discourse, with the prospect of drawing a "practical, if not conceptual, distinction between two kinds of virtues" - moral and civic virtues. This distinction is important to Kim since, according to him, it corresponds to two other distinctions. First, the distinction between a fully comprehensive Confucianism and a partially comprehensive form of Confucianism, with Kim's public reason Confucianism being a candidate of the latter kind. Second, the institutional distinction between associational membership and Confucian democratic citizenship. (174)

Chapter 6 returns to what Kim calls the third proposition (P3) of public reason Confucianism, or the public equality proposition. This proposition stipulates that *in a Confucian society, all citizens are equal to one another qua public citizens and together they exercise popular sovereignty*. The specific burden is to justify this proposition "from a Confucian perspective". Accordingly, Kim offers a reinterpretation of Mencius, attempting to show that Classical Confucian discourse is no stranger to tension between an expressed commitment to moral equality and human dignity on the one hand, and a "lingering adherence to political inequality" embedded in aristocratic political ritualism on the other hand. Reasoning from this idea, Kim ultimately derives a form of "political equality understood in terms of equal moral opportunity to become a public official", on the basis of which he attempts to justify "ideas of popular sovereignty and the right to political participation."

Throughout both chapters, Joseph Chan is the main foil, which is not surprising.

1 Sungmoon Kim, *Public Reason Confucianism: Democratic Perfectionism and Constitutionalism in East Asia* (Cambridge University Press 2016) 171 – 240

Chan's Confucian perfectionism focuses exclusively on the cultivation of moral (or human), rather than civic (or citizens') virtue.² Together with Fan Ruiping, Daniel Bell and Jiang Qing, Chan is also critical of democratic political participation, preferring a more elitist or meritocratic form of politics.³ In a different way, we can also see Kim arguing with the writers of the *Analects*, *Mencius* and *Xunzi* - after all, one could well think that it is but a fine line between creatively reinterpreting something and disagreeing with it (i.e., the version that has not been creatively transformed). In what follows, I will focus more on the second rather than the first dimension of Kim's discussions.

From Classical Confucian Ethical Monism to Confucian Civic Virtue in a Context of Pluralism

Kim is of the opinion - shared by many - that "neither classical nor neo-Confucians ever made a distinction, either conceptual or practical, between moral virtue and civic virtue; in fact, the ethical continuum between moral virtue and civic virtue is one of the defining characteristics of Confucian ethics and politics, even though Confucians never developed the concept of civic/citizen virtue." (184) Put differently, "statecraft and soulcraft" inextricably intertwines in the Confucian faith. (185)

However, as Kim has also noticed, the early Confucians were not insensitive to the possibility that personal moral virtues can sometimes come apart from the virtues needed to safeguard the integrity of the polity. For example, the early Confucians recognized that even though Guan Zhong engaged in shady political machinations to get Duke Huan onto the throne, he was also instrumental to bringing order to a fractious world. His actions earned him Confucius's comment that he was *ren* (*Analects* 14.17). The overall conclusion Kim draws is that other things being equal, Classical Confucianism takes human virtue to be perfectly congruent with and also the basis of political virtue, but it also recognizes that nonideal occasions can arise in which qualities not wholly congruent with human virtues are required for a political agent. Kim calls this synthesis *tempered virtue monism*. (193)

The argument laid out so far is fine. However, I believe that we can go further. If the *Analects'* treatment of Guan Zhong implies that not all political virtue is moral virtue, properly considered, the converse is also evidenced in the text: not all moral virtue is or culminates in political virtue. This motif comes out as early as 1.1:

The Master said, 'Is it not a pleasure, having learned something, to try it out at due intervals? Is it not a joy to have friends come from afar? Is it not gentlemanly not to take offence when others fail to appreciate your abilities?'

Notice the punchline: it becomes the *junzi* to remain unresentful when not "recognized" - i.e., by the powers that be and so employed to a position of authority, so that what he learned can be put into practice. (A side note on the second line: the fact that the friend - or "classmate under the same teacher", as this is what the term *peng* means -

2 Joseph Chan, *Confucian Perfectionism: A Political Philosophy for Modern Times* (Princeton University Press 2014)

3 Bai Tongdong, *New Mission of an Old State* 舊邦新命 (Peking University Press 2009); Daniel A. Bell, *Beyond Liberal Democracy: Political Thinking for an East Asian Context* (Princeton University Press 2006), *The China Model: Political Meritocracy and the Limits of Democracy* (Princeton University Press 2015); and Jiang Qing, *A Confucian Constitutional Order: How China's Ancient Past Can Shape Its Political Future* (Daniel A. Bell and Ruiping Fan eds, Edmund Ryden trans, Princeton University Press 2012).

is coming from afar hints that he was recognized and so employed. His return is thus the occasion of any resentment that the one who stayed behind could have felt - if he was not of sufficient cultivation.) The upshot is clear: it is entirely possible to attain the status of an exemplary moral agent, a *junzi*, without political participation.

Another (even more revealing) passage is 11.26. There, Confucius asked several disciples what they would do if their abilities were recognized. The one interlocutor whose answer he affirmed as agreeing with his own thoughts is Zeng Xi (father of Zengzi):

"...In late spring, after the spring clothes have been newly made, I should like, together with five or six adults and six or seven boys, to go bathing in the River Yi and enjoy the breeze on the Rain Altar, and then to go home chanting poetry." The Master sighed and said, "I am all in favour of Tian."

It is hard not to notice that for Confucius and Zeng Xi, their vision of living well is essentially apolitical, even though it remains an entirely *social* vision, since there is no talk of becoming a hermit.

How can we interpret the above? One modest conclusion I would like to draw is that, for at least some early Confucians - those associated with the *Analects* tradition - the expression of human or moral virtues *need not* take place in the political sphere by participation in the business of governance. In other words, not all moral virtue is or culminates in political virtue. This notion is not hard to find in the *Analects*, even if one insists that it is ultimately a concession for those unruly times when political participation invariably meant compromising on moral virtue.

Yet as Kim has already argued, not all political virtue is moral virtue in the *Analects*. So not all cases of Xs are Ys, and not all cases of Ys are X - in other words, some Xs are not Ys, and some Ys are not Xs. The implication is clear: at some level, we have to distinguish between the human or moral virtues considered as such, on the one hand, and political virtues, considered as such, on the other hand, just in order to do full justice to the *Analects* data, even if we also recognize that the distinction has a greater salience in nonideal conditions than in ostensibly ideal conditions.

There are, however, complications. First, the implied distinction seems more palpable in the *Analects* than the other Classical Confucian sources. Second, the Classical tradition does not seem to give equal emphasis to both moral and political virtues. Confucius might concede that Guan Zhong, for his achievements in preserving the integrity of the polity, deserves to be considered *ren*. But we simply cannot find him advising his students to seek political virtue in a mode where it is distinguished from moral virtue, or openly claiming that pursuing political virtue without reference to moral virtue is a viable conception of the human ideal worth pursuing in its own right. In contrast, we do find explicit quotes from him indicating that moral virtue is valuable even if it is not exercised in a political context (as in 1.1), or that the expression of the human good might well take place in an apolitical context (as in 11.26). It is thus unclear to me if Kim's interpretation of the *Analects*, or re-interpretation, as he would prefer, is enough to sustain the importance that Public Reason Confucianism emphasis on civic virtue, where the latter is understood as a political virtue.

Ironically, I am of the opinion that the above does not matter, since Kim's strongest case for the importance of civic virtue goes in a different direction. He gives at least two reasons for Public Reason Confucianism's focus on civic virtues. First, "Public Reason Confucianism does not ground its theory and practice on controversial moral

and philosophical assumptions about the essential feature of human nature, how human nature is related to human/moral virtue, and which virtues are directly or authentically connected with human excellence, although it affirms and maintains a loose ethical connection with traditional and tempered monistic Confucianism" (196). Second, Public Reason Confucianism assumes a background of moral and ritual pluralism. This means that for an erstwhile Confucian virtue such as filial piety, even though it "might be cherished as an important human/moral virtue by all (at least most) kinds of ethical communities... but for morally incommensurable reasons and with different sets of practices justified by such reasons." (198) Thus, even though "from a conceptual standpoint, Confucian virtues that are publicly affirmed and promoted in public reason Confucianism are hardly distinguishable from traditional Confucian moral virtues such as, among others, filial piety, respect for elders, and ritual propriety", and yet, on the other hand, "the public significance of these virtues as Confucian virtues is acknowledged only if they are understood as civic virtues, virtues pertaining to all citizens." (ibid.)

If the foregoing argument withstands scrutiny, it follows that what Kim needs is not a distinction between moral virtue as opposed to political virtue. The distinction he needs is one between the interpretation of a manner of conduct or character disposition as a moral virtue given a comprehensive moral doctrine, and a more free-standing interpretation of that erstwhile *same* manner of conduct or character disposition as a civic virtue, an interpretation that can be shared by people coming from a variety of comprehensive backgrounds. I do not think the earlier distinction between political and moral virtue will be either necessary or sufficient for this purpose.

From Mencian Universalism to the Right to Political Participation

To recall, Chapter 6 presents a justification for the idea that *all citizens are equal to one another qua public citizens and together they exercise popular sovereignty* "from a Confucian perspective" (204). Here, it bears mentioning from the onset an important qualification. The intended point is that although all citizens under Public Reason Confucianism have the right to political participation, it does not necessarily follow that all will or even should exercise this right. As Kim explains further, Public Reason Confucianism does not insist that every citizen must actively participate in every public affair at every moment. Apart from the fact that having a right to do something is not the same as having an obligation to do it, the right can be "reasonably fulfilled, perhaps even more effectively, by delegating the task to a small subset of citizens (say, members of the legislature) who are better qualified for the task, if they are selected according to democratic procedures." (231; see also 223-224) So from a modern perspective, the right is relatively modest, even if dear to the hearts of all democrats. But from a purely historical perspective, it is entirely radical, since no such right was ever articulated by pre-modern Confucianism. So how can it be justified from a Confucian perspective?

Kim's answer contains a good measure of Mencius plus three key "sociological premises". He begins by rehearsing the philosopher's famous doctrine that "human beings are born with moral sensibilities, which incline them toward moral goodness, and that such inclinations are a critical part of human flourishing." (210). These inclinations are the four "sprouts of virtue", which are further explained in terms of the moral sentiments - the feeling of pity and compassion as the sprout of humanness (*ren*), the feeling of shame and aversion as the sprout of rightness (*yi*), the feeling of modesty and compliance as the sprout of propriety (*li*), and the sense of right and wrong as the sprout of wisdom (*zhi*)

(*Mengzi* 2A6). The main lesson that Kim draws is the idea that, implicit in Mencius is the claim that "human beings, regardless of their social backgrounds, are equal, naturally as well as morally."

To be clear, Kim does not construe the Mencian proposition to mean that all human beings are literally morally equally good, but only that they have an equal moral potential. More radically, his Mencian thought is that the main reason why a person fails to be fully good is because of a lack of "moral effort" in cultivating the virtues, and as Kim reminds us, "surprisingly, [Mencius] understands the kernel of these cardinal moral virtues as consisting of nothing more than one's ability 'to be affectionate toward those close to one' and 'to have respect for elders.'" The implication is that everyone is capable to do such things - Kim calls this an "unflinching faith in human perfectibility, an ability possessed by all human beings to become a sage, perfect moral paragon." (213). The critical implication of the above is the further thought (following Donald Munro) that "all human beings are of equal worth, thus deserving equal treatment."⁴ (211) In presenting the above interpretation, Kim goes against other scholars of Confucianism who argue that "in Mencius's moral and political thought only those who are virtuous have moral dignity." On Kim's presentation of Mencius, "dignity is the moral entitlement of everyone qua human being, and it is rooted in the foundational idea that all human beings are able to become sages." Or in short, "for Mencius human dignity derives directly from (natural) moral equality." (216)

This is an inspiring way to read Mencius; but it invites a couple of obvious questions. For instance: why did Mencius not advocate more for political equality? Kim's short answer points to "...Mencius's lingering adherence to political ritualism established during the Zhou dynasty (1044–256 BCE), at the center of which lies the universal monarch, the Zhou king." (217) (The longer answer brings us to the three sociological premises which identify conditions current in East Asia that were brought about largely by historical contingencies. Just as Mencian Confucianism has adapted to political ritualism under monarchy in the past, now a new set of historical circumstances have come about in which the same Mencian Confucianism can realize its full democratic potential.)

The second question is more troublesome - would grounding Public reason Confucianism upon a Mencian theory of human nature not do something that Kim says it is not supposed to do, as previously quoted: "ground its theory and practice on controversial moral and philosophical assumptions about the essential feature of human nature, how human nature is related to human/moral virtue, and which virtues are directly or authentically connected with human excellence...?" (196) In fact, immediately after saying that, Kim draws an explicit comparison with Mencian Confucianism, which, as he states, "is monistic and fully comprehensive", presumably because it "assumes that humans have natural moral inclinations toward goodness, and genuine human virtues..." (ibid.) It would thus seem that by justifying the right to political participation upon a conception of human dignity that is itself grounded upon the Mencian doctrine that human nature is good Public Reason Confucianism takes on board ideas that are much more at home within a comprehensive moral doctrine. On the face of it, the move would be as controversial (from a public reason perspective) as grounding dignity upon a full-blooded Kantian conception of autonomy. It does not seem as if a Mencian grounding for human dignity can be supported by an appeal to public reason accessible to people holding a variety of comprehensive moral doctrines; in fact, the reasoning will be controversial to any Confucian who, for instance, holds to a Xunzian doctrine of human nature. I wonder if I am missing something here.

