

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

Publisher: Cambridge University Press (April 2016)

Language: English

ISBN-10: 1107106222

ISBN-13: 978-1107106222

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**

Hong Kong Journal of  
Law and Public Affairs  
2019, Inaugural Volume, 57  
© The Author(s) 2019  
Reprints and permissions:  
glchku6810@gmail.com

### 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

### Professor Bryan William Van Norden

Chair Professor, School of Philosophy, Wuhan University  
Kwan Im Thong Hood Cho Temple Professor, Yale-NUS College  
James Monroe Taylor Chair in Philosophy, Vassar College

Hong Kong Journal of  
Law and Public Affairs  
2019, Inaugural Volume, 58 - 65  
© The Author(s) 2019  
Reprints and permissions:  
glchku6810@gmail.com

This article reviews Professor Sungmoon Kim's outstanding and well-received book, *Public Reason Confucianism*.<sup>1</sup> 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.<sup>2</sup> In Vietnam, leaders of the independence movement also actively worked on a synthesis of Western constitutionalism and Confucianism, as documented by Bui Ngoc Son.<sup>3</sup>

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.<sup>4</sup> 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."<sup>5</sup> 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).<sup>6</sup> 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.<sup>7</sup> 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."<sup>8</sup> 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 20<sup>th</sup> 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."<sup>9</sup> 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...."<sup>10</sup> 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 ...."<sup>11</sup> 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."<sup>12</sup> 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."<sup>13</sup> For example, some reasonable people are theists, who believe that the ultimate goal of life is to seek, to know, and to love God,<sup>14</sup> 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."<sup>15</sup>

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."<sup>16</sup> Consequently, "political society exists for the sake of noble actions."<sup>17</sup> 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,"<sup>18</sup> 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."<sup>19</sup> 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.<sup>20</sup> For example, the politics of Mike Pence, the current Vice President of the US, may be considered a form of Christian political perfectionism.<sup>21</sup>

---

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,<sup>22</sup> while Joseph Chan defends a Confucian version of moderate perfectionism.<sup>23</sup>

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.<sup>24</sup>

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.<sup>25</sup> In addition, the House of Lords, although now generally considered to be "a ludicrous affront to the most basic ideas of democracy and accountability,"<sup>26</sup> 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/](http://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*.<sup>27</sup> 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.<sup>28</sup>

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."<sup>29</sup> 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 20<sup>th</sup> 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.)<sup>30</sup>

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),<sup>31</sup> a C-student (George W. Bush, who actually bragged that he "didn't learn a damn thing" in college),<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup>

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.<sup>35</sup> 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.<sup>36</sup> Countries where voting is mandatory, like Singapore<sup>37</sup> and Australia,<sup>38</sup> 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?<sup>39</sup>

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

Hong Kong Journal of  
Law and Public Affairs  
2019, Inaugural Volume, 66 - 71  
© The Author(s) 2019  
Reprints and permissions:  
glchku6810@gmail.com

**Dr. Hui-Chieh Loy**

Associate Professor, National University of Singapore Department of Philosophy

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

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.<sup>2</sup> 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.<sup>3</sup> 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 emphasizes 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.”<sup>4</sup> (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

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

Hong Kong Journal of  
Law and Public Affairs  
2019, Inaugural Volume, 72 - 76  
© The Author(s) 2019  
Reprints and permissions:  
glchku6810@gmail.com

Dr. Jaclyn L. Neo

Associate Professor, National University of Singapore Faculty of Law

## I. Confucianism and the Non-Liberal Constitutional Movement

Professor Kim Sungmoon's *Public Reason Confucianism*<sup>1</sup> 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".<sup>2</sup> As Walker emphasizes, they are united as a category by their negation of the principal liberal affirmations prioritizing individual rights and endorsing state neutrality.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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”.<sup>7</sup> 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”.<sup>8</sup> 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.<sup>9</sup> In addition, the idea that Confucianism can serve as a normative framework for constitutionalism is one that has received close exposition.<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup>

---

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.<sup>13</sup> 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 pluralism<sup>14</sup> 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.<sup>15</sup> 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 adaptation 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

Hong Kong Journal of  
Law and Public Affairs  
2019, Inaugural Volume, 77 - 83  
© The Author(s) 2019  
Reprints and permissions:  
glchku6810@gmail.com

## Professor Andrew Harding

Professor, National University of Singapore Faculty of Law

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 constitutionalism<sup>1</sup> 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.<sup>2</sup> Other scholars have tried to see how Confucianism affects or explains judicial reasoning; and this is not confined to constitutional cases.<sup>3</sup> 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.<sup>4</sup> 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 Thompson<sup>5</sup> and a right-wing political-economist such as Friedrich Hayek<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> Or perhaps it is the other way round. Karl Popper shredded this idea in *The Open Society and its Enemies*.<sup>10</sup> 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*, 5<sup>th</sup> 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,<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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 19<sup>th</sup> century; his was a lone voice in stressing the binding nature of social values in relation to government and capitalism.<sup>15</sup> 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.<sup>16</sup> In matters concerning the *preservation* of culture, there is, it seems, value in al-

16 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.<sup>17</sup> 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

---

17 Goldie, Mark (ed) (2010), *A Letter Concerning Toleration and Other Writings*, Indianapolis: Liberty Fund.

their rights (of participation and property) than their rites.<sup>18</sup>

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.<sup>19</sup>

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

Professor, City University of Hong Kong College of Liberal Arts and Social Sciences

Hong Kong Journal of  
Law and Public Affairs  
2019, Inaugural Volume, 84 - 89  
© The Author(s) 2019  
Reprints and permissions:  
glchku6810@gmail.com

## 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."<sup>1</sup> 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

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."<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup>

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

<sup>4</sup> 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.