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CONSTITUTIONALISM AND THE RULE OF LAW: CONSIDERING THE CASE FOR ANTECEDENTS

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As a scholar of constitutionalism, I found Tom Ginsburg's, *Constitutionalism: East Asian Antecedents*, both informative and intriguing, like all of his excellent scholarship.[1] But I lack the expertise to evaluate his characterizations of the political and legal histories of China, Japan, and Korea, so the contribution I attempt in this response is conceptual: I seek to identify questions that I believe scholars should consider, rather than argue for definitive answers to those questions. If there is a critical aspect to these comments, it is not that Ginsburg is wrong on any substantive point. It is that the focus of his analysis may lead us to neglect features of East Asian traditions that represent challenges to, rather than anticipations of, modern written constitutionalism—challenges that, if we attend to them, might prove instructive.

My starting point is the relationship of what Ginsburg calls "constitutionalism" to the more general topics addressed in many of the other contributions to this symposium: the "rule of law," or the very "idea of law" more generally. The original workshop papers, and those collected here, provide convincing evidence that many East Asian societies do have significant traditions of the rule of law—but those societies also display more ambivalence than some Western countries about the feasibility and desirability of such rule. To be sure, Western thinkers from Aristotle on have recognized the reality that causes ambivalence about law in many Eastern thinkers. Law, understood as a body of relatively fixed general rules, always needs to be applied to particular situations—and generally desirable rules can often produce less than desirable results when applied to particular situations that vary in some ways from those imagined by the people promulgating the rules. If the best outcomes are to be achieved in those cases, some de-

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1. *See generally* Tom Ginsburg, *Constitutionalism: East Asian Antecedents*, 88 CHI.-KENT L. REV. 11 (2012).

partures from the general rules, which is to say some departures from the rule of law, may be required. As Aristotle put it,

> [I]n situations where it is necessary to speak in universal terms but impossible to do so correctly, the law takes the majority of cases, fully realizing in what respect it misses the mark... [I]n a situation in which the law speaks universally, but the case at issue happens to fall outside the universal formula, it is correct to rectify the shortcoming, in other words, the omission and mistake of the lawgiver due to the generality of his statement. Such a rectification corresponds to what the lawgiver himself would have said if he were present... 2

Many of the papers in this symposium suggest that, though it is a matter of degree, in many East Asian societies, particularly those strongly shaped by Confucian traditions, there has long been a stronger emphasis than in the modern West on these limitations of law and the rule of law. Consequently, these political communities have placed greater faith in resolving disputes through reliance on the pragmatic application of unwritten social norms, rather than on the strict application of written general rules, in order to achieve harmonious and beneficial outcomes. This approach to dispute resolution, of course, gives decision-makers discretionary authority that may be subject to corruption, abuse, incompetence, and discriminatory decision-making, as most Asian, as well as Western scholars, recognize. Yet it still appears settled that both descriptively and normatively, one characteristic feature of East Asian perspectives is their comparatively greater stress on *not* conforming strictly to the rule of law, understood as the application of relative fixed general rules.

Tom Ginsburg focuses here not on the idea of law or the rule of law put so generally, but more specifically on "constitutionalism."[3] He sees constitutionalism as originally instantiated in the first modern *written* constitutions adopted in the U.S., France, and Poland in the late 1700s.[4] Ginsburg describes constitutionalism as an effort to limit government via law—it is the pursuit of the "ideal of limited government under law"—and he stresses that it involves more than efforts to limit particular subordinate agencies of government.[5] Ginsburg defines those attempts as simply "legality"—the rule of law applied by the top government officials to their subordinates.[6] Constitutionalism aims

2. ARISTOTLE, NICOMACHEAN ETHICS 141-42 (Martin Ostwald trans., 1962).
3. Ginsburg, *supra* note 1, at 12.
4. *Id.*
5. *Id.*
6. *Id.* at 17.

higher. It seeks to constrain whoever is regarded as sovereign in and over an entire government, whether the sovereign is a monarch or a democratic people.[7]

Ginsburg also indicates that in constitutionalism, these constraints on the sovereign are not merely procedural; they limit the substance of what the sovereign can do, along with the means through which the sovereign's ends can be pursued.[8] For example, not only must rituals be performed in certain ways; in some times and places gifts to the ruling court must be returned, and forced labor can be imposed only at seasonable times.[9] Constitutionalist restraints are also not purely normative.[10] They must be institutionalized in ways that involve some kind of minimally effective enforcement mechanism, such as the remonstrations of a Board of Rituals.[11]