At one level, Kim's dialectical aim can be inferred. If his attempted grounding of Public Reason Confucianism upon a reading of Mencius succeeds, he makes a strong case for the former to full-blooded Mencian Confucians. Put another way, it is as if he says to the Mencian Confucian - "Given your background, you can and should be a Public Reason Confucians too! Your doctrinal commitments lead to my position, once you have made a suitable update of your empirical priors using my three sociological premises." If this is what Kim is doing, I believe he has made a plausible case (but not being a Mencian Confucian myself, I will leave the final judgment to those who are). Even so, the initial problem is not resolved. What Kim's discussion of Mencius has done is to make a strong case for an aspect of Public Reason Confucianism, specifically, the right to political participation. But there are many ways to make a case for that - one could be a Rousseauian Democrat, or Kantian Liberal, or a Millian Liberal, and so on. Presumably, even Kim would have to grant that not every such justification of the right to political participation will be compatible with Public Reason Confucianism. They might fail to be *Confucian* in any way, shape, or form. But more to the point, they might fail to be *Public Reason*.

To be fair, all is not lost - a conception of moral equality of humans can be found even in Xunzi, the erstwhile Confucian rival of Mencius. Xunzi too, agrees that the man on the street (i.e., everyone) can become a Yu (i.e., a sage). In fact, he is just as explicit as Mencius in asserting that the reason why people end up being morally good or bad - holding fix a suitable environment in which Confucian ritual is practiced - is that while one put in the effort, the other was unwilling. To fully cash out this claim, he even went to the trouble of drawing a distinction between different modalities to flesh out a claim that while all, in one sense, can (*ke yi*) become good, not all, in a different sense, have the capability (*neng*) to do so. Nonetheless, the important point remains: deriving the equal dignity of people from a distinctively Mencian doctrine of human nature complete with its teachings about the four sprouts as the potential for a suite of distinctively Confucian virtues begs the question against Xunzi. At the very least, Kim should attempt to ground the equal dignity of people upon an overlapping consensus between Mencius and Xunzi. But knowing his dedication, I am sure he is already working on this.



Pluralist Constitutionalism in Asia and Public Reason Confucianism

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I. Confucianism and the Non-Liberal Constitutional Movement

Professor Kim Sungmoon's *Public Reason Confucianism*¹ is a timely contribution to an emerging conversation on constitutionalism in non-liberal variants. Non-liberal constitutions, being defined in alternative and often in opposition to liberal constitutions, are "varied and competing".² As Walker emphasizes, they are united as a category by their negation of the principal liberal affirmations prioritizing individual rights and endorsing state neutrality.³ As such, there can be many varieties of non-liberal constitutions, and they range from those that are anti-liberal to those that are ambivalent towards liberalism, as well as those that may be considered semi-liberal.⁴ In contrast to liberal constitutions, non-liberal constitutions do not commit to the idea of state neutrality but openly privilege a substantive vision of the good that could be comprehensive doctrines identified on the basis of ethnicity, religion, or communal morality.⁵ Confucianism is one such possible comprehensive doctrine.

In this book, Kim builds upon his earlier work on *Confucian Democracy in East Asia: Theory and Practice* (Cambridge: Cambridge University Press, 2014) by also examining how public reason Confucianism can be relevant as a constitutional theory and applied in constitutional practice. The discussion on constitutional implications should be seen as contributing to an expanding trajectory in comparative constitutional law

- 1 Sungmoon KIM, *Public Reason Confucianism: Democratic Perfectionism and Constitutionalism in East Asia* (Cambridge: Cambridge University Press, 2016) (hereafter "Kim").
- 2 Graham WALKER, "The New Mixed Constitution: A Response to Liberal Debility & Constitutional Deadlock in Eastern Europe" (1994) 26(3) *Polity* 503 at 506.
- 3 Ibid. Admittedly, liberalism is an internally diverse tradition, and, as John Rawls puts it, there are "many liberalisms". John RAWLS, *Political Liberalism* (Columbia: Columbia University Press, 1993) 223. Nonetheless, these two claims are widely accepted as central to liberalism.
- 4 In her discussion about illiberal polities, Thio uses the term 'illiberal' in a more generic fashion, positing that that illiberal polities could encompass illiberal, pre-liberal, non-liberal or semi-liberal societies. Li-ann THIO, "Constitutionalism in Illiberal Polities" in Michel ROSENFELD and András SAJÓ, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 133-134.
- 5 Graham WALKER, "The Mixed Constitution after Liberalism" (1996) 4 *Cardozo Journal of International and Comparative Law* 311 at 319.

scholarship focusing on alternative viewpoints based on constitutional practices of countries that have until recently tended to be considered in the periphery of mainstream academic scholarship. In particular, research done from the perspective of constitutional law and practice in Asia (in addition to the fascination with religion and law in the Middle East) has started to gain traction among comparative constitutional law scholars. This scholarship involves not just comparative studies between Asian countries and Anglo-European countries; increasing attention is also being placed on intra-Asian comparisons.⁶ Indeed, these regional contributions, as Uitz points out, adds "much needed nuance to the basic premises of comparative constitutional analysis", not least because, for the most part, this area of work still "continues to draw on its liberal democratic foundations often in a manner that is not particularly sensitive to the differences in the local context and the changes in circumstances".⁷ Indeed, these regional research expansions pose a challenge to the entrenched dominance and thereby often unstated assumption of the normative ideal of liberal constitutionalism.

Kim's theory is situated within a scholarly movement that presents Confucianism as an alternative to liberalism as an ideational theory for constitutionalism. As Hirschl observes, "[i]deational theories suggest that the meaning and quality of ideas are key factors in explaining their prevalence or demise" and further that "[p]olitical actors and institutions advance certain ideas primarily because they genuinely deem those ideas to be right, just, and suitable".⁸ Confucian constitutionalism engages with Confucian theory as a normative basis for constitutional choices and action. The question of whether Confucianism is compatible with democracy is one that has received a significant amount of attention from Confucian scholars in recent times.⁹ In addition, the idea that Confucianism can serve as a normative framework for constitutionalism is one that has received close exposition.¹⁰ However, there has been reluctance to fully embrace Confucian constitutionalism, especially among liberal scholars who continue to view non-liberal forms of constitutionalism as *not* constitutionalism. For some, constitutionalism's ultimate purpose is the securing of the fundamental rights of individuals and anything less than a rights-oriented approach is not constitutionalist.¹¹

Kim's public reason Confucianism and the constitutional regime that it sketches out seek to provide a middle way connecting social Confucianism with political liberal-democratic structures. As a democratic political theory, Kim's public reason Confucianism proceeds from the same premise common to liberal democracy that "political authority or the exercise of political power be publicly justifiable to reasonable citizens" (p. 112). Liberal scholars have emphasized this need for power to be publicly justifiable in a liberal polity.¹²

6 See e.g. Jaclyn L. NEO and Ngoc Son BUI, *Pluralist Constitutions in Southeast Asia* (Oxford and Portland, Oregon: Hart Publishing, 2019); Kevin YL TAN and Ngoc Son BUI, *Constitutional Foundations in Southeast Asia* (Oxford and Portland, Oregon: Hart Publishing, 2019); CHANG Wen-Chen, "East Asian Foundations for Constitutionalism: Three Models Reconstructed" (2009) 3(2) *National Taiwan University Law Review* 111; David Law, et al., *Oxford Handbook of Comparative Constitutional Law in Asia* (Oxford: Oxford University Press, 2020 (forthcoming)).

7 Renáta UITZ, "Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary" (2015) 13(1) *International Journal of Constitutional Law* 279.

8 Ran HIRSCHL, "The Strategic Foundations of Constitutions" in Denis GALLIGAN and Mila VERSTEEG, eds, *The Social and Political Foundations of Constitutions* (Cambridge: Cambridge University Press, 2013) 158.

9 Joseph CHAN, *Confucian Perfectionism: A Political Philosophy for Modern Times* (New Jersey: Princeton University Press, 2013).

10 See e.g. BUI Ngoc Son, *Confucian Constitutionalism in East Asia* (Oxford & New York: Routledge, 2016)

11 See Graham WALKER, "The Idea of Nonliberal Constitutionalism" in Will Kymlicka and Ian Shapiro, eds, *Ethnicity and Group Rights: NOMOS XXXIX* (New York: New York University Press, 2000) 154.

12 Bruce A. ACKERMAN, *Social Justice in a Liberal State* (New Haven, Connecticut: Yale University Press, 1981).

However, as Kim points out, in Confucian democratic political theory, there is an additional constraint, which is that "Confucianism, inasmuch as its core values are publicly promoted, [must] be reasonable to all citizens who, though broadly saturated with Confucian mores and habits, subscribe to diverse moral, religious, or philosophical doctrines" (p. 112).

II. Public Reason Confucianism and Constitutional Law

Reading Kim's theory of public reason Confucianism, three important features stand out in his conception of constitutional law. First, constitutional law is dynamic; secondly, constitutional law is adaptive or responsive; and thirdly, constitutional law is contingent. The last may be thought of as an unintended consequence, while yet also a requirement for public reason Confucianism to work.

First, on dynamism, for Kim's theory to work, it requires Confucianism and liberalism to be active sites of contestation and change. This means that both comprehensive doctrines must be capable of dynamic reinterpretation. For instance, public reason Confucianism, as he concedes, requires Confucianism to be transformed into a version that is "publicly reasonable and democracy-enhancing" (p. 112). Furthermore, the content of public reason is also dynamic because while it is "tethered with a particular comprehensive doctrine to which citizens partially subscribe", it is also "open to democratic contestation both in formal public forums and in civil society" (p. 20). Kim's critique of his prime case study of the South Korean Constitutional Court's decision on the family head system reflects this dynamism requirement. As this is the primary example used by Kim, I will briefly set out here the findings of the case and Kim's critique.

This case concerned the constitutionality of provisions in the family law which set out a family-head system based on patrilineal dominance. This family-head system, Kim observes, has a clear Confucianist basis and tended to discriminate against female members of the family. The Constitutional Court found the provisions in the law unconstitutional in a six-to-three vote on the basis that the law contravened the principles of human dignity and gender equality guaranteed under the South Korean Constitution. In coming to its conclusion, the Constitutional Court sketched out a clear hierarchy of norms in which the liberal values of the constitution take precedence over its non-liberal, Confucianist ones. The majority judgment stated that the Constitution embodied a "constitutional resolution to no longer tolerate the patriarchal and feudal order of marriage". Accordingly, it proclaimed that such patriarchal and feudal thinking are remnants of "our past society", and that the Constitution has declared equality of men and women in marriage as the basis of a constitutional marital order.

Kim's critique is that the Court did not give sufficient regard to Article 9 of the Korean Constitution which stipulates that the state shall strive to sustain and develop the "cultural heritage" and to enhance national culture (p. 121). This is because, instead of seeking an integrative balance between the constitutional provisions on gender equality with the stipulations of cultural heritage and national culture protection, the Constitutional Court asserted the priority of gender equality over aspects of the law that could be attributed to South Korea's Confucianist cultural heritage. It did so by reframing traditions and cultural as concepts that needed to be "defined according to their contemporary meanings considering the constitutional value order, the common values of mankind, justice, humanity, etc". Thus, the Court concluded that "if a certain family system, remaining from the past, is contrary to the individual dignity and gender equality ... it

cannot be justified on the basis of Article 9" (p. 118).

Notably, to avoid a legal vacuum, the Court issued a decision of "constitution nonconformity" whereby the provisions remained temporarily valid until the law is amended with a new population registry system not predicated on the family-head system (p. 117). A month after the decision, the National Assembly of Korea passed revisions to the family law by scrapping virtually all patriarchal and patrilineal legacies of the traditional Confucian family sustained through the institutions of the family-head system. In its place, the family registry system was replaced by an individual identification system (p. 117).

Kim disagrees with the reasoning as well as the outcome of the case for not taking Confucianism seriously. Further to illustrate the first requirement of dynamism, Kim takes the view that Confucianism and liberal values are not inherently incompatible but that both can be subject to interpretation. He argues that "the Court also appears to subscribe to the simplistic but widely accepted view that human dignity and gender equality are exclusively liberal values, thus incompatible with traditional Confucian notions and practices of the family". Instead, public reason Confucianism would militate against the "deconstruction of the ka structure, by arbitrarily decoupling the institution of the ka from the ethical and social values it inculcates and buttresses, but its reconstruction into a more just social institution and legal entity" (p. 135). This would retain the family system but reform it so that it remains the most crucial institutional basis of Confucian constitutionalism (p. 135).

This leads me to the second requirement that public reason Confucianism imposes on constitutional law, which is its *adaptiveness*. Kim argues that a proper application of public reason Confucianism would have required the reconstruction of the family-head system into a "more just social institution and legal entity that is compatible with democratic constitutional principles and sociopolitical institutions" (p. 135). For instance, he points to the dissenting opinion which suggests that the family-head system be changed to make family headship open to both men and women, as well as removing other gender-discriminatory elements from the family law. Thus, one could retain the family structure, which Kim considers to be an integral part of Confucianist society, while making it conform to the liberal values embodied within the constitution.

