Chicago-Kent Law Review

Volume 88
Issue 1 *Methodological Approaches to Asian Constitutionalism*

Article 5

December 2012

Excavating Constitutional Antecedents in Asia: An Essay on the Potential and Perils

Arun K. Thiruvengadam

EXCAVATING CONSTITUTIONAL ANTECEDENTS IN ASIA: AN ESSAY ON THE POTENTIAL AND PERILS

ARUN K. THIRUVENGADAM*

INTRODUCTION

Tom Ginsburg's exploratory article on the antecedents to constitutionalism in East Asia[1] is a valuable addition to the existing literature on Asian constitutionalism. My own research interests lie in constitutionalism in India specifically, and in Asia more generally, and I found his article both insightful and stimulating. Although I appreciate the scholarly trajectory invited by Ginsburg's article, I would like to flag some concerns, based on debates in Indian constitutional law on the use of historical and culturally grounded arguments, that should be considered by constitutional scholars who seek to make tradition-based arguments in relation to contemporary constitutional law in Asian societies. I emphasize that in many contemporary Asian societies, modern constitutionalism typically marks a radical departure from pre-existing legal traditions. Therefore, calls invoking pre-modern traditions in such societies that might approximate to contemporary practices of constitutionalism have to take note of some concerns that I will raise in this comment.

I begin by summarizing Ginsburg's argument, as I understand it. Ginsburg begins by examining the notoriously contested concept of constitutionalism through the lens of rational choice theory to identify what he asserts to be at its core: agency cost theory and precommitment theory.[2] He also distinguishes constitutionalism from the requirements of judicial review and legality to further narrow the focus of his historical inquiry.[3] With this narrowly defined notion of constitutionalism in hand, Ginsburg examines scholarship on historical docu-

* Assistant Professor, Faculty of Law, National University of Singapore. I am grateful to Ernest Caldwell, Juliette Duara, Michael Hor, Terry Nardin, and Victor Ramraj for constructive comments that improved this essay and helped me avoid errors and flaws of reasoning. I remain solely responsible for those that remain.

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

2. *See id.* at 13-18.

3. *See id.* at 17.

ments relating to legal and political institutions in China, Japan, and Korea.[4] After conducting a largely textual analysis, Ginsburg concludes that these East Asian societies "had elaborate constitutions in the Aristotelian sense" as well as "proto-constitutionalist institutions that embodied substantive precommitments by the sovereign."[5] He further concludes that these societies "were able to induce agents to work for sovereigns through a combination of normative exhortation and institutional structure that constrained arbitrary behavior on the part of both,"[6] and therefore (with some qualifications) "we can indeed speak of an East Asian constitutionalist tradition."[7] Ginsburg ends by encouraging more studies to expand the relatively limited range of historically informed scholarship on constitutional law in East and Southeast Asia.[8]

I. THE VIRTUES AND PROMISE OF GINSBURG'S ANALYSIS

On my reading, Ginsburg's article has many virtues. First, by boldly identifying some core ideas at the heart of constitutionalism, it raises issues that go beyond the scope of his discussion in ways that invite scrutiny, given the continuing debate over the meaning of constitutionalism.

Second, as in other writings, Ginsburg moves beyond the traditional focus on countries in the Global North. The corpus of comparative constitutional law, despite encouraging trends in recent years, continues to be dominated by Western experience and concerns. Ginsburg's article expressly seeks to "call[] into question the Western narrative of exceptionalism, in which constitutionalism and the rule of law are seen as distinctive Western contributions."[9] Ginsburg's argument in this essay will hopefully lead to similar historically-oriented studies of other constitutional traditions that are under-studied in the existing literature.