Constitutionalism's constraints therefore act, Ginsburg suggests, as general means to limit governments from doing what they should not do, even as constitutionalism empowers them to do what they should do.[12] Constitutional limitations serve as specific means of achieving the advantages of precommitment—imposing restraints on short-term actions to achieve long-term benefits.[13] To sum up Ginsburg's view of constitutionalism in a somewhat fuller formula than he offers: constitutionalism means the use of written constitutions to limit and empower sovereigns by law, both procedurally and substantively, in order to maximize the beneficial contributions of governments and limit their dangers.[14]

I fully accept this definition of constitutionalism. Among other things, it enables us to consider two further potentially illuminating questions. The first is: what is the relationship of this notion of constitutionalism to "the rule of law" or the "idea of law"? Are they identical or distinct, and if distinct, in what ways? The second question is: do the East Asian concerns about the limitations of the rule of law I have men-

7. *Id.*
8. *Id.*
9. *Id.* at 21, 25.
10. *Id.* at 17.
11. *Id.* at 29.
12. *Id.* at 12-13.
13. *Id.* at 14-15.
14. *See id.* at 13-18. Ginsburg defines constitutionalism "in the simple way as limited government under law that could not be changed through ordinary means." *Id.* at 13. He defines constitutionalist norms as "those of *a legal character that constrain the sovereign itself, not merely the agents of the sovereign.*" *Id.* at 17.

tioned apply to Ginsburg's definition of constitutionalism—at all, or to a lesser, equal, or greater extent?

Let me offer some tentative answers. One might contrast "constitutionalism" and "the rule of law" by holding, as Ginsburg appears to do, that the rule of law is not as comprehensive as constitutionalism in ordering all of a government's basic institutions.[15] Perhaps the rule of law can be reasonably understood to bind only citizens or subjects of the law and some government officials or agencies, but not all, and particularly not the constitution's sovereign. I think there is something to this distinction, but it can be overstated. It strikes me more as a matter of degree.

On the one hand, the more we find in a political community institutions and actors that are not thought to be bound by law, the less likely we are to say that the rule of law exists at all in that community. The logic of the rule of law pushes in the direction of making it comprehensive—eventually applicable even to the sovereign, which would transform the "rule of law" into full-fledged "constitutionalism" in Ginsburg's terms. On the other hand, in every written constitution that I know, there are procedures by which the sovereign can alter that constitution, in most if not all respects.[16] Yet, if the sovereign can modify whatever constitutional constraints on sovereign power exist, then even "constitutionalist" regimes appear in practice not much more fully limited by law than systems offering mere "legality."

We might reasonably conclude, then, that constitutionalism rarely if ever imposes permanent procedural or substantive limits on sovereigns—or at a minimum, that constitutionalist regimes do not *have* to include any such permanent limits in order to be deemed constitutionalist. And if that is the case, then constitutionalism is generally, if not always, less than fully and finally comprehensive in the limits, powers, and substantive commitments it provides. If the logic of the rule of law pushes toward becoming more comprehensive in its regulatory impact, while the logic of constitutionalism generally does not require insulating much if anything from sovereign amendment, then the two concepts appear less distinct than they may initially seem.

The contrast between the rule of law and constitutionalism also becomes less sharp when we consider the second question I noted: the relationship of constitutionalism to the widely recognized need to

15. *See id.* at 11.

16. *See e.g.*, U.S. CONST. amend. V; 1958 CONST. art. 11, 58 (France); INDIA CONST. art 368.

modify strict adherence to written general rules in order to accommodate particular circumstances. Though Ginsburg rightly stresses that modern constitutionalism has come to rely extensively on written constitutions,[17] it also remains true, first, that we speak of some countries like Britain and Israel as having "unwritten," or at best partly written, constitutions. These modern Western societies have institutions and practices that impose limits on sovereign governments through invocations of norms and customs more than written rules. The Korean judicial decision in regard to the location of the capital in Seoul that Ginsburg cites[18] is a very comparable example of a court giving weight to what it sees as a binding but unwritten constitution. One can readily imagine a similar ruling by an English court should there be an effort to move the capital from London (the question of the historically rightful capital of Israel is, of course, far more intensely contested).