Kim's public reason Confucianism, therefore, seeks a mutually adaptive approach to ideational differences. As Kim puts it, "the best way to make Korea (and other East Asian Confucian countries) a Confucian constitutional democracy is to reconceptualize the (direct) constitutional principles of human dignity and gender equality from the perspective of Confucian values to which it is publicly (i.e., indirect-constitutionally) committed, as much as adapt Confucian values, institutions, and practices to democratic constitutional principles" (p. 135).

In this regard, public reason Confucianism requires the constitutional arrangement to be somewhat more contingent than what is commonly envisaged under a liberal or Confucian polity. The values to be promoted within the democratic Confucian polity needs to be adaptable and adapted where conflicts arise. Resolutions are not the result of a hierarchical ordering where one value supersedes another but requires a contextualized outcome that takes into account both values. Constitutional synthesis of the thesis / anti-thesis values requires a more creative and active judiciary.¹³ It is in this way that public reason Confucianism appears to be far more *contingent* than one may sometimes assume within a liberal polity or even indeed a Confucianist polity.

13 See Jaclyn L. NEO, "A Theory of Mixed Constitutionalism" Yale Law School, JSD Dissertation (unpublished).

III. Conclusion

Kim's public reason Confucianism is both an integrative and adaptive approach to competing constitutional values. It can further serve to provide an integrative approach within constitutions that encompass ideational pluralism¹⁴ especially where constitutional practice gives rise to what Bui Ngoc Son and I have called "state constitutional pluralism", involving the coexistence of "*heterarchical constitutional authorities, and divergent constitutional norms, ideas, and values*" within the state.¹⁵ Indeed, as Kim's analysis of the Korean Constitutional Court's engagement with the family-head structure demonstrates, ideational conflict between liberal ideas and Confucian ideas need not be a zero-sum game. There could be heterarchical arrangements, involving respectful (or even disrespectful) coexistence, which could at times require an integrative adaption of different sets of ideas in order to accommodate one another. Accordingly, Kim's public reason Confucianism could have broader generalizable relevance than immediately obvious beyond Confucianist societies in East Asia.

Nonetheless, one has to question whether Kim's commitment to Confucianism as a normative signifier to public reason may itself undermine the coherence of Confucianism as a comprehensive doctrine. This is because in proposing an adaptive approach to Confucianism and liberal ideas, the outcomes of Kim's approach may be identified as neither Confucian nor liberal. For instance, a gender-egalitarian family head system would presumably make it an elective choice as to whether a new couple registers their family with the husband or wife as the head of the family and consequently which family should the new family be associated with. This would have significant repercussions on the next generations. Alternatively, if society remains deeply Confucianist, the continuation of the family registration system with its gender-egalitarian reforms may not result in much change because of external social pressure to maintain the patriarchal practices associated with the system. As such, even if the law is changed to allow women to become heads of family, in reality, most families will retain a male head of the family simply because this best conforms with social norms. In this regard, while the law is changed to conform with liberal values of human dignity and gender equality, this may not in fact change the practice of the law. That said, Professor Kim Sungmoon's thoughtful exegesis is a profound contribution to the emerging scholarship problematizing the idea of liberal constitutionalism. It should inspire further scholarship along these lines.

¹⁴ Neo and Bui, *supra* note 6.

¹⁵ Jaclyn L. NEO and Ngoc Son BUI, "State Constitutional Pluralism" (forthcoming).



Values and Constitutionalism: A Comment on Kim Sungmoon and The Case of The Daughters' Rebellion

Centre for Asian Legal Studies, National University of
Singapore Faculty of Law
Roundtable Discussion on Public Reason Confucianism

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In this brief discussion, I wish to comment on Kim Sungmoon's fascinating and thought-provoking discussion of the 2005 constitutional case discussed in chapter 4 of his book *Public Reason Confucianism*. I must first disavow any expertise either in Confucianism (public-reason, traditional, or otherwise) or in Korean constitutionalism or Korean society. Nonetheless, I wish to look at this study in a larger frame of reference in terms of comparison and constitutional theory, and the relationship between law and society, with specific reference to value-pluralism.

Constitutions and Values

Constitutions enshrine values. To pretend that they are somehow neutral is futile. An exception perhaps is the kind of 'semantic' constitution, which simply organises institutions, and 'façade' constitutions that are legal fictions or feint in the direction of liberal constitutionalism¹ and do not represent the actual values that a society holds. These categories of constitutions can be ignored for present purposes.

However, what does it mean exactly when a constitution is said to enshrine values? Is constitutionalism itself something that defines its own values, that are essentially liberal-democratic and universal? Or is the value-system of constitutionalism, so to speak, of a secondary order and one that may be tailored to a specific (first-order) value system?

We can consider these questions by reference to the example of Confucianism, and Kim Sungmoon's work is of great interest in this regard. The juxtaposition of 'western constitutionalism' and Confucian values in Kim's work is not in itself new. Yet, his consideration

1 For the categorisation applied to Asian constitutions, see Chen, Albert (2014), 'The achievement of constitutionalism in Asia: moving beyond 'constitutions without constitutionalism'', ch.1 of Chen, Albert (ed), *Constitutionalism in Asia in the Early Twenty-First Century*, Cambridge: Cambridge University Press.

of public discourse and his particular attempt to conjoin the two concepts are original and powerful. Bui Ngoc has also discussed broadly and deeply the notion of 'Confucian constitutionalism' in particular, and the work of these two scholars may well persuade us that accommodation is possible between these two ideas.² Other scholars have tried to see how Confucianism affects or explains judicial reasoning; and this is not confined to constitutional cases.³ My own response is to say that constitutionalism enshrines certain values that arise from constitutions being, in the first place, law, so that there is a close analogy between Lon Fuller's idea of the internal morality of law and the principles of constitutional government which assume the rule of law as a basic premise.⁴ But this does not mean that constitutionalism is locked into an ideology. Indeed, if it is possible for, say, a left-wing historian such as EP Thompson⁵ and a right-wing political-economist such as Friedrich Hayek⁶ to espouse the rule of law with equal certainty if not equal intent, then the same will be true of constitutionalism. Notably, constitutional preambles (not always present) tend to express common values allowing for flexibility of purpose and policy. By the same token, Confucianism is capable of expressing values consistent with constitutionalism, as both Kim and Bui have shown; and this is true in spite of the well-known aversion exhibited by Confucius himself to law's coerciveness and the prioritising of morality over the law as a mode of social ordering. Although the classification of constitutional systems is a sub-discipline fraught with some difficulty, we can at least see that different constitutional forms are all (subject as above) consistent with the basic notion of constitutionalism. It remains a matter for debate whether constitutionalism extends to 'non-liberal' or even 'illiberal' constitutional systems.⁷ To me, this is mainly a matter of definition. All constitutional orders can be said to contain non-liberal elements. It is only a matter of degree and definition whether a given constitutional order is so illiberal that it contravenes the underlying morality of the idea of a constitutional order, as opposed to a certain state of governmentality. This is not to say that Confucian ideas will inevitably be illiberal and inherently opposed to constitutionalism; Kim and Bui show us eloquently that is not so, and provide subtle answers describing the relationship. Whatever the origins of constitutionalism, it remains sufficiently lithe to scale the walls between civilisations. If this were not so, we would be hard put to explain East Asian constitutionalism.⁸ This leads to the idea of 'constitutional perfectionism'.

Constitutional Perfectionism

In 'constitutional perfectionism', as Kim calls it, we have something like Plato's idea that to discover justice in the state we must first examine justice in the individual.⁹ Or perhaps it is the other way round. Karl Popper shredded this idea in *The Open Society and its Enemies*.¹⁰ For a constitution to prescribe for citizens what is the good life or the just citizen is nothing less, according to Popper, than an exercise in totalitarianism. Yet this very view is necessarily held in parts of Asia where Confucianism is strongly adhered to, and there is a

2 Bui Ngoc Son (2016), *Confucian Constitutionalism in East Asia*, London: Routledge.

3 Chen-Wishart, Mindy, 'Legal transplant and undue influence: Lost in translation or a working misunderstanding?' 62: 1 *International and Comparative Law Quarterly* 1 (2013); Ginsburg, Tom, 'Confucian constitutionalism: The emergence of constitutional review in Korea and Taiwan' 27:4 *Law and Social Inquiry* 763 (2002).

4 Fuller, Lon (1969) *The Internal Morality of Law*, rev. ed. New Haven CT: Yale University Press.

5 Thompson, EP (1975), *Whigs and Hunters: Origins of the Black Act*, New York: Pantheon.

6 Hayek, Friedrich (1960), *The Constitution of Liberty*, Chicago: Chicago University Press.

7 Tushnet, Mark (2017), 'The possibility of Illiberal constitutionalism', 69 *Florida Law Review* 1367.

8 Jiunn-rong Yeh and Wen-chen Chang (2011), 'The emergence of East Asian constitutionalism: Features in comparison', 56 *American Journal of Comparative Law* 805; contra Chen, above n.1.

9 Blackburn, Simon (2006), *Plato's Republic: A Biography*, London: Atlantic Books.

10 Popper, Karl (1966), *The Open Society and its Enemies*, 5th ed., Vol I (Plato), London: Routledge.

perceived continuum of, rather than a distinction between, the citizen and the state.

This prompts further reflection on the relationship between society's values and those expressed in the constitution. While the checks and balances represented by 'constitutionalism' are designed to prevent the bad, they do not necessarily thereby define the good. One common answer to the idea of constitutional perfectionism is that, while we can easily identify injustice in practice when we meet it, we nonetheless find it hard to explain what justice is in the abstract. Instead, we are usually reduced to simply explaining the process we hope leads to substantive justice, as embodied in the phrase 'access to justice' which places a clear emphasis on access rather than justice. Constitutionalism's defect from an Asian perspective is that it tells us nothing about the quality of leadership. This was true even before President Trump's tenure raised issues, seemingly for the first time, as to what constitutes a 'good' president, and what is the abstraction with which he fails to conform? The critiques of Trump put one very much in mind of the rectification of names, showing that not just constitutionalism, but Confucianism too may have global resonance. From this perspective, political leaders are as such entitled to a certain degree of trust,¹¹ and the rule of good men (in Confucian societies it is rarely women, but we will come back to this issue of gender) is probably more important than the rule of good laws. The Confucian view of leadership is well expressed by Singapore's ideal of the 'junzi' or educated Confucian gentleman, for whom checks and balances are internally rather than externally imposed.¹² The opposite pole of this is perhaps Henry David Thoreau's emphasis on the individual right to disobey and be guided solely by his own sense of right and wrong.¹³ It is hard to imagine a Confucian spending a night in jail, as Thoreau did, for refusing to pay a tax. A Confucian is also, I conjecture, less likely to insist on the freedom to speak that which offends.¹⁴

Taking this point further, the Confucian may point to the absence of any notion of social harmony in Western constitutional ideas. Even the arch-rule-of-law-rationalist Max Weber emphasised the importance of protestant ethic in the modernisation of Germany in the late 19th century; his was a lone voice in stressing the binding nature of social values in relation to government and capitalism.¹⁵ Consequently, constitutionalism does not always in itself offer any clues as to how to deal with the issues of leadership and social harmony; or, for that matter, inter-generational justice. How does one regard public discourse about pension rights that allows the elderly to benefit economically at the expense of the young, or about climate change that shifts the burden and risk down the generational line?

If we pause to consider constitutionalism from a law-and-society perspective, a constitution should reflect the values a society as a whole holds dear. Constitutionalism achieves this by entrenching fundamental rights, democracy, and the rule of law. Indeed if it does not achieve this, there are ways in which it may well be forced to – and one of those ways is by judicial decisions that try to balance formal with informal sources of reasoning, as we see in Kim's study, which is a great example of this point. Yet even in *reflecting* society's values, constitutions also have the function of *constructing* society itself

11 Tan, Kevin YL (2004), 'The role of public law in a developing Asia', *Singapore Journal of Legal Studies* 265.

12 Thio Li-ann (2012), 'Between apology and apogee, autochthony: The "rule of law" beyond the rules of law in Singapore', *Singapore Journal of Legal Studies* 269. See, more generally, Bui Ngoc Son (2016), *Confucian Constitutionalism in East Asia*, London: Routledge.

13 Thoreau, Henry David (1849), 'The Resistance to Civil Government', in Peabody, Elizabeth P (ed), *Aesthetic Papers*, Boston and New York: The Editor.

14 Radics, George B, and Poon Yee Suan (2016), 'Amos Yee, free speech, and maintaining religious harmony in Singapore', 12:2 *University of Pennsylvania Asian Law Review*, 186.

15 Weber, Max (1930/ 2002), trans. Baer, Peter, and Wells, Gordon C, *The Protestant Ethic and the Spirit of Capitalism*, London: Penguin Books.

and its values, or at least those values that are held in common or are commonly held. In attending to the gap between aspiration and actuality this is a point we often miss. If the constitution adopts a function of construction, there is, of course, a danger of falling into the platonic trap that those values should be absolutely or perfectly adhered to. Under liberal constitutionalism, a balance is kept between values held in common and values that are recognised as legitimate or allowed. For this reason, there is a distinction to be drawn between values that are inherently held by citizens (constitutionally entrenched values) and values that are merely permitted to be held under liberal value-pluralism. The fact that the latter values present difficulties is not of course a new idea, but addressing the Korean case of the daughters' rebellion may add to our understanding of this problem.