Third, Ginsburg's call for a turn to history is motivated by a desire to strengthen the roots of modern constitutionalism in the societies

4. *See id.* at 18-30.
5. *Id.* at 31.
6. *Id.*
7. *Id.* at 13.
8. *Id.* at 32-33.
9. *Id.* at 11.

that he studies.[10] In his earlier work, Ginsburg insightfully charted the course of contemporary constitutionalism in several East Asian nations by displaying a sophisticated understanding of the constitutional politics that led to dramatic changes in the constitutional cultures of countries such as South Korea, Taiwan, and Mongolia.[11] In this work, he explains how modern constitutionalism came to be grounded in these countries after they successfully transitioned to democracy between the late 1980s and early 1990s and he illustrates how these countries witnessed the emergence of strong constitutional review.[12] A striking claim made by Ginsburg—as noted by one reviewer—was the fact that "the establishment of constitutional review in new democracies is largely a function of politics and interests" rather than being "a reflection of macro-cultural or societal factors."[13] Although Ginsburg's earlier analysis emphasized the importance of focusing on contemporary political factors—rather than historical or cultural factors—for understanding the emergence of constitutionalism in new democracies,[14] this article can be seen as encouraging the use of historical and cultural arguments for strengthening contemporary constitutionalism.[15]

II. SOME CONCERNS OVER THE TURN TO HISTORY IN ASIAN CONSTITUTIONALISM

Having set out the positive attributes of Ginsburg's analysis, I now focus on some concerns about the implications of his analysis and methodology. The first of these flows from the last virtue identified above. While I appreciate his (unstated) motivation in strengthening the roots of modern constitutionalism in East Asia, I worry that he ig-

10. *See, e.g., id.* at 13, 30-31 (concluding that "there are some materials in the East Asian tradition that do approximate those features associated with the modern concepts of constitutions and constitutionalism," like precommitment).

11. *See* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003).

12. *Id.*

13. Ran Hirschl, Book Review, 13 LAW AND POL. BOOK REV. (Dec. 2003), http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/Ginsburg1203.htm (reviewing TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003)).

14. *See id.* ("Ginsburg examines the politics of constitutional transformation and design in [new Asian democracies]—all of which underwent a transition to democracy in the late 1980s and early 1990s—as well as their newly established constitutional courts' struggle to maintain and enhance their stature within political environments that lack an established tradition of judicial independence and constitutional supremacy.")

15. *See* Ginsburg, *supra* note 1, at 13 (asking "whether we can indeed speak of an East Asian constitutionalist tradition. The answer is a qualified yes. East Asia has long had notions of limited government and constraint on authority and had, at certain times and places, genuine institutional constraints on authority.").

nores the possibly deconstructive implications that a turn to history might have for contemporary constitutionalism in the societies on which he focuses or for other societies in Asia. To make this point clear, I rely on two examples. The first of these draws from a case cited in Ginsburg's article, while the second is from an Asian jurisdiction to which, following his call for historically-oriented research in other Asian constitutional systems, Ginsburg's analysis could be usefully extended: India.

A. *The Korean Constitutional Court's Decision in the* Capital City Case

To illustrate the manner in which his historical inquiry may be relevant to contemporary constitutional issues, Ginsburg cites a single example: the *Capital City Case* decided by the Korean Constitutional Court in 2004.[16] In this case, the Korean Constitutional Court ruled upon the constitutionality of a statute that sought to move the nation's capital away from Seoul.[17] In striking down the law, the Constitutional Court of Korea relied upon the notion of an unwritten "customary" convention that had the force of law and would override statutory law that was inconsistent with such custom.[18] The majority of the Constitutional Court held that since Seoul had been the capital of the nation since the time of the Choson dynasty, it should remain so; thus, the Court interpreted the provisions of the Korean Constitution to give force to such a conclusion.[19] Ginsburg argues that, to the extent that the Constitutional Court draws attention to aspects of constitutional law dating from the Choson dynasty that his analysis characterizes as a constitutionalist regime, the Constitutional Court was correct to invoke this historical argument that served to enhance "the normative power of the Court's assertion."[20]

On its face, this case seems like a good example to support Ginsburg's argument that reliance on history and pre-modern constitutional traditions can strengthen an understanding of contemporary

16. *Id.* at 32. *See* Constitutional Court [Const. Ct.], 2004Hun-Ma554 & 566 (consol.), Oct. 21, 2004, (16-2(B) KCCR, 1) (S. Kor.), *reprinted in* DECISIONS OF THE KOREAN CONSTITUTIONAL COURT 112 (2006), http://www.ccourt.go.kr/home/att_file/library/decision_2004.pdf [hereinafter *Capital City Case*].