Second, as Ginsburg notes, written constitutional rules always have to be interpreted, and in many times and places they have been consciously and explicitly interpreted by judges, executive officers, and other officials in ways that seek to express and honor prevailing social norms, values, and practices.[19] Ronald Dworkin gained enduring international prominence by arguing that such broader social values have to have some place in any coherent constitutional jurisprudence.[20] He has long contended that sometimes it might be appropriate for constitutional courts to judge, on the basis of the most coherent and substantively persuasive accounts of moral values available to them, that some who violate laws should not be punished.[21] Instead the laws requiring punishment should be changed.[22] So for both these reasons, constitutionalism, too, involves supplements to, and sometimes departures from, written legal texts, not just in practice but also in principle. These features of written constitutionalism also make it, like the rule of law, less than fully comprehensive in ordering political life.

I suggest, then, that we see modern written constitutionalism as at one end of a spectrum of possibilities for instantiating the idea of the

17. Ginsburg, *supra* note 1, at 12.

18. *See id.* at 32 n.109 (citing Constitutional Court [Const. Ct.], 2004Hun-M554 & 556 (consol.), Oct. 21, 2004, (16-2(B) KCCR 1) (S. Kor.) (ruling that Korean President Roh Moo Hyun could not fulfill his campaign promise to move the capital to a different city because this would violate "constitutional custom," though not any express constitutional provision)).

19. *Id.* at 14-17.

20. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 106-07, 149 (1977).

21. *Id.* at 221-22.

22. *Id.* at 222.

rule of law. It is the pole of possibilities that places very strong emphasis on making the powers, the purposes, and particularly, the limits imposed by law as explicit as possible, as comprehensive as possible, and, especially, as binding on the sovereign as possible, with identifiable institutions (not necessarily courts) charged with enforcing those constraints. Yet even at this end of the pole, in practice written constitutionalism may not prove sufficient to resolve all disputes, and it may not bind the sovereign in many important respects, at least over time.

If this understanding is correct, then Ginsburg's paper provides evidence that the notion of constitutionalism is certainly not unknown or alien to East Asian societies. In fact, if written constitutionalism is not quite so comprehensive or as mechanically applicable as some of its proponents (not Ginsburg) have presented it as being, the gap between many traditional East Asian understandings of governance and constitutionalism may be even less than Ginsburg indicates.

Yet the gap persists nonetheless. Written constitutionalism still involves a significantly stronger embrace of written general rules to limit and guide governments than appears to have been characteristic of many East Asian societies throughout history and, in many cases, still today. To see precedents for constitutionalism in the past of East Asian societies like Japan and Korea is therefore not wrong. But to stress these precedents risks understating the ambivalence toward strict adherence to the rule of law that has clearly been a powerful presence in these societies (and far from absent in most Western societies). Such understatement might, in turn, circumscribe reflection on how far that ambivalence is justified, on what implications it might have for the practice of written constitutionalism, and on consideration of alternative ways to achieve the values that written constitutionalism pursues.

These concerns stem in part from my perception that, although Ginsburg's paper credibly identifies some examples in Japan and Korea of and precedents for constitutionalism as he defines it,[23] they are at best *weakly* constitutionalist examples. For Japan, Ginsburg first discusses Article XVI of the 604 C.E. Shotoku constitution, the provision that exhorts all authorities, presumably including the shogun, to honor an appropriate temporal schedule when requiring forced labor.[24] Ginsburg then cites the provisions of the 1232 C.E. *Goseibai shikimoku*

23. *See* Ginsburg, *supra* note 1, at 20-30 (describing precedents of constitutionalism in Japan and Korea).

24. *Id.* at 21-22.

governing land ownership and providing guidance to vassals, which some scholars believe helped to shield the rights of vassals against sovereign violations, and the 1336 C.E. Kemmu Formulary, which includes the requirement for the shogun to return gifts, among other provisions.[25] But, Ginsburg does not identify any institutionalized enforcement mechanisms for these restrictions, which is perhaps why he sometimes refers to them as only "quasi-constitutional,"[26] suggesting they are precedents for the idea of legal limits on sovereign power but not yet the real thing. He nonetheless concludes that they represent "genuine, albeit nascent, constitutionalism."[27]