Two recent instances from news reports come to my mind to illustrate this. In the UK it was recently suggested that new migrants should demonstrate their understanding and adherence to 'British values'. It was pointed out in response, with pleasing irony, that requiring people to undergo this process was itself contrary to British values. The apparent contradiction is explained by value-pluralism. If a basic value is toleration of different values, it follows that you cannot logically require people to adhere to values that are less basic than this. In France, in the second instance, a migrant failed this test of value-adherence when she refused on religious grounds to shake hands with the officials administering her citizenship ceremony which is explicitly required. The decision was that she had indeed thereby demonstrated her failure to adhere to the values of the French Republic which led to her citizenship application being denied. Carl Schmitt would no doubt have had a field day with this, but my point is that liberal constitutionalism is neither value-free nor value-perfectionist. Drawing the line between the two positions is of course in practice difficult, as my two examples show.

The Daughter's Rebellion Case

The daughters' rebellion case raises in complex ways, and in a different, Asian context, an issue of value-pluralism. The fundamental issue is this: can a clan association based on Confucian values discriminate gender-wise between its members, when the constitutional order enshrines gender equality?

Kim finds, as we would expect, that there are two sides to this debate. Yet the characterisation of the two viewpoints is neither intuitive nor easy to state unequivocally, as each point of view embraces a number of nuances or ambiguities. I do not, however, have space to set these out here, and they are well discussed by Kim in his chapter.

Standing back from this debate, I will begin by pointing out that despite the rich and in some ways puzzling context of this case, it raises an issue that is of fundamental interest to constitutional lawyers, namely, how far, or in what circumstances, can constitutional values be imposed upon civil-society or *non-state* organisations, which seem to inhabit a space somewhere between the public and the private? Here we can note that in constitutional law there is an increasing trend of treating issues falling under the family and what one might call purely social issues; for example, a comparable current issue might be whether a private party should be allowed to discriminate on the basis of sexual orientation, caricatured by the American baker who refused the bake a wedding cake for a gay couple.¹⁶ In matters concerning the *preservation* of culture, there is, it seems, value in al-

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As in the recent US Supreme Court case reported at <<https://www.theguardian.com/law/2018/jun/04/gay-cake-ruling-supreme-court-same-sex-wedding-colorado-baker-decision-latest>> (accessed 11 July 2018).

lowing discrimination that would not be permitted in the case of a public decision-making body. We would not regard it as wrong for a cultural association to refuse membership to somebody who hated that culture, or even to somebody who did not belong to it. The question of policy here, though, is how far does this principle extend? I suggest it extends as far as anything that does not tend to undermine in practice the common values of citizens within that particular system of law. An association devoted to religion-based terrorism obviously passes beyond the bounds of toleration. (I remain, however, unhappy with the use of the word 'tolerance', which suggests that non-citizen values are inherently bad, but we put up with them for purely strategic reasons.¹⁷ Kim's piece actually shows us another way of thinking about this.)

In this instance in Korea, the issue was, as I have said, whether a Confucian clan association was required to observe the constitutional principle of gender equality. Thus the Korean case of the daughters' rebellion reflects a familiar problem, albeit in a context which, I will argue, is unusual (in a helpful way) in its causes, incidents, and ramifications.

In raising the question to a general level, I have to confront immediately an analytical issue of great importance. Kim helps us with this example to understand creatively how practical accommodation can be reached between liberal constitutionalism and prevailing societal values by the use of Confucian public reasoning. In this public reasoning, Kim explains, traditional Confucian belief and social ordering is, in his helpful phrase, 'housed within' the liberal constitutional order. While it is not always clear to me whether we are using liberal constitutionalism or Confucianism to explain this (and perhaps the ambiguity is exactly the point), the example is highly instructive in terms of how we might approach value-pluralism more generally. If I have a criticism, it is that Kim pays insufficient attention to an analytical question that I now pose, and that is derived from my earlier comments.

The case raises an issue that is sought by the majority judges and Kim himself to be explained in terms of a theory of voluntary associations. On this view Confucian clan associations are voluntary ones, being elements, if you like, of civil society. One can proceed from there to argue either that for this reason, they need not comply with constitutional norms (that is, they may discriminate on the basis of gender, like, say, a club for sufferers from testicular cancer or breast cancer), or that, despite this status they must (on, of course, some clear, logical, and publicly-reasoned basis) be required to comply with such norms.

An important preliminary point, therefore, is whether indeed clan associations are voluntary associations based on an articulated belief-system or adherence to a set of cultural norms. This may be doubted for reasons that emerge from the debate that the case itself sets up.

First, it turns out that a very large number of Korean people, in fact, as Kim alleges, almost all, belong or potentially belong to a clan association. I say potentially belong only because the correct basis of membership is in dispute. By this I mean that it is not clear whether it is based on any or some or all of i) a decision of the elders to admit, ii) adhering to a set of cultural values demonstrated through the observance of rites, or iii) genetic affinity. But suffice it to say at this point that, given the prevailing culture, Confucianism is deeply expressed for Korean people through clan associations that, specifically, address filial piety, ancestor worship, and family harmony as duties imposed on clan members, and expressed through observing rites. Nonetheless, the daughters were more concerned with

their rights (of participation and property) than their rites.¹⁸

Secondly, it also turns out (and here there is again some ambiguity) that all men are *automatically* members of the relevant surname-clan-association by virtue of *descent*. Yet, puzzlingly, women are described as being merely *entitled* to membership if they *consent* to be members. Here the discussion is to my mind a little opaque in distinguishing between women who marry into a clan, and women who are born of clan members and so have a genetic rather than marriage connection to the clan. Given the purposes and possible bases of membership, one would have thought that daughters had a greater claim than women marrying-in. Yet this argument does not seem to gain traction with the Confucianists. This immediately draws attention to the patriarchal nature of clan associations, which is not at all denied (indeed it is celebrated) by advocates of their autonomy. A man does not become a member of his wife's clan, yet a woman becomes a member of, if any, her husband's clan.

This leads to a further question as to the opposite of a patriarchal and patrilineal system. Semantically, the opposite is a matriarchal and matrilineal system (as in some South East Asian and African cultures). What is demanded, however, is a system that is gender-neutral. The court achieves this only partly, by saying that both filial piety and genetic affinity inhere in women as well as men. It then muddies the water by a gendered approach to membership that is inconsistent with the above rationale.

Thirdly, the Korean Constitution provides in Article 9 that '[t]he State shall strive to sustain and develop cultural heritage and to enhance national culture'. Thus it may be argued that clan associations are in effect designed to fulfil the state's constitutional duty. Here the preservation of culture is not simply a kind of latent policy objective or toleration-inspired position inherent in a liberal constitutional order - it is an express duty. This distinction is important and is not uncommon in Asia. For example, the 2017 Constitution of Thailand specifically provides for the preservation of local communities, heritage, cultures and customs. This is expressed as both a democratic right of local communities, and as a duty of both state and citizens.¹⁹

Thus, the word 'voluntary' is being stretched beyond its meaning if we seek to describe clan associations as voluntary. One can refuse or fail to perform the duties or rites of the association, and I suppose one could (and I understand many Koreans these days do) expressly reject the belief system involved; but one may well not be able to cease to be a member of it, any more than one could cease to be genetically related to members of one's own family.

If so, then what, analytically, are these associations? Here I am reminded of the way in which we seek to classify public and private entities for regulatory purposes. Different systems have different ways of doing this, but the purpose is to decide which entities fall under private law and which under public law. In this it is a choice how much weight to give to the form, structure and legal basis of the entity; the substance of its purposes and activities; and the original reason for setting it up or setting up in a particular manner. For example, German law recognises that one cannot *escape* from public law into private law simply by adopting the legal form of a private entity (this is referred to as '*flucht ins privatrecht*'). Some systems may indeed ask whether the function in question would have to

18 Let me add here that Kim's analysis, consistently with the legal analyses he discusses, seems not to see this as an issue of property rights: *sed quaere* ... this of course is another discussion.

19 Ibid., ss.43, 50, 57, 76.

be performed by the state if the entity concerned did not perform it. This may be highly relevant in terms of a duty to preserve culture. If the testicular-cancer or breast-cancer club closed shop, that might well be most unfortunate for those affected: but if Confucian clan associations closed shop it would for all Koreans be a cultural loss, one assumes, of cataclysmic proportions.

Clan associations do not fit easily into the type of reasoning I have set out. If they are private, they are such, not because they are set up under a regulatory instrument (I assume they are not, or if they are, then it is of no great importance), but because they actually pre-date the modern state and the very concept of regulation. They are traditional, as is argued by the advocates of their autonomy under traditional Confucian thinking, and as is accepted under Confucian public reasoning. They have not *escaped* into the private law arena; on the contrary, they have simply remained as they always have been, and the private law label is then imposed on them by the court, not chosen by them as a strategy. I observe here (and this is an element of comparative sociology, or perhaps anthropology, and I may be wrong about this) that clan associations which very closely resemble the Korean ones are common all across Asia, especially in the overseas Chinese culture, and are not necessarily explicitly Confucian – they could be Buddhist or Taoist, for example. I, therefore, wonder whether they should be seen as elements of deep traditional culture, rather than equivalent precisely to religious organisations. By deep traditional culture I mean one that has historic depth, persistent social penetration, and constitutive value. I remain unsure, however, if, or how, this might affect the issue. It may be that, if one sees this as a culture, which of its nature changes, rather than as a belief-system that largely does not, then the result achieved is consistent with the prohibition on gender-discrimination.

These arguments lead to my conclusion, which is based on the question whether it is correct to see clan associations as purely private in the *Korean context*. Given the state's duty to maintain heritage and culture, there seems to be a case for treating them as public rather than private institutions, in which case the duty of clan associations would be to implement full gender-equality without reservation. This might look like a contradiction, given the argument for patriarchy and Article 9; yet any public entity would surely be bound by the more express prohibition against gender discrimination in Article 11. No doubt Confucianists would see it as desecration of their belief system. In my view, if this social phenomenon is seen as i) public not private, and ii) cultural rather than religious, then we can accept that culture varies according to changing values of society, and those values are in part prescribed by the constitution.

Gender-equality is one such value. In my view, the daughters' rebellion succeeds in full. In my court, they get everything they asked for. I concede that my argument may be based on incorrect empirical sociological assumptions, and I am happy for it to be trumped on this basis, but let us notice that a sociological analysis will also change over time, and that the many-headed rebellion of the daughters is in itself evidence of social change. My only concession to the patriarchs is that the preservation of their culture needs to be tempered with an understanding that culture is not immutable, but that by elevating their clans to the level of public institutions, I am in fact giving them a *higher* status than the court would actually allow them. They could of course retreat from this position, but by doing so they may think they lose more than they gain.



The Practice of Public Reason Confucianism: Reply to Van Norden, Loy, Neo, and Harding

Centre for Asian Legal Studies, National University of
Singapore Faculty of Law
Roundtable Discussion on Public Reason Confucianism

Professor Sungmoon Kim

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Response to Van Norden

Professor Van Norden begins his commentary by locating my work in the long tradition of political theory which is marked by creative tensions and ceaseless conversations between liberalism and (comprehensive) perfectionism and between meritocracy and democracy. He raises three specific questions regarding public reason Confucianism's key underlying assumptions.

First, Van Norden wonders whether I am too quick to dismiss some of the problems that are currently consuming Western democracies such as "xenophobia, racism, nationalism, and militarism." Though I do not believe that democracy is the only legitimate way to organise citizens' political life, this concern seems to be somewhat misguided. Public reason Confucianism does not advocate democracy because democracy promises all the goods necessary for human flourishing or because democracy is completely insulated from practical problems. In my previous work, I argued that "democracy is neither omnipotent nor impotent, and neither understanding of democracy captures the core tenets of democracy as a political system and as a social practice."¹ In public reason Confucianism, democracy is neither a panacea nor an anathema as far as social problems are concerned. Instead, it offers a fair and enduring political and constitutional framework in which various moral, economic, and social conflicts can be resolved in a way justifiable to all citizens who are subject to the state's coercive power. Put differently, public reason Confucianism is a normative political theory that explores a philosophically (as well as socially) attractive vision of Confucian democracy in the increasingly pluralist and multicultural contexts of contemporary East Asia. As for the social problems that Van Norden associates with democracy, I believe a careful empirical examination is necessary to determine whether it is

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1 Sungmoon Kim, *Confucian Democracy in East Asia: Theory and Practice* (New York: Cambridge University Press, 2014), p. 2.

democracy itself or its failure or neither that has caused them.

Second, Van Norden also wonders whether I am too quick to dismiss the logic of a mixed political system. Indeed, many Confucian meritocrats propose a bicameral system in which the democratic lower house is checked by the meritocratic upper house composed of "the best and brightest." In *Public Reason Confucianism*, I refuted various proposals of a mixed regime offered by Confucian meritocrats, but I do not dismiss the logic of mixed regime wholesale. Drawing from Daniel Deudney, an American political scientist, I argued that American democracy itself had been founded as a mixed regime that "structurally resists both one-man tyranny and the tyranny of the majority, thereby creating a space for political liberty and public freedom."² In citing the American example, my intention was not to espouse the American representative democracy as the ideal form of democracy but to demonstrate the possibility of a "democratic mixed regime" that public reason Confucianism welcomes. Equally important, I wanted to show that there should be an overarching political purpose in instituting a mixed government, be it public freedom or public equality. Unfortunately, none of the models suggested by Confucian meritocrats clearly specifies its underlying political purpose that can justify the strongly meritocratic (or elitist) outlook of the polities they support, nor do they seem to be concerned with the separation of powers between branches of government. In marked contrast, public reason Confucianism supports a constitutional democracy governed by the principle of public equality and embraces several meritocratic components such as an independent judiciary within the normative constraint of public equality.