17. *Capital City Case*, *supra* note 16, at 122.

18. *Id.* at 142.

19. *Id.* at 138-39.

20. Ginsburg, *supra* note 1, at 32.

constitutional issues.[21] However, examining this case in greater detail shows that the issue is more complex.

The Korean Constitutional Court ruled 8:1, with 7 judges holding the law unconstitutional through a single judgment, one judge concurring separately in the result, and one judge dissenting through a separate judgment.[22] In what follows, I focus on the facts of the case and the actual judgments handed down by the majority and the dissent to identify some troubling implications of the majority's reliance on the argument from history and tradition.

The *Capital City Case* arose from an interesting set of facts.[23] In the 2002 Korean Presidential elections, Roh Moo-Hyun campaigned as the Grand National Party's candidate and made several electoral pledges.[24] The most significant of these was a promise that he would relocate the capital from Seoul in order to solve the problem of overpopulation and to facilitate the equal development of other areas in Korea.[25] In December 2002, Roh Moo-Hyun was elected the sixteenth President of South Korea.[26] To fulfill his campaign promise, President Roh's government initiated "The Special Act on the Establishment of the New Administrative Capital" (hereinafter "New Capital Act") to build a new capital in the Chungcheong area.[27] As noted in the majority judgment, the New Capital Act passed in the National Assembly (which sits as a unicameral Parliament) on December 29, 2003, by an overwhelming majority, garnering 167 votes out of the total of 194 members.[28] Only thirteen members voted against the Act, while fourteen abstained.[29] Soon thereafter, in January 2004, the New Capital Act was promulgated as law.[30] The petitioners who brought the case before the Korean Constitutional Court in July 2004 consisted of a group of public officials, city council members, and citizens drawn from across the nation.[31] This group challenged the constitutional validity of the New Capital Act

21. *Id.*

22. *Capital City Case*, *supra* note 16, at 143-44.

23. The background context of the case and the details of the several judgments issued are succinctly analyzed in Jonghyun Park, *The Judicialization of Politics in Korea*, 10 ASIAN-PAC. L. & POL'Y J. 62, 75-87 (2008).

24. *Id.* at 75.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Capital City Case*, *supra* note 16, at 117.

29. *Id.*

30. *Id.*

31. *Id.* at 118.

by contending that it violated a number of their constitutionally protected rights, such as the right to vote on referendum and the rights to equality, travel, and the pursuit of happiness.[32]

The majority judgment of the Constitutional Court, as noted earlier, found in favor of the petitioners and held that the New Capital Act violated the right of citizens to be involved in revisions to the Constitution guaranteed under Article 130 of the Constitution.[33] This provision applies to explicit attempts at revising the Constitution, and the provision confers a participatory right on citizens.[34] It mandates that any attempt to revise the Constitution be made pursuant to a vote by citizens through a national referendum.[35] On its face, the application of this provision to this case is puzzling because the New Capital Act did not seek to revise or amend any textual provision in the Constitution.[36] Indeed, that foundational document does not have any textual provisions relating to the location of the capital of the national government of Korea.[37] The majority judgment conceded this crucial fact when it noted that "[t]here is no express provision within . . . our Constitution that states 'the capital is Seoul.'"[38] However, this fact did not deter the majority judgment from drawing on historical facts combined with an intriguing interpretive strategy to reach its final conclusion.

The series of steps adopted by the majority to support its reasoning merit close scrutiny. The majority judgment began its analysis of this issue by emphasizing that the dictionary meaning of "Seoul" is "capital," and the present Seoul area had continuously been the capital of Korea for over six hundred years, since the establishment of the Choson dynasty in 1392.[39] The majority judgment then asserted that these facts gave rise to the existence of a "constitutional custom . . . with respect to the location of the capital [in Seoul], in light of the historical, traditional[,] and cultural circumstance of our nation."[40] The majority argued that while the primary source of constitutional law was the text of the Constitution, there was also space for recognizing the value of "unwritten" constitutional rules or "customary consti-

32. *Id.*
33. *Id.* at 143.
34. *Id.* at 123.
35. *Id.* at 122.
36. *Id.* at 170 (Jeon, J., dissenting).
37. *Id.* at 133.
38. *Id.*
39. *Id.*
40. *Id.*

tutional law."[41] The majority judgment argued that the existence of the capital in Seoul for over six hundred years gave rise to a customary constitutional principle that Seoul would continue to be the capital of the nation.[42]

Taking this argument further, the majority judgment argued that once a legal norm is acknowledged as a principle of customary constitutional law, it has the same legal effect as the written text of the Constitution.[43] This result would therefore mean that any legislative enactment that sought to change the location of the capital would amount to a revision of the text of the constitution, requiring adherence to the procedure set out in Article 130 of the Constitution.[44] The majority reasoned that, because a national referendum had not been called in deference to the demands of that provision, the New Capital Act violated the fundamental rights of the petitioners under Article 130 of the Constitution.[45]

Justice Jeon Hyo-sook fundamentally challenges this entire line of argument in her dissenting judgment.[46] She began her judgment by acknowledging that Seoul had historically been the capital of South Korea.[47] However, she disagreed with the importance accorded by the majority to this fact and criticized the majority for inferring "a normative constitutional proposition that 'Seoul should be the capital' from [the] factual proposition that 'Seoul is the capital.'"[48]

Instead, Justice Jeon highlighted the fact that when the law came up for debate in the National Assembly, it had been passed by an overwhelming mandate and had garnered votes by members across the political spectrum, including those of members from within the ruling and the major opposition parties.[49] Justice Jeon placed great emphasis on this fact, since the National Assembly was a representative body of all citizens of Korea, and the Constitution mandated that its actions in passing legislation be accorded due respect and consideration.[50]

41. *Id.* at 130.
42. *Id.* at 138-39.
43. *Id.* at 139.
44. *Id.*
45. *Id.* at 143.
46. *Id.* at 165 (Jeon, J., dissenting).
47. *Id.* at 166.
48. *Id.* at 167.
49. *Id.* at 166.
50. *Id.* at 170.

Turning to the argument advanced by the majority on "customary constitutional law," Justice Jeon was willing to concede the legitimacy of this interpretive category.[51] However, she strongly argued against treating any such principles on par with the written Constitution.[52] She noted that at best such customary principles could play a supplementary role, and could only aspire for supplemental, rather than equal, force.[53] She argued that not treating this interpretive category as such would result in the dangerous situation where an unwritten, "customary principle" could lead to the overriding of written, textually enshrined principles of the Constitution.[54] She also hinted at the potentially arbitrary nature of this interpretive category by noting that the majority judgment had identified only certain features as potentially falling within this category, including the capital, the Korean language, and the Korean alphabet.[55] Justice Jeon argued that even for these features, it was the National Assembly that had the requisite legitimacy to decide whether they should be varied in accordance with the wishes of the people, whom the National Assembly represents better than any other institution in Korea.[56] Justice Jeon therefore refuted every single step in the reasoning of the majority's judgment and concluded that since no violation of Article 130 had occurred, the petitioners had no cause of action.[57]

When Ginsburg endorses the majority judgment in this case, he does not address the significant points made in Justice Jeon's dissent.[58] As Justice Jeon shows with admirable clarity, the category of "history" or "tradition" is invoked by the majority judgment to thwart a policy that a popularly elected President sought to implement with legislative support, not only of his ruling party, but also of the main opposition parties. In such a situation, the use of a textually-unsupported historical argument by what is essentially an unelected body is set against the policy choice of more representative wings of government that has greater interpretive weight and also conforms with the written text of the Constitution. I do not want to suggest that judges are never justified in thwarting the "will of the majority" by adopting modes of inter-

51. *Id.* at 167.
52. *Id.*
53. *Id.*
54. *Id.* at 168.
55. *Id.* at 169.
56. *Id.*
57. *Id.* at 173.
58. *See* Ginsburg, *supra* note 1, at 32.

pretation that go beyond the constitutional text. However, the classic justifications invoked for doing so—namely, for the protection of rights of historically oppressed minorities or women—simply do not apply in this case.

Jonghyun Park's analysis of the *Capital City Case* references the reaction of several Korean constitutional scholars to the decision.[59] After noting that the majority's reasoning found supporters among some constitutional scholars, Park observes that other constitutional scholars criticized the majority's rationale on several grounds.[60] One line of criticism argued that, in a civil law system such as the one in place in Korea, it was "absurd" to contend that a principle of customary constitutional law could equal the weight given to a written provision.[61] Other scholars argued that such principles were potentially dangerous and invoked the specter of attempts by Mussolini and Hitler to repudiate democracy.[62]

What I found particularly interesting was Park's observation that the Court's attempt to invoke traditional understanding of Korean law provided support to "conservative Confucian scholars."[63] Park notes that these scholars sought to use the idea of customary constitutional law to defend their traditional understanding of family and to oppose progressive action by civic groups which were seeking to jettison the male-oriented "family head system" (*Hojujedo*).[64] Although Justice Jeon Hyo-sook never explicitly articulates this as a reason, I found it striking that the first woman appointed to the Korean Constitutional Court opposed a move that would make it easier to invoke notions of traditional Korean law and culture that would inevitably have worrying implications for issues relating to gender and minorities. In other parts of Asia, calls for invoking pre-modern notions of culture, tradition, and law have been viewed with concern by those pursuing rights of women and minorities for precisely this reason. As we shall see, such concerns have been expressed in the context of family law issues in contemporary India as well.

My emphasis here is on the potential uses of arguments based on tradition, especially when they conflict with other interpretive categories and in situations where a genuine clash exists between the de-

59. Park, *supra* note 23, at 78.
60. *Id.* at 78-79.
61. *Id.* at 79.
62. *Id.*
63. *Id.* at 86.
64. *Id.*

mands of tradition and those of the constitutional choices made by more recent generations.

B. *The Controversy Over Calls for Invoking Traditional and Pre-modern Understandings of Law and Constitutionalism in India*

The Constitution of India, which came into force in January 1950, was one of the first formal constitutions to be adopted in the decolonization era that followed the end of the Second World War. For this reason, India's Constitution was closely studied by framers of several constitutions that were adopted across Asia and Africa in the 1950s and 1960s. India's Constitution thus came to be an influential model over time, influencing the drafting process of future constitutions, such as the constitution-making process in South Africa in the 1990s.[65]

Although the Indian Constitution combined elements of legal regimes that existed in pre-modern, pre-colonial and colonial India, the Constitution of India sought to mark a fundamental rupture from those pre-existing legal systems by incorporating institutions and elements that were new and informed by the modern, progressive, and nationalist ideas of its framers. In a recent study of the motivations of the framers of the Indian Constitution, Uday Mehta argues that Nehru and his colleagues in the Indian Constituent Assembly "view[ed] the present as the disjuncture between the past and the future, rather than the connecting tissue that linked the two."[66] While acknowledging the desire of the framers to make radical departures from what came before, it is important to note, as Mehta emphasizes, that the Constitution of India was not a "revolutionary" document because it continued many elements of earlier legal and constitutional orders.[67] Indeed, one scholar asserts that as much as seventy-five percent of the new Constitution was derived from the last major colonial statute used to govern India, the Government of India Act of 1935.[68] For this reason, in Indian political discourse, critics argue that the Indian Constitution was drawn

65. *See, e.g.*, Arun K. Thiruvengadam, *The Global Dialogue among Courts: Social rights jurisprudence of the Supreme Court of India from a comparative perspective, in* HUMAN RIGHTS, JUSTICE AND CONSTITUTIONAL EMPOWERMENT 264, 272 (C. Raj Kumar & K. Chockalingam, eds., 2007) (noting that "[i]n the early 1990s, when drafts of the South African constitution were being actively considered, several detailed studies of the Indian constitutional experiences with social rights were conducted by South African scholars.").

66. Uday S. Mehta, *Constitutionalism, in* THE OXFORD COMPANION TO POLITICS IN INDIA 15, 16 (Niraja Gopal Jayal & Pratap Bhanu Mehta eds., 2010).

67. *Id.* at 19.

68. SUBHASH C. KASHYAP, OUR CONSTITUTION: AN INTRODUCTION TO INDIA'S CONSTITUTION AND CONSTITUTIONAL LAW 5 (4th rev. ed. 2005).

from foreign and alien ideas and did not represent the ideas of law and justice held by the people who have historically lived in the territory now known as India.[69] For some critics, this feature of the Indian Constitution results in a problem that, in their view, affects its foundational legitimacy.[70]

In 2010, the Constitution of India completed sixty years of functioning. While the constitutional project in India continues to face great obstacles and problems, there is general agreement among constitutional scholars that the project has been successful, at least in terms of endurance and in the achievement of some of the founding goals, even as many others remain unfulfilled.[71] The contest over the success of constitutionalism in India occurs over many fronts and diverse issues. To some extent, those who question the foreignness of the provisions of the Constitution have had to mute their criticism as it has become evident that some of those "foreign" ideals have taken root in the soil of Indian constitutionalism. These include the decision of the framers of the Constitution to grant all Indians universal adult suffrage at a time when women and ethnic or religious minorities did not have the right to vote in several "developed" nations.[72] This has not, however, caused such a critique to vanish completely because there continue to be areas where the very "foreignness" of constitutional concepts and ideas continue to be fundamental obstacles to the attainment of a robust constitutional culture that is also rooted in the Indian social milieu. The contested debate over India's model of constitutional secularism is an example of an issue where critics continue to maintain that the system in place is unsuited to the Indian context.

This near-constant tension in Indian constitutionalism is evident in the way debates are structured over several constitutional issues. Three such issues demonstrate the controversial nature of any assertion that seeks to invoke historical claims in Indian constitutional law.

69. RAMACHANDRA GUHA, INDIA AFTER GANDHI: THE HISTORY OF THE WORLD'S LARGEST DEMOCRACY 107-10 (2008).

70. See, for instance, the complaint of one member of the Constituent Assembly, K. Hanumanthaiya, who lamented that while some of his fellow nationalists had wanted "the music of [indigenous instruments such as the] *Veena* or *Sitar*", the end-result was "the music of an English band." The allusion is to the foreign origins and content of many of the provisions of the Constitution. 7 CONSTITUENT ASSEMBLY DEBATES 616 (Nov. 4, 1948) (statement of K. Hanumanthaiya).

71. THE SUCCESS OF INDIA'S DEMOCRACY (Atul Kohli, ed., Cambridge Univ. Press 2001).

72. Arun K. Thiruvengadam and Gedion Hessebon, *Constitutionalism and Impoverishment: A complex dynamic*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 165 (Michel Rosenfeld & Andras Sajo eds., 2012)

An early heated debate around these issues occurred within the Constituent Assembly, where some members who supported Gandhi's critique of Western civilization, argued that the new constitution should avoid the perils of totalitarianism inherent in ideas of a strong state prevalent in Western constitutional models.[73] The Gandhians argued that independent India should opt instead for a decentralized system that took as its starting point the village or *panchayat* system that had historically been the principal unit of governance in pre-colonial India.[74] This move was opposed by several influential members of the Assembly. B.R. Ambedkar, the Chairperson of the Drafting Committee and the champion of the cause of Dalits (who had historically faced great injustices under the Hindu caste system) vehemently opposed the idea.[75] Ambedkar argued that "these village republics have been the ruination of India" and famously asked: "What is the village but a sink of localism, a den of ignorance, narrow-mindedness and communalism?"[76] Ambedkar's outburst was met with some equally strong comments by advocates of the Gandhian *panchayat* system, one of whom asserted that Ambedkar's views were founded on an ignorance of Indian history.[77] Ultimately, however, the framers chose a centralized model of governance featuring a federal system that leaned towards the center and concentrated power in institutions located in the capital city of Delhi. This did not mean a complete defeat for the *panchayat* system. As a compromise, a provision encouraging the establishment of *panchayats* was relegated to a relatively unimportant part of the Constitution.[78] As it happened, later political events caused the *panchayat* system to witness a resurgence in the mid-1980s. *Panchayats* are now more salient in the contemporary Indian constitutional order, though no close observer would claim that the institution in its modern contemporary form has any relation to the way it operated in earlier times.

A similar compromise was also adopted for the second issue I focus upon here: the system of personal laws that continue to exist

73. *See, e.g.*, CONSTITUENT ASSEMBLY DEBATES, *supra* note 70, at 212-13 (Nov. 5, 1948) (statement of Damodar Swarup Seth). *See also id.* at 1130 (Dec. 30, 1948) (statement of Pocker Sahib Bahadur).

74. *See, e.g., id.* at 285 (Nov. 6, 1948) (statement of Shibban Lal Saksena); *id.* at 350 (Nov. 9, 1948) (statement of N.G. Ranga).

75. *Id.* at 38-39 (Nov. 4, 1948) (statement of B.R. Ambedkar).

76. *Id.* at 39.

77. *See id.* at 219 (Nov. 5, 1948) (statement of H.V. Kamath); *id.* at 285 (Nov. 6, 1948) (statement of Shibban Lal Saksena); *id.* at 350 (Nov. 9, 1948) (statement of N.G. Ranga).

78. *See* INDIA CONST. art. 40.

alongside the modern constitutional framework in India. The Indian Constitution guarantees equality and freedom from discrimination based on gender, religion and other markers of identity.[79] It also guarantees the right to freedom of religion.[80] The compromise adverted to earlier enables religious communities in India to be governed by their specific religious codes in relation to family law matters, such as those affecting matters of inheritance and succession, marriage, divorce, custody, guardianship.[81] This recognition is another feature of the contemporary Indian legal order that seeks to recognize that the political unit, now known as the Republic of India, was not formed on a clean state and that its laws and people carry the imprint of prior legal regimes. In this instance, recognition is sought to be granted to the legacies of religious legal traditions such as the Hindu and Islamic traditions. For all other matters, such as those affecting public and criminal law, Indian citizens are treated on par, but in matters falling within the realm of these "personal laws," they are subject to different legal regimes. A scholar who is critical of "this contradictory embrace of individual rights and group rights" argues that "the personal law system creates both differential rights within the family for Muslim, Hindu, and Christian citizens, and inequality for women."[82]

Scholars who celebrate the existence of legal pluralism find the continuance of personal laws to be a salutary trend, critical as they are of uniform, hegemonic traditions of law.[83] Nevertheless, women and disempowered minorities within each religious tradition continuously assert their constitutionally guaranteed rights to demand equal treatment on par with men and dominant groups within each religious tradition. When such claims are presented before courts and other legal institutions, the courts are confronted with difficult questions that expose the contradictions underlying the compromise that cannot be easily sorted out in ways that are legally defensible. Women's rights activists emphasize that women are disadvantaged twice over—once by the forces that advocate for legal plurality in the constitutional order, and again by the forces of tradition in the personal law regime that applies to them.[84] This disadvantage prevents them from enjoying full

79. *Id.* at art. 15(1).

80. *Id.* at art. 25(1).

81. *See id.* at art. 40.

82. VRINDA NARAIN, RECLAIMING THE NATION: MUSLIM WOMEN AND THE LAW IN INDIA 5 (2008).

83. *See, e.g.*, WERNER MENSKI, COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA 277 (2d ed. 2006); WERNER MENSKI, MODERN INDIAN FAMILY LAW 349-55 (2001).

84. *See* Narain, *supra* note 82. *See generally* FLAVIA AGNES, FAMILY LAW (2011).

citizenship rights on par with male citizens.[85] The tension in family law in India is therefore similar to that analyzed by Park's article in relation to Korea.

A third example is an important ongoing court case before the Supreme Court of India. In February and March 2012, the Supreme Court of India heard oral arguments in a constitutional challenge to a criminal statutory provision dating back to the colonial era that criminalizes sexual intercourse between males.[86] In this case, groups asserted that the criminal provision in question violates the constitutionally guaranteed rights of LGBT individuals.[87] Earlier, the Delhi High Court, in its judgment in the case of *Naz Foundation v. Government of NCT Delhi*, "read down" the provision to exclude private sexual intercourse between males, holding that without such a reading down, the provision would violate the constitutional rights to equality, privacy, and dignity of LGBT individuals.[88] The case was brought on appeal to the Supreme Court by an assorted group, which consisted of religious bodies and groups, some of whom argued that allowing homosexual intercourse went against the cultural and religious traditions represented across India.[89] This case shows that the liberal democratic and progressive vision emphasizing the importance of individual rights sought to be advanced by the text of the Constitution is in deep tension with other visions of law and tradition that continue to co-exist in Indian society. Both sides draw upon their particular visions of history, but such debates are not easily resolved because the protagonists question the specific historical narratives advanced by their opponents. Given this backdrop, calls for examining the history of traditions of constitutionalism that existed in India prior to the colonial era are not viewed as neutral or objective agendas.

Ginsburg's analysis brings to mind similar attempts undertaken by scholars in India, such as the comprehensive study of the *Dharmashastras* by P.V. Kane published between 1930-1962 that runs across

85. *See* Agnes, *supra* note 84.

86. *Verdict reserved on appeals in gay sex case*, THE HINDU, March 27, 2012, *available at* http://www.thehindu.com/news/national/article3250607.ece

87. *Id.*

88. Naz Foundation v. Government of NCT of Delhi, (2009) 160 D.L.T. 277 (India), *available at* http://lobis.nic.in/dhc/APS/judgement/02-07-2009/APS02072009CW74552001.pdf.

89. *See* Atiq Khan, *Muslim Clerics Feel Family System Will Be Destroyed*, THE HINDU,July 3, 2009, *available at* http://www.hindu.com/2009/07/03/stories/2009070361341800.htm ("Homosexuality does not jell with India's 'mizaaj' [cultural ethos] and cannot be tolerated in our society.") To be clear, similar sentiments against the High Court's judgment were voiced by representatives of all major religions in India.

five volumes and 6,500 pages.[90] Explaining his motivations for the study of ancient Indian practices relating to the law, Kane states as follows:

> It may be asked: What in these days is the use of the study of the theory and practice of government in ancient India? It may be conceded that the situation in which we find ourselves now and in which we shall be placed in the near future is unique and much light cannot be thrown by a study of the past on the solution of the problems that will have to be tackled by us. But that study has certain useful purposes to serve.
>
> The study of the past will give us hope and convey the assurance that we have in the past conducted governments and administrations of vast empires, that we have evolved theories and practices which were not inferior to those of some of the most advanced nations of the world, that allowed the opportunities and scope, we may rise equal to what the circumstances may demand of us.[91]

It is striking that Ginsburg seems motivated by similar concerns, which are, as I have indicated earlier, laudable goals. Nevertheless, one has to be careful about the methodology of such a study and the conclusions one draws. To demonstrate this concern in an area I am more familiar with, I focus upon such studies conducted by a contemporary scholar named M. Rama Jois. Rama Jois' 1984 book, *Legal and Constitutional History of India*, is a recognized text in Indian law schools and has been cited as authoritative in judgments by courts.[92] More recently, in 2000, he published the second edition of *Seeds of Modern Public Law in Ancient Indian Jurisprudence*.[93] In both these works, Rama Jois conducts a close analysis of ancient Indian texts and sources of law, and, particularly in the second book, argues that analogues for many concepts in the modern Indian constitutional system can be traced to ancient Indian concepts of law. In both books, Rama Jois argues that the ancient Indian principle of *Rajadharma* (law governing kings) is a concept equivalent to what we mean by constitutionalism in the modern sense.[94] Rama Jois trawls through, and cites extensively from, a vast array of sources including the *Dharmashastras*, the *Smritis*, and other important treatises to back this claim.[95]

90. *See* PANDURANG VAMAN KANE, HISTORY OF DHARMASASTRA: ANCIENT AND MEDIAEVAL RELIGIOUS AND CIVIL LAW (2