For Korea, Ginsburg's examples are the promulgated codes and legislative writings of the Choson dynasty that provided guidelines for the conduct of many official rituals and procedures for making new laws.[28] The latter had to be ratified by a censorate and certified by a Board of Rituals, occupied by members of the bureaucratic-scholar class.[29] Ginsburg suggests that both the bureaucratic-scholars' deliberations and their remonstrations for violations of process and ritual did effectively constrain Korean kings, making these features of Korean governance evidence of "constitutionalism in practice."[30] He also notes that their impact was mostly on administrative matters and not substantive constitutional issues.[31] In the Korean case, then, there do appear to have been institutionalized enforcement mechanisms for written codes, but their scope clearly falls short of any comprehensive, substantive system of constraints on the sovereign and government—and Ginsburg does not indicate that anyone thought they were on the way to becoming such a system or should be on the way to becoming so. These therefore still seem examples, at best, of weak and limited constitutionalism.

More controversially, let me also suggest that it is at best debatable to see these historic practices as examples of "nascent" or "proto-" constitutionalism, as Ginsburg calls them.[32] Doing so carries the implication that it was and is normatively appropriate and empirically likely over time for these societies to become much more fully "constitution-

25. *Id.* at 23-26.
26. *See e.g., id.* at 25.
27. *Id.* at 26.
28. *Id.* at 27-30.
29. *Id.* at 29.
30. *Id.* at 30.
31. *Id.*
32. *See e.g., id.* at 18, 26, 28, 31.

alist," as Ginsburg has defined the term, relying heavily on institutionalized enforcement of written legal limits on sovereign power. It seems at least as plausible to conclude that although these East Asian societies do display awareness and some support for what Westerners see as constitutionalism, it has long been a very limited kind of support, both in principle and in practice. And that limited support has arguably not reflected these societies' "underdevelopment" so much as the longstanding doubts of many of their leaders and members about the desirability of unqualified reliance on the written rule of law—doubts that, again, seem characteristic of many East Asian political traditions.

Ginsburg's choices of evidence and emphasis appear to express a deep underlying confidence that those doubts are, for the most part, misguided. His arguments throughout suggest that he believes that establishing written constitutionalism, enforced by institutions that effectively sustain legal limits on sovereigns (whether autocrats or democratic majorities) is a very good thing for any political society. That is why he treats the discovery of historical precedents that may help further legitimate constitutionalism in East Asian societies as a good thing. If those indeed are Ginsburg's guiding beliefs, they are highly plausible ones, at least to me. As someone profoundly shaped by the political culture of a society that originated in a revolution against a distant centralized government acting in apparent violation of both written legal guarantees and unwritten constitutional norms, I too am inclined to believe that scholarship that provides reasons for East Asian societies to adopt systems and practices of written constitutionalism, as Ginsburg defines them, is on the whole very desirable. Yet, I feel obliged to register two worries. First, if we simply go through East Asian history looking for precedents not just for the "rule of law," but specifically for "written constitutionalism," we risk distorting that history, making it appear far more congenial to the modern adoption of Western-style written constitutionalism than is in fact true—even if we soften the distinction between "legality" and "constitutionalism" as I have suggested we can reasonably do. We may therefore not grasp the legal and political dynamics of those societies as well as we seek.

Second, and perhaps even more fundamentally, we may fail to learn important lessons for governance everywhere from the traditional East Asian doubts about not only the feasibility, but also the desirability, of constitutionalism and the rule of law in their strongest forms. Although it goes against the grain both of my own education and experience—indeed, precisely *because* it goes against the grain of my

education and experience, which may distort my judgment in these regards—I am reluctant to rule out, without a good deal of further reflection, the possibility that reliance on unwritten but commonly practiced social norms and pragmatic reasoning about their proper application may be preferable to written general laws in a wider range of circumstances than Western scholars tend to think. It seems prudent instead to try to understand as fully as possible just why many East Asian societies, particularly those strongly influenced by Confucian traditions, have often resisted written legalism accompanied by enforcing institutions and what the results of that resistance have been. Furthermore, it seems prudent to consider whether those results suggest that there may be places along the spectrum, ranging from overwhelming reliance on full-blown written constitutionalism to a much more limited practice of the "rule of law," that are not only more empirically descriptive of government practices in a wide range of locations, but actually more normatively desirable. I do not argue that this is the case; in fact I remain skeptical about whether it is so. But I do think scholars exploring constitutionalism and the rule of law in East Asia are likely to produce more penetrating analyses if they and we remain open to the possibility that at least some East Asian doubts about written constitutionalism may just be right.