Finally, Van Norden asks whether it is really a better system in which those who feel like voting get to elect the rulers, than that in which people can get to voice their satisfaction or dissatisfaction with the quality of public policy designed by the experts. Let us call the former system the *sovereign model* of citizenship and the latter the *consumer model*. The underlying assumption here is that what is really important about politics is whether it serves the well-being of the people and as long as the people have sufficient power to voice their dis/satisfaction with public policy, though it is made by un-elected political leaders, there is no *prima facie* reason to prefer a democratic self-government. But how can citizens voice their dissatisfaction with public policy effectively if they are prevented from influencing public decision-making either directly or by representation? If citizens have no right or power to select the political leaders themselves, how are they able to *effectively* sanction them or hold them accountable? Though traditional Confucianism regarded the common people as barometers that can passively indicate the quality of the government, public reason Confucianism empowers them to become active political agents who are at once the rulers and the ruled, thus paying equal attention to both the sovereign and the consumer models of citizenship.

Response to Loy

Focusing on Chapters 5 and 6 where I discuss the practical distinction between civic virtue and moral virtue and explore the Confucian justification for the popular right to political participation, Professor Loy raises two important questions regarding my textual interpretation and its implications for the normative arguments that I make.

The first question concerns the distinction between moral virtue and civic virtue in the Confucian ethical tradition. As Loy notes, the guiding concern of Chapter 5 is how

2 Sungmoon Kim, *Public Reason Confucianism: Democratic Perfectionism and Constitutionalism in East Asia* (New York: Cambridge University Press, 2016), p. 10.

to justify the practical distinction between moral virtue and civic virtue in a tradition that does not, at least conceptually, recognize civic or political virtue independent of moral virtue that is concerned with *human* excellence and flourishing. The distinction, however, is practically important to public reason Confucianism because it aims to justify the public promotion of Confucian virtues as pertaining to *all citizens*, their diversity notwithstanding. In public reason Confucianism, the Confucian virtues that are instrumental to creating and sustaining Confucian democratic citizenship are captured in terms of civic virtues and distinguished from moral virtues that are grounded in certain Confucian philosophical doctrines or believed to be essential for human flourishing. Loy's question revolves around how to create or justify this distinction in light of classical Confucianism.

In Loy's view, my underlying assumption that the structure of Confucian virtue ethics is essentially monistic and political virtue is conceivable only if Confucianism's otherwise strong virtue monism is tempered is premised on a controversial interpretation of the classical Confucian texts, the *Analects* in particular. The *Analects*, argues Loy, has ample textual resources to show that all moral virtues do not necessarily culminate in political virtues and this belies the core assumption of Confucian virtue monism, thus creating room for the possibility of moral virtue that is independent of political virtue. That is, classical Confucianism, at least the version advanced by Confucius, takes apolitical moral virtue as intrinsically valuable, sufficiently good in making one morally perfect without requiring one to be involved in politics. Based on this observation, Loy wonders whether I am justified in deriving civic/political virtue from classical Confucianism and using it as the foundation for the virtue of political participation, when, in his judgment, my aim could have been served perfectly well by simply presenting a free-standing interpretation of character dispositions that can be shared by the people in general.

I do not have the space to discuss at length the different ways in which Loy and I interpret the *Analects*. That being said, I admit (and I believe Loy would agree) that my interpretation of Confucian virtue ethics is largely based on Mencius's and Xunzi's strongly monistic Confucianism and in the book I attempted to conceptualize civic/political virtue by tempering *this* version of Confucianism that I believe strongly influenced the later development of the Confucian ethical and political tradition in East Asia. After all, traditional Confucians never acknowledged the independent value of common citizenship, and my goal was to justify the mode of virtue directly conducive to Confucian democratic citizenship by reinterpreting Confucian virtue ethics not only from the standpoint of tempered virtue monism, but, just as important, from the perspective of the constitutional separation between citizenship and membership.

Loy's second question is motivated by the same concern - why do I ground the right to political participation in the Mencian conception of moral equality and human dignity when public reason Confucianism is not supposed to be grounded in controversial moral and philosophical assumptions about human nature, human excellence, and human flourishing? What if one appeals to a Rousseauian, or a Kantian, or a Millian justification to the right to political participation? Or worse, what if one subscribes to a Xunzian account of human nature which leads to the idea of human dignity that is more aligned with unequal rights in political participation? Indeed, it is far from my intention to affiliate public reason Confucianism with one particular strand of comprehensive Confucianism. However, it is important to note that it was certainly not my intention to make public reason Confucianism "Confucian political perfectionism" of the kind that Joseph Chan advocates, from which comprehensive doctrines including a Confucian comprehensive doctrine, are completely decoupled, whether they are fully or only partially comprehensive.³

Instead, public reason Confucianism is a political theory in which partially comprehensive Confucianism is intertwined with democratic perfectionism by a distinctive Confucian mode of public reason. Since it does not aim at Confucian perfectionism perfectly sanitized from comprehensive Confucianism, public reason Confucianism embraces its loose connection, though moderately controversial, with traditional Confucianism and this connection renders the Confucian part of public reason Confucianism culturally intelligible to citizens in East Asia. What is important is that though loosely grounded in traditional comprehensive Confucianism, the partially comprehensive nature of public reason Confucianism allows it to be capacious enough to accommodate various kinds of comprehensive doctrines. Thus understood, my Mencian-Confucian justification for the right to political participation is intended primarily to establish its Confucian intelligibility, not to preclude non-Confucian justifications. Inasmuch as non-Confucian justifications are compatible with the Confucian justification that I offered with reference to (reinterpreted) Mencian Confucianism, public reason Confucianism has no problem accommodating them.

Reply to Neo

In her commentary, Professor Neo sheds new light on my idea of public reason Confucianism from a broader comparative constitutional perspective. Neo notes that as a non-liberal constitutional theory public reason Confucianism does not commit to the idea of state neutrality but openly privileges a substantively Confucian vision of the good predicated on a comprehensive doctrine as an expression of communal morality, thus being capable of contributing to a more expanded understanding of the constitution and constitutionalism. More specifically, and examining my analysis of the 2005 Korean Supreme Court decision to abolish the family-head system, Neo believes that public reason Confucianism imposes three requirements on constitutional law: be dynamic, be adaptive, and be contingent.

First, Neo argues that public reason Confucianism requires constitutional law to be dynamic as it presents Confucianism and liberalism not so much as two mutually incompatible value systems but as "active sites of contestation and change," equally subjecting them to interpretation. Second, public reason Confucianism requires constitutional law to be adaptive. One aspect of public reason Confucianism Neo finds notable is that it makes existing Confucian institutions (including the family system or *ka* in Korean) and social practices "conform to the liberal values [such as human dignity and gender equality] embodied in the constitution," on which the Korean polity is directly and formally predicated. According to Neo, these two requirements further require the constitutional arrangement to be "more contingent than what is commonly envisaged under a liberal or Confucian polity." As public reason Confucianism does not assume a fixed hierarchical order between liberal and Confucian values but rather requires "a contextual outcome that takes into account both values," it is likely to endorse "a more creative and active judiciary" that can more effectively engage in contextual jurisprudence. In the end, Neo concludes that public reason Confucianism can be understood as one specific kind of what she calls *state constitutional pluralism* that acknowledges "[the] coexistence of heterarchical constitutional authorities and divergent constitutional norms, ideas, and values within the state."

I fully agree with Neo that public reason Confucianism supports constitutional law and jurisprudence that is more dynamic, more context-sensitive, and more adaptive to legal and social contingencies. I also agree that public reason Confucianism upholds constitutional pluralism, encouraging a dialectic negotiation between liberalism and

Confucianism, which produces constitutional norms as well as informs constitutional identity. Therefore, public reason Confucianism has no principled objection to a more creative and active court. However, this does not mean that public reason Confucianism takes the judiciary to be the center of its actualization or endorses judicial supremacy over democratic politics. In public reason Confucianism the arena in which cultural negotiations take place is primarily civil society where citizens engage in public deliberation in a mutually acceptable manner, thereby producing (Confucian-informed) public reason, and it is the legislature that makes the law, by use of public reason, in which liberal rights and freedoms are balanced with Confucian values and civilities. The constitutional court consummates this long and complex democratic process of legal identity formation by examining the constitutionality of a specific law made in the people's name.⁴

This finally leads to Neo's question: would public reason Confucian constitutionalism not undermine itself in the long run, generating constitutional norms that are neither Confucian nor liberal? For instance, if public reason Confucianism allows a senior member of the family of either gender to become the family head, would it not undermine a traditional Confucian family structure and rather cause more family (especially marital) disputes? Neo is right to understand public reason Confucian constitutionalism as committed neither to Western-style liberalism nor to traditional(ist) Confucianism. This, however, does not imply its liability as a "Confucian" constitutional theory. Because public reason Confucianism encourages citizens who otherwise subscribe to diverse values as private individuals to *cultivate* reasons that can be acceptable to others - hence public reason(s) - by negotiating their privately-held moral, religious, and cultural values with Confucian values, mores, rituals, and moral sentiments with which they are socially saturated, often unwittingly, the public reason thus cultivated is still meaningfully, albeit only partially, Confucian. Likewise, public reason Confucian constitutionalism facilitates a transformation of Confucianism into a modern Confucianism that is compatible with democratic principles and liberal rights but it always appeals to Confucian public reason as a point of reference in both law-making and adjudication of law. Though the resulting Confucianism may be significantly different from traditional Confucianism, it would still retain its loose yet culturally intelligible connection with a traditional Confucian way of life. At a minimum, it is still motivated by the Confucian conception of the good life, however contested it could be in the democratic decision-making process.

Reply to Harding

Finally, Professor Harding turns to Chapter 4 and reexamines the 2005 Korean Supreme Court case of the daughters' rebellion with special attention to the legal status of clan associations within Korea's overall constitutional structure. The case, which was mainly about equal membership between men and women within the Confucian clan organisation, raises both legal and political-theoretical questions. The legal question is how to understand the status of clan organisations, which are believed to have emerged naturally and have been protected under customary law since the beginning of the Republic of Korea, making its modern legal status quite ambiguous - is it a private voluntary association whose internal autonomy should be largely insulated from state intervention by its constitutional right to freedom of association, or a public entity that ought to be directly regulated by constitutional norms and principles? The political-theoretical question arises when clan organisations are viewed as private voluntary associations: how to balance between

⁴ On the procedural structure of public reason Confucianism and its connection with legal substances, see Sungmoon Kim, *Democracy after Virtue: Toward Pragmatic Confucian Democracy* (New York: Oxford University Press, 2018), chap. 3.

constitutional perfectionism (i.e., the constitution's ambition to maintain and reproduce a common citizenship in light of democratic principles) and associational autonomy and freedom. What further complicates the political-theoretical question is the context in which the normative balancing between constitutional perfectionism and associational freedom is sought, namely, a society where citizens are still deeply embedded in Confucian societal culture, their diverse moral, cultural, and religious values notwithstanding. In this society, constitutional perfectionism is expressed in terms of Confucian democratic perfectionism regulated by the constitutional principles of public equality (including gender equality) and individual dignity, against the backdrop of which the scope of associational freedom ought to be evaluated. Harding's overall concern is mainly with clarifying the first question.

Harding finds it most reasonable to treat Confucian clan organisations in Korea as public rather than private institutions, not least because "they pre-date the modern state and the very concept of [legal] regulation," but, more importantly, given Article 9 of the Korean Constitution stipulating sustenance and development of cultural heritage and national culture. Once we see clan organisations as public rather than private and cultural rather than religious, argues Harding, we can easily uphold the Korean Supreme Court's decision applying equal clan membership between men and women (and, by implication, an equal right to clan-owned property), because "culture varies according to changing values of society and those values are in part prescribed by the constitution." Harding is further convinced that treating clan organisations as public and cultural institutions does not diminish their moral status, even though doing so requires them to temper their cultural claims, but rather elevates them to the level of public institutions.

In contrast, in the book I argued that under Korea's modern legal structure, clan organisations should be treated as private associations of civil society whose internal autonomy must be protected by the constitutional right to freedom of association and that this is how public reason Confucianism would place them within its constitutional theory. In evaluating the contrasting views suggested by Harding and myself, however, there is an important caveat. While I approached the clan organisation case largely from the perspective of public reason Confucianism with a view to theory building, Harding assesses it purely from a legal standpoint in light of the Korean Constitution. My argument was that both the Court's majority and dissenting decisions hardly make sense with reference to liberal political and constitutional theories (political liberalism and liberal pluralism in particular) and that public reason Confucianism provides an alternative constitutional framework that makes the Court's Confucian moral reasoning more coherent. From the perspective of "democratic pluralism," one of public reason Confucianism's core propositions, I suggested that as private associations clan organisations' internal autonomy must be respected, even if it involves certain gendered relationships and social practices if two conditions are met: first, clan membership and the clan's internal operation do not critically violate the constitutional principles of gender equality and individual dignity, and second, intra-clan practices are voluntarily exercised by both male and female members.

Seen in this way, there is a meaningful difference between Harding and myself with regard to the political-theoretical question raised by the case. By understanding clan organisations as public and cultural institutions, Harding upholds a near perfect congruence between constitutional norms and the cultural practice of social institutions within civil society. While I agree with Harding that the principle of equal membership should apply within clan organisations, I believe that more constitutional respect should be given to their (or any social association's) internal autonomy as long as the democratic constitutional order remains unchallenged. Again, I call this balance between the constitutional demand of democratic citizenship and the cultural respect of associational membership *democratic pluralism* and distinguish it from liberal pluralism.

CHRONICLES OF THE GOVERNMENT AND LAWS COMMITTEE

2018 - 2019





GOVERNMENT & LAWS COMMITTEE

PPAA SSS HKUSU

LEX INJUSTA NON EST LEX

OVERVIEW

The Government and Laws Committee, Politics and Public Administration Association sss HKUSU was established in April 2018 with a rich historical heritage and is the official student community of the BSocSc (Govt & Laws) & LLB Programme at The University of Hong Kong.

GLC was born out of a strategic vision to become the Region's first-ever non-partisan, student-driven think tank specialising in law and politics. Bringing together current students, alumni, and professors, it is committed to promoting a stronger understanding of cutting-edge legal-political issues at the international and domestic levels. To this end GLC offers a robust platform for the dissemination of legal and political knowledge to students and the general public alike.

The GLC maintains close partnerships with the GLaws Programme and the Department of Politics and Public Administration and communicates GLaws students' views to the University. It also delivers tailor-made services to GLaws students such as mentorship schemes, career workshops, and examination support.

The GLC has organised a range of exciting initiatives, including face-to-face meetings between students and prominent practitioners of government and laws such as leaders of the European Union, Hong Kong Bar Association and the Department of Justice, forums on a range of internationally prominent issues such as Brexit and visits to legal and political institutions such as the Court of Final Appeal. GLC also publishes the Hong Kong Journal of Law and Public Affairs and Public Jurist, which has quickly established itself as a leading student magazine on law and public affairs in the entire Region.

OUR MOTTO

LEX INJUSTA NON EST LEX

- An unjust law is not law -

THE GOVERNMENT AND LAWS CREST

OUR IDENTITY. OUR STRONGHOLD.

The lion is the mascot of HKU. The inclusion of the lion into the GLaws Crest reinforces the close ties between GLC and HKU. The lion symbolises the qualities of the ideal GLaws student: courage, stateliness, and determination. The raised paw stands for GLC's boldness to initiate and to inquire as well as readiness to serve. The tail held high reminds of the importance of ideals.

The letters "G & L" stand for "Government & Laws". The scales and the sword represent the principle that public power (the sword) ought to be exercised fairly, in accordance with the rule of law (the scales).

The shield signifies that GLaws is a stronghold made up of young people who are committed to the public interest and the rule of law.



The GLaws Crest was designed by Dr. Eric C. Ip, Associate Professor of Law and Director of the GLaws Programme. Dr. Ip himself is a graduate of GLaws (Class of 2008).



OUR PROUD HISTORY

WHERE TRADITION AND INNOVATION CONVERGE

GLC is both old and new. It has a rich historical heritage that stretches all the way back to 1915, over a century ago.

- 1915 — The community of students studying Politics and Public Administration at HKU – the original forebearers of GLaws students – was inaugurated 103 years ago, in 1915.
- 1937 — This community, a training ground for generations of public servants of Hong Kong and elsewhere, steadily grew as the Department of Politics and Public Administration was established under the name of 'Department of Economics and Political Science' in 1937.
- 1973 — In 1973, HKU Politics and Public Administration students decided to officially incorporate themselves into the Politics and Public Administration Association ^{SSS} HKUSU, Hong Kong's first academic society focused on global public affairs and is the forerunner of the Government and Laws Committee.
- 1999 — The BSocSc (Govt & Laws) & LLB Double Degree Programme was formally co-established by the Department of Politics and Public Administration and the Faculty of Law in 1999.
- 2018 — GLC was established within PPAA, just as the GLaws programme is administered by the Department of Politics and Public Administration in 2018. The rise of GLC signifies the birth of a new and entrepreneurial model of student governance.



OUR FORERUNNER

POLITICS AND PUBLIC ADMINISTRATION ASSOCIATION

SSS HKUSU

Politics and Public Administration Association SSS HKUSU (PPAA) is Hong Kong's first student-led academic society focused on the study of global and public affairs. Founded in 1973, it has quickly emerged as one of the most successful of its kind in the region. For years, it has adhered to its mission to advance the public interest through changing political apathy into awareness and nurturing students to be leaders of high calibre who are concerned with serving the society uncompromisingly.

OUR ESTABLISHMENT IN 2018

The first batch of GLaws students was officially admitted in 1999 following the inauguration of the programme which was led both the Department of Politics and Public Administration and the Faculty of Law. For years, GLawyers have sought to establish a unique platform dedicated to facilitating the free exchange of ideas and delivery of tailor-made services for themselves, such as forums, career events and examination support.

The hardwork did not end up in vain. With the approval from the GLaws Programme Directors and full support of PPAA, the GLC was formally founded in 2018 as a sub-committee of PPAA. Current GLaws student representatives as well as executive committee members of PPAA collaborated together closely and strove to transform this unique platform into one which can both benefit GLawyers academically and personally and a place which we can call 'home' with pride.

Established for roughly a year, the GLC has managed to deliver astonishing results widely acknowledged by both the Government and Laws community and the wider public.

"The Department is very pleased to continue supporting the Government and Laws Committee's activities."

Professor Richard W. X. Hu
Former Head of Department of Politics
and Public Administration, HKU

"GLC has offered a range of career and academic-oriented activities, which enables GLaws students to delve into peculiar sectors."

Joyce Lau
BSocSc (Govt&Laws) & LLB III

"Against all odds, three undergraduate GLC officers have succeeded in delivering services at the highest level, freely without charge or conditions to GLawyers, other students, and beyond. As a former PPAA leader, I am very proud of GLC."

Eric Choi
BSocSc (Govt & Laws) '09

OUR PEOPLE

CONSTITUTING A STRONG AND TIGHT COMMUNITY

HONORARY BOARD

Professor Eliza W. Y. Lee
Honorary President
Director of the GLaws Programme
(Politics and Public Administration)

Associate Professor Eric C. Ip
Honorary President
Director of the GLaws Programme
(Law)

Professor Joseph C. W. Chan
Emeritus Honorary President
Former Director of the GLaws Programme
(Politics and Public Administration)

ADMINISTRATION

2018 - 2019

Ms. Nydia K. Y. Yeung
Founding President
Undergraduate Representative, Board of Studies for the
BSocSc (Govt&Laws) & LLB Programme, Senate

2018 - 2019

Mr. Trevor T. W. Wan
Founding Executive Director
Undergraduate Representative, Board of Studies for the
BSocSc (Govt&Laws) & LLB Programme, Senate

2018 - 2019

Ms. Alice O. S. Tsui
Founding Operations Director

2019 - Present

Mr. Frederick H. H. Leung
President



OUR HOST PARTNERS

CONNECTING ALL GLAWYERS WITH TEACHING STAFF

DEPARTMENT OF POLITICS AND PUBLIC ADMINISTRATION



DEPARTMENT OF POLITICS AND
PUBLIC ADMINISTRATION
THE UNIVERSITY OF HONG KONG

The Department of Politics and Public Administration of The University of Hong Kong is a founding department of the Faculty of Social Sciences. During the past four decades, the Department has contributed to advancements in its field both locally and internationally through excellence in research, teaching, and service to the community. Scholars at the Department have produced high-quality research outputs, which appear in top-tier journals such as *The China Journal*, *The China Quarterly* and *Journal of Political Philosophy* etc.

The GLaws Programme has been the backbone of the Department since its inception in 1999, with JS6810 being the only JUPAS Code directly administered by the Department. The Department has provided tremendous support to GLC in pushing forward its initiatives, with teaching staff of the Department, such as Honorary Professor Peter H. L. Lai and Mr. Sebastien Fung being guests of GLC's events.

FACULTY OF LAW



The Faculty of Law of The University of Hong Kong is the first law school in Hong Kong and one of the most prestigious law schools internationally. First established in 1969 as the Department of Law in the Faculty of Social Sciences, it became a School of Law with an autonomous Board of Studies in 1978, and a Faculty of Law on 1 July 1984. Today, the Faculty has over 60 full time academic staff from about 17 jurisdictions; and 2,300 students. The Faculty's programmes emphasize quality teaching, student-based learning, interactive participation and international exposure.

GLaws is one of the three double degree programmes offered by the Faculty, alongside BBA(Law) & LLB and BA(Literary Studies) & LLB. The Faculty also houses four academic staff who are graduates of GLaws, including Ms. Cora Chan, Dr. Peter Chau, Dr. Eric C. Ip and Mr. Carter Chim, all of whom are distinguished academics. Professor Michael Hor, the former Dean has expressed his enthusiasm regarding the establishment of the GLC and written the inaugural foreword for GLC's quarterly magazine, the *Public Jurist*.

ACADEMIC POWERHOUSE

ENHANCING LEGAL AND POLITICAL AWARENESS

The GLC most fundamentally aspires to become an academic powerhouse aimed at disseminating legal and political science knowledge in a non-partisan manner. Established in an era in which a nuanced understanding of local and global issues is indispensable, the GLC positions itself to assist our fellow GLawyers in the acquisition of interdisciplinary perspectives to attack legal and political issues which will inevitably be useful for both undergraduate studies and career pursuit. To this end, the GLC has organised a variety of events, ranging from forums, exhibitions, visits and luncheons to achieve its mission.

FORUMS AND DIALOGUES

The GLC invites prominent speakers to address the audience in forums and dialogues in which both locally and internationally prominent issues are critically engaged. Professor Peter H. L. Lai, former Secretary for Security of Hong Kong and Professor Richard Cullen, Visiting Professor at the Faculty of Law were invited to explore the future of Hong Kong from the perspectives of politics, law and economy. Ms. Carmen Cano, Ambassador of the European Union to Hong Kong and Macao was invited to share her insights regarding the future of European integration following Brexit.

VISITS

GLC organises visits to legal and political institutions and enables students to comprehend the real-life workings of Government and Laws. A visit to the Court of Final Appeal was held in late February 2019 and students toured around the historic building and had an interesting conversation with Mr. Justice Andrew Cheung, Permanent Judge of the Court of Final Appeal. Mr. Martin Hui SC, former Deputy Director of Public Prosecutions kindly provided us with an overview of Hong Kong's prosecutorial system during a visit to the Department of Justice.

EXHIBITIONS

Exhibitions allow the GLC to maximise its reach which assists the dissemination of knowledge to the general public in an effective manner. In collaboration with the Global Lounge at the University of Hong Kong, an exhibition on Nuclear Politics was held in November 2018 featuring in-depth analysis of the Iran Nuclear Deal and Nuclear Security on the Korean Peninsula from multiple perspectives.

LUNCHEONS

Prominent leaders in law and politics are invited to converse with students over lunch and conduct in-depth exchanges on various topics. Mr. Thomas S. T. So, Partner at Mayer Brown and Former President of the Law Society of Hong Kong was the inaugural guest of our Eminent Luncheon Series.

STUDENT SERVICES

DELIVERING TAILOR-MADE SERVICES FOR GLAWYERS

The GLC is uniquely positioned to understand, analyse and provide solutions to various demands of GLawyers. With the core administration composed of student representatives of GLaws, the GLC is able to formulate concrete plans concerning the demands, among which include career support schemes, examination support and freshmen induction. The GLC also reflects students' opinion to relevant school authorities in a timely manner, complemented by regular attendance at the Staff-Student Consultative Committee Meeting held by the Department of Politics and Public Administration.

EXAMINATION SUPPORT

Before the end of each semester, the GLC invites senior students and teaching staff to deliver short talks on examination preparation and course selection for GLawyers of all years. Free past paper distribution is also available.

CAREER SUPPORT

The voluminous experience and extensive connection possessed by our alumni are invaluable assets to current GLawyers as they facilitate the organising of career events including firm visits and deliver career workshops themselves. Previous career series include firm visit and talk at Herbert Smith Freehills, a leading international law firm in Hong Kong, and career talks at the Legal Aid Department and the Department of Justice, among countless others.

FRESHMEN INDUCTION

From August to September every year, the GLC is in charge of holding a series of induction events for the new batch of GLawyers and introduces them to the proud tradition of GLaws. This series of events include an Induction Day immediately following the release of JUPAS results and a departmental welcoming lunch.

STAFF-STUDENT CONSULTATIVE COMMITTEE MEETING WITH THE DEPARTMENT OF POLITICS AND PUBLIC ADMINISTRATION

The GLC representatives attend the annual Student-Staff Consultative Committee Meeting held by the Department of Politics and Public Administration and convey the views towards the curriculum and academic matters reflected by GLawyers to the Head of Department, Chief Examiner and Programme Directors.

CONNECTING ALUMNI

CONSOLIDATING AN EXTENSIVE ALUMNI NETWORK



The GLC has been traditionally the cradle of distinguished lawyers, public servants, businessmen and academics etc. Through close partnership with our Programme Directors, the GLC is able to reconnect with our alumni whom have excelled in different fields, with aims of forming a tight network of GLaws graduates, facilitating different initiatives and exploring possible opportunities to provide mentorship to the undergraduates.

EXTERNAL IMPACT

ADVANCING THE PUBLIC INTEREST



Established with a view to promote awareness towards current local and global affairs, the GLC regularly ventures beyond the campus and engages the public through disseminating legal and political knowledge and expressing viewpoints directly. In September 2018, GLC accepted an invitation from RTHK to appear at its flagship current affairs programme, The Pulse, and presented students' viewpoints towards the issue of land supply in a panel that consists of Mr. Stanley Wong Yuen-fai, the Chairperson of the Task Force on Land Supply and legislators among others.

OUR INITIATIVES

THINK. ACT.

OFFICIAL ESTABLISHMENT

GLC was established with the endorsement from the Programme Directors, Professor Joseph C. W. Chan and Dr. Eric C. Ip.

April 2018



EXAMPREP SYMPOSIUM

GLaws students gathered together in the first-ever GLC ExamPrep Symposium featuring Free Pastpapers Distribution, Curriculum Work-shop, and Free Lunch. GLC President Nydia Yeung outlined GLC's various initiatives and Dr. Eric C. Ip advised on a range of academic and non-academic matters.

April 2018



STAFF-STUDENT CONSULTATIVE COMMITTEE MEETING

GLC participated in the Staff-Student Consultative Committee Meeting (SSCC) held by the Department of Politics and Public Administration and channeled to the teaching staff opinions it had collected from GLawyers earlier. This was the first SSCC in which the Heads and Directors from both Departments of Politics and Public Administration and Law were concurrently present, helping to bridge the gap between the two parts of the Programme.

May 2018





HKU FACULTY OF LAW 50TH ANNIVERSARY KICK-OFF CEREMONY
 GLC was invited to attend the Faculty of Law 50th Anniversary Kick-off Ceremony, and conversed with Professor Johannes Chan SC, former Dean of the Faculty of Law, and Professor Andy Hor, the Acting-Vice Chancellor, familiarising them with recent developments of the GLaws Programme.

June 2018



GOVERNMENT AND LAWS TOUCH DAY 2018

The first-ever HKU GLaws Touch Day (including campus tour and quizzes) and Admissions Talk (including current students sharing) were held in collaboration with the Department of Politics and Public Administration.

June 2018



INDUCTION DAY 2018

The induction day featuring welcoming address by Programme Directors and an informal course registration workshop was held in collaboration with the Department of Politics and Public Administration for the 19th Cohort of GLaws students.

August 2018



MEETING WITH THE EXTERNAL EXAMINER OF GLAWS PROGRAMME
 GLC had a fruitful meeting with the External Examiner of GLaws Programme, Dr. Eva Pils from King's College London School of Law, in multiple panels, enabling individual students to convey their personal views directly to the External Examiner for the benefit of the Programme as a whole.

September 2018

TRADITIONAL GOVERNMENT AND LAWS WELCOMING LUNCH 2018

The Department of Politics and Public Administration marked the beginning of the new semester with its traditional annual GLaws welcoming lunch. Professor Richard Hu, Head of Department and Professor Eliza Lee gave welcoming speeches to freshers, who were also introduced to other academic staff present.

September 2018



INVITATION TO RTHK FORUM "THE PULSE" ON LAND SUPPLY

Representatives from the GLC were invited to attend the RTHK The Pulse Forum on Land Supply: Housing - A Crisis in Land Supply?, during which Nydia Yeung, President of GLC weighed in on the issue of inadequate housing.

Link: https://www.rthk.hk/tv/dtt31/programme/thepulse/episode/526147?fbclid=IwAR0Hz5hJZzwZP9aHWP6BIKdO_zdLZbeRfrzjeQZco5AG9ZUmlvMSov7i16A

September 2018



PUBLIC GOVERNANCE EXPLORER VISIT TO THE LEGISLATIVE COUNCIL AND MEETING WITH MR. KENNETH CHEN, SECRETARY-GENERAL OF THE SECRETARIAT

A visit to the Legislative Council Complex was held and participating GLawyers conducted fruitful exchanges with Mr. Kenneth Chen Wei-on SBS, Secretary General of the Legislative Council Secretariat following a tour around the interiors of the Complex. The Delegation and Mr. Chen exchanged views on various issues of public and constitutional concern.

September 2018





MEETING WITH PROFESSOR WILLIAM HAYWARD, DEAN OF THE FACULTY OF SOCIAL SCIENCES

The GLC Delegation had a meeting with Professor William Hayward, Dean of the Faculty of Social Sciences in which the Delegation requested the Dean to give serious consideration to GLawyers' common concerns about credit transfer, the delivery of GCSI information, and reforms of the sequence of courses.

September 2018



LEGAL GOVERNANCE EXPLORER VISIT TO THE PROSECUTIONS DIVISION, DEPARTMENT OF JUSTICE AND MEETING WITH MR. MARTIN HUI SC, DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS

A visit to the Prosecutions Division of the Department of Justice was organised. Mr. Martin Hui SC, Deputy Director of Public Prosecutions, kindly and enthusiastically explained to participating students the structure and operations of the Department and the Division, how the criminal justice system operates in practice and the role played by prosecutors in the criminal justice system.

September 2018



LEGAL GOVERNANCE EXPLORER VISIT TO THE LEGAL AID DEPARTMENT

A visit to the Legal Aid Department was organised and Legal Aid Counsel Mr. Patrick Wong kindly received the GLC Delegation. Participating students were able to gain first-hand insight into the challenging work of the Department in promoting the constitutional right to access to justice, without which the rule of law would become nothing but empty talk. He also kindly offered career advice to students interested in a career at the Legal Aid Department.

September 2018

LEGAL GOVERNANCE EXPLORER VISIT TO THE HONG KONG BAR ASSOCIATION AND MEETING WITH MR. PHILIP DYKES SC, CHAIRMAN OF COUNCIL OF HKBA

Students joint a visit to the Hong Kong Bar Association and was greeted by Mr. Philip Dykes SC, Chairman of the Council of the Hong Kong Bar Association, who kindly received the GLC Delegation. They exchanged views on various issues of constitutional and public concern, and learned a lot about the prospects of young barristers.

September 2018



EMINENT LEADERS LUNCHEONS LUNCHEON WITH MR. THOMAS S. T. SO, FORMER PRESIDENT OF THE LAW SOCIETY OF HONG KONG

Over thirty students took part in a luncheon with Mr. Thomas S. T. So, the former President of the Law Society of Hong Kong and a solicitor advocate of the High Court of Hong Kong. During the luncheon, Mr. So highlighted the importance of exploring diverse opportunities as the key to sustaining one's career and equipping oneself with different skills in preparation for unexpected opportunities.

October 2018



CAREER EXPLORER 2018 FIRM VISIT TO HERBERT SMITH FREEHILLS

Around 20 participating students enjoyed a guided tour of the office of Herbert Smith Freehills and networking drinks. Partners, senior associates and associates of the firm, including several alumni of GLaws, enthusiastically discussed with students about their career and academic prospects, offering the latter with first-hand career advice.

October 2018





INTERVIEW WITH MS. VERA KOBALIA, FORMER MINISTER OF ECONOMY AND SUSTAINABLE DEVELOPMENT, GEORGIA

Officers of GLC spoke with Ms. Vera Kobalia, former Minister of Economy and Sustainable Development of Georgia, and an Asia Global Fellow at the Asia Global Institute (AGI), in an interview to appear in the *Public Jurist*. She has kindly gone to great detail about her experiences in overseeing her country's economy and confronting numerous kinds of policy difficulties.

October 2018



POLISCOPE 2018 INTERNATIONAL SYMPOSIUM ON THE POLITICS OF DENUCLEARISATION

A public symposium on the Politics of Denuclearisation was held and featured lively and mind-provoking discussions between political scientists Dr. Lami Kim and Mr. Sebastien Fung. In-depth explorations were conducted as to the prospect of denuclearisation in both the Korean Peninsula and Iran, together with a nuanced debate on whether nuclear warfare is possible in the 21st century.

November 2018



POLISCOPE 2018 EXHIBITION ON INTERNATIONAL LAW AND DENUCLEARISATION

An exhibition on the International Law and Denuclearisation was held in partnership with The University of Hong Kong's Global Lounge. The exhibition was open to the public, and focused on a wide array of issues including relevant international legal norms and their deficiencies, as well as the law and politics underlying Iranian and North Korean denuclearisation.

November 2018

HKU INFORMATION DAY 2018

Student ambassadors enthusiastically promoted the Department of Politics and Public Administration's flagship GLaws Programme to prospective students from all over Hong Kong and beyond. Two well-attended admissions talks were organised by the Department, during which Professor Eliza Lee, Dr. Eric C. Ip and various alumni shared their insights about various dimensions of the programme to attendees.

November 2018



MEETING WITH PROFESSOR MICHAEL HOR, DEAN OF THE FACULTY OF LAW

GLC held a meeting with Professor Michael Hor, Dean of the Faculty of Law, during which both sides exchanged views on the course transfer issues of exchange students, and other issues affecting GLawyers.

November 2018



UNVEILING OF GOVERNMENT AND LAWS HOODIE

An exquisitely designed, custom-made hoodie was unveiled in celebration of the 20th anniversary of HKU GLaws.

November 2018





INTERVIEW WITH LORD HOFFMANN NPJ AT THE HONG KONG COURT OF FINAL APPEAL

The GLC Delegation interviewed Lord Hoffmann NPJ, a former Lord of Appeal in Ordinary of the United Kingdom House of Lords at the Court of Final Appeal. He has kindly shared his opinions on a wide array of issues including the proper boundaries of judicial activism, the ingredients of the rule of law and the societal role of alternative dispute resolution. The interview will appear in the *Public Jurist*.

January 2019



INTERVIEW WITH MR. CLIVE GROSSMAN SC, FORMER DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS

The GLC delegation conversed with Mr. Clive Grossman SC, former Deputy Director of Public Prosecutions of British Hong Kong in an interview to appear in the *Public Jurist*. Mr. Grossman shared his views with the delegation on a diverse range of important legal issues of political interest, including the role of public prosecutors in the administration of justice and the role of law and public policy in combating commercial crimes associated with cryptocurrency.

January 2019



DIALOGUES SAPIENTIA MS. CHERRY TSE JP, PERMANENT SECRETARY FOR HOME AFFAIRS

A GLC delegation conversed with Permanent Secretary for Home Affairs Ms. Cherry Tse JP in order to gain a stronger understanding on how public administration is actually practiced on a daily basis, so as to complement their studies. Participating students and the Permanent Secretary expressed and exchanged their individual views on interesting matters ranging from youth development and policy, social welfare and civic engagement.

January 2019

DIALOGUES SAPIENTIA ON JUDICIAL INDEPENDENCE WITH MR. JUSTICE ROBERT TANG NPJ

A GLC delegation enjoyed a dialogue about judicial independence with Mr. Justice Robert Tang, Non-Permanent Judge and formerly Permanent Judge of the Court of Final Appeal. Mr. Justice Tang generously shared his unique insights with students on matters including but not limited to the challenges against the rule of law in Hong Kong and the roles of judicial dissents, legal education, and CFA Non-Permanent Judges in reinforcing judicial independence.

February 2019



ADVOCACY SYMPOSIUM 2019

The GLC organised an Advocacy Symposium featuring an interactive question-and-answer session delivered by Mr. Adrian T. But '09 from Sir Oswald Cheung's Chambers, and Mr. Victor Lui '14 from Temple Chambers. The two outstanding GLaws alumni who are currently practising barristers in Hong Kong generously shared their insights with participating students on how to develop one's advocacy skills during undergraduate years and the practical aspects of the work of barristers in relation to litigation.

February 2019



DIALOGUES SAPIENTIA ON THE FUTURE OF HONG KONG: POLITICS, LAW AND ECONOMY

GLC organised a Dialogue Sapientia, featuring Professor Peter H. L. Lai JP, formerly Secretary for Security of Hong Kong and Professor Richard Cullen, Visiting Professor at the Faculty of Law, on various dimensions of the Future of Hong Kong. A lively discussion took place on the position of Hong Kong before and after the handover vis-a-vis China, including interactive exchanges on the constitutional arrangement of "One Country Two Systems".

February 2019





GUIDED TOUR TO THE HONG KONG COURT OF FINAL APPEAL BUILDING

A guided tour to the Hong Kong Court of Final Appeal Building in Central was co-organised with the Faculty of Law. Participants learned a lot about how the Court functions on a daily basis, as well as the history of the Court building. They also took part in an ad hoc audience with Mr. Justice Andrew Cheung PJ. The former Chief Judge of the High Court was free and kind enough to meet participants briefly, taking questions from the audience about various aspects of judging and the administration of justice in Hong Kong.

February 2019



INTERVIEW WITH PROFESSOR IAN GRENVILLE CROSS SC, FORMER DIRECTOR OF PUBLIC PROSECUTIONS

A GLC delegation conversed with Professor Grenville Cross QC, SC, a leading criminal justice analyst, and formerly Director of Public Prosecutions of Hong Kong. Professor Cross shared his views on a diverse range of important issues of constitutional interest, including the role of public prosecutors in the administration of justice, and the future of the rule of law in Hong Kong.

February 2019



PUBLIC ADMINISTRATION EXPLORER VISIT TO THE OFFICE OF THE OMBUDSMAN

A GLC delegation visited the Office of the Ombudsman. The Chief Investigation Officer of the Ombudsman's Office, Ms. Karen Cheng, kindly met with the participants and shared with them first-hand information about how the Ombudsman discharges its functions in investigating maladministration. The visit allowed students to acquire an insider's perspective into the system of administrative oversight of Hong Kong.

March 2019

GLOBAL FORUM BREXIT AND BEYOND - THE FUTURE OF EUROPEAN INTEGRATION

The GLC co-organised with the Department of Politics and Public Administration the Global Forum on Brexit and Beyond – The Future of European Integration. The forum featured three prominent speakers, namely Ambassador Carmen Cano, Head of the European Union Office to Kong and Macao, Dr. Nicole Scicluna, Honorary Lecturer at the Department of Politics and Public Administration, and Dr. Martin Chung, Assistant Professor at the Department of Government and International Studies, Hong Kong Baptist University. In-depth discussions during this inspiring event examined the various political and legal aspects of the United Kingdom's prospective exit from the EU as well as Brexit's impact on the future of European Integration, which were then supplemented by a nuanced debate on the possibility of a second and further referendums and their potential outlook, in the UK.



March 2019

PUBLIC ADMINISTRATION EXPLORER DIALOGUES SAPIENTIA ON ADMINISTRATIVE REGULATORS WITH PROFESSOR ALAN N. LAI, FORMER OMBUDSMAN

An interactive dialogue was organised featuring Professor Alan N. Lai, former Ombudsman and an Adjunct Professor at the Faculty of Social Sciences, exploring multiple dimensions of Administrative Regulation and Access to Information Law in Hong Kong. Various aspects of public administration including how to regulate the quality of governance were discussed in the dialogue.



March 2019

OUR PUBLICATIONS

REALIZING PUBLIC IMPACT THROUGH WORDS



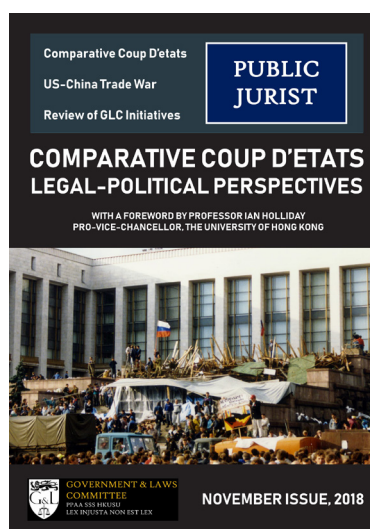
Public Jurist is the official magazine of students belonging to the GLaws programme. It is a non-partisan interdisciplinary publication that serves as a forum for diverse viewpoints on law and politics at the local and international levels, and promotes intellectual exchanges between students and academics on topics of interest relating to current public and legal affairs.



Issue 1

US-DPRK Détente
The Law and Politics Underlying it

Foreword by
Professor Michael Hor
Dean of the Faculty of Law



Issue 2

Comparative Coup d'etats
Legal-Political Perspectives

Foreword by
Professor Ian Holliday
Pro-Vice-Chancellor
(Teaching and Learning)



Issue 3

Meet the Jurists
Government and Laws 20th Anniversary

Foreword by
Mr. Trevor T. W. Wan
Editor-in-Chief
Public Jurist

HONG KONG JOURNAL OF LAW AND PUBLIC AFFAIRS

香港法律與公共事務學刊

The Hong Kong Journal of Law and Public Affairs (HKJLPA) is the first student-edited law and political science journal in all of Asia. The Journal publishes articles in both English and Traditional Chinese from researchers, teachers, practitioners, and students all over the world. It accepts submissions in all areas broadly related to the intersection between law and politics. As the GLC's in-house flagship publication, the Journal is committed to promoting a stronger understanding of cutting-edge issues that lie at the nexus of law and politics at the international and domestic levels, and to offering a robust platform for the exploration of ideas that will guide how societies are organised and governed.

HKU GOVERNMENT AND LAWS PROGRAMME

**BACHELOR OF SOCIAL SCIENCES
(GOVERNMENT AND LAWS) &
BACHELOR OF LAWS**



MISSION

**To educate principled leaders who will
advance the public interest and the rule of law**

WHAT IS HKU GOVERNMENT & LAWS?

Celebrating its 20th anniversary in 2019, HKU Government & Laws (GLaws) is an elite undergraduate programme in public affairs that no serious student can afford to overlook. Since 1999, HKU GLaws has brought forth cohort after cohort of outstanding lawyers in public and private practice, government administrative officers (AOs), professors, business professionals, and leaders of the non-profit sector. The programme's mission is to educate principled leaders who will advance the public interest and the rule of law by offering innovative solutions to problems confronting our society and beyond.

WHY STUDY GOVERNMENT & LAWS TOGETHER?

Government and laws naturally go together. Politics gives rise to laws, and laws supply the framework through which public policy is debated, made, and enforced. The most important developments in our present age regularly feature the intersection of government and laws, be it BREXIT, nuclear disarmament on the Korean peninsula, trade disputes between major powers, transnational terrorism and human rights abuses, China's Belt-Road Initiative, and so on. It is virtually impossible for anyone interested in a career in law, public service, international governance, transnational commerce and business, and nongovernmental organisations to stand out in a crowd nowadays without a grasp of the principles and practice of government and laws.

WHAT IS SO SPECIAL ABOUT HKU GLAWS?

GLaws has a distinct educational approach. Unlike the stand-alone law degree, GLaws draws on multiple disciplines such as comparative politics, political philosophy, international relations, and public administration to nurture top-notch thinkers who are competent at attacking social and legal problems from all angles.

BE PART OF AN EMINENT TRADITION

HKU counts among its alumni Dr. Sun Yat-sen, the Founding President of Modern China; Lim Bo Seng, Singapore's national hero; Fu Bingchang, China's ambassador to Belgium and the Soviet Union; judges of the former Supreme Court of Hong Kong and the Hong Kong Court of Final Appeal, and numerous first class legal minds whose impact can be felt beyond Hong Kong. Politics and public administration have been taught at HKU for more than one century, since 1915, training generations after generations of public servants. Becoming an HKU GLaws student means following their footsteps towards greatness.

STUDY AT ASIA'S GLOBAL UNIVERSITY

HKU's Department of Politics and Public Administration and Faculty of Law are consistently ranked among the top in Asia and worldwide. Becoming an HKU GLaws student means having access to over 100 international experts on law and/or politics, many of whom conduct state-of-the-art research into how societies should be organised and governed.

THE PROGRAMME DIRECTORS

The Directors of HKU GLaws are Professor Eliza W. Y. Lee from the Department of Politics and Public Administration and Associate Professor Eric C. Ip from the Department of Law.

Professor Eliza W. Y. Lee, was formerly the Head of the Department of Politics and Public Administration at HKU. Her research looks into the politics of social policy development, civil society organisations, civic engagement, and collaborative governance in Hong Kong and elsewhere in Asia. An international expert in public administration, her work has appeared in leading journals in the field such as *Governance and Public Administration Review*.

Associate Professor Eric C. Ip, '08 himself an alumnus of GLaws, is an expert in comparative administrative law, the field that studies how and why legal mechanisms, such as judicial review, that regulate decisions and decision-making processes of governments vary across different jurisdictions and historical periods. Currently co-editing *The Oxford Handbook of Comparative Administrative Law*, he is also the author of the leading textbook on Hong Kong's legal system.

CAREER PATHS

Employers look not only for employees who are skilled in one professional discipline, but also in possession of knowledge in multiple fields to address significant issues that confront modern public and private organisations. GLaws enables you to acquire critical skills from a wide range of disciplines: political economy, philosophy, and law to strengthen your competitiveness. Knowledge of the law is considered an asset in many areas of employment. Most GLaws graduates have found positions in the legal and government sectors, but others have also excelled in a diverse variety of career fields such as journalism, business, academia, and non-government organisations. In short, GLaws is an excellent choice regardless of whether you intend to become a legal practitioner in Hong Kong or not.

HKU GLAWS PROVIDES ITS STUDENTS WITH GREAT FLEXIBILITY

GLaws students enjoy the flexible option of graduating with an BSocSc (Govt & Laws) degree in 4 years, or an BSocSc (Govt & Laws) & LLB double degree in 5 years. They are entitled to make an informed choice on whether to pursue the 4-Year Track or the 5-Year Track at the end of their second year, after they have studied a wide array of law courses such as administrative law, constitutional law, contract law, law and society, legal research and writing, legal system, and tort law.



HKU GOVERNMENT AND LAWS 20TH ANNIVERSARY 2019

The GLaws Programme formally enters its 20th year in 2019. Dedicated itself to nurturing top-notch legal and public professionals for two decades, GLaws has undoubtedly attained its status as a premier public affairs programme in all of Asia. In collaboration with the GLaws Programme and the Department of Politics and Public Administration, the GLC will launch a series of initiatives in celebration of the 20th anniversary of GLaws, including the publication of this inaugural volume of the Hong Kong Journal of Law and Public Affairs.

ADMISSIONS INFORMATION

Email: bssgl@hku.hk

Links to Admissions Viewbook 2019: ppa.hku.hk/programmes/ug/gl

The information above is correct as of October 2018. The Department of Politics and Public Administration and The University of Hong Kong reserve the right to alter or withdraw courses and amend other details without prior notice.

ACKNOWLEDGEMENTS AND SPECIAL THANKS

ACKNOWLEDGEMENTS

The Inaugural Volume of the Hong Kong Journal of Law and Public Affairs would not have come into being without the support from the following parties. The Editorial Board would like to take this precious opportunity to express our sincere gratitude to them:



**DEPARTMENT OF POLITICS AND
PUBLIC ADMINISTRATION
THE UNIVERSITY OF HONG KONG**

**Department of Politics and Public Administration
The University of Hong Kong**



Faculty of
Social Sciences
The University of Hong Kong
香港大學社會科學學院

**Faculty of Social Sciences
The University of Hong Kong**



**Faculty of Law
The University of Hong Kong**



**BSocSc (Govt & Laws) & LLB
Programme
The University of Hong Kong**

SPECIAL THANKS

The Government and Laws Committee would also like to express our gratitude to the following persons and parties who have kindly supported the numerous initiatives of the GLC and enabled their ultimate success. They are, in alphabetical order:

Mr. Adrian T. But
Mr. Kenneth Chen SBS, JP

Dr. Martin Chung
Lord Hoffmann NPJ
Ms. Vera Kobalia
Mr. Justice Robert Tang NPJ

Ambassador Carmen Cano
Mr. Justice Andrew Cheung PJ
Mr. Philip Dykes SC
Mr. Martin Hui SC
Mr. Thomas S. T. So
Mr. Patrick Wong

Ms. Karen Cheng
Professor Ian Grenville Cross SBS, QC, SC
Mr. Clive Grossman SC
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Ms. Amy Wan

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Mr. Paul Law
Mr. Isaac Ng
Mr. Alvin Yeung

EXTERNAL ORGANISATIONS

Home Affairs Bureau, HKSAR
Legislative Council, HKSAR
Office of the Ombudsman, HKSAR
The Hong Kong Court of Final Appeal
Hong Kong Bar Association

Department of Justice, HKSAR
Legal Aid Department, HKSAR
Herbert Smith Freehills
Mayer Brown
Asia Global Institute, The University of Hong Kong



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THE HONG KONG JOURNAL OF LAW AND PUBLIC AFFAIRS (HKJLPA)

The Hong Kong Journal of Law and Public Affairs (HKJLPA) is the first student-edited law and political science journal in all of Asia, established by the Government and Laws Committee, Politics and Public Administration Association SSS HKUSU (GLC) with full support from the Bachelor of Social Sciences (Government and Laws) and Bachelor of Laws Programme (BSocSc (Govt&Laws) & LLB / Government and Laws / GLaws) at The University of Hong Kong in 2018.

The Journal publishes articles in both English and Traditional Chinese from researchers, teachers, practitioners, and students all over the world. It accepts submissions in all areas broadly related to the intersection between law and politics, including but not limited to comparative constitutional law and politics, international law and relations, jurisprudence and political philosophy, and administrative law and public administration.

As the GLC's in-house flagship publication, the Journal is committed to promoting a stronger understanding of cutting-edge issues that lie at the nexus of law and politics at the international and domestic levels, and to offering a robust platform for the exploration of ideas that will guide how societies are organised and governed.

THE INAUGURAL VOLUME: CONFUCIAN DEMOCRACY AND CONSTITUTIONALISM

The Inaugural Volume of the Hong Kong Journal of Law and Public Affairs will be published in Fall 2019, in celebration of the 20th anniversary of the Government and Laws Programme at The University of Hong Kong.

The theme of the inaugural volume is "Confucian Democracy and Constitutionalism". For decades, scholars and practitioners have been theorizing and debating possible models for Western political institutions such as representative democracy and constitutionalism to operate in East Asian countries in which the traditional Confucian culture is deeply embedded within. This interdisciplinary study features essays from leading political science, philosophy and legal scholars that engage these theories and debates through investigating multiple East Asian jurisdictions such as China, Vietnam and Korea to further illuminate our understanding on the Region's political and constitutional future.

This inaugural volume also features a review of the GLC's initiatives over the past year, including various forums, visits to legal and political institutions and career events.

c/o Department of Politics and Public Administration
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**HONG KONG JOURNAL OF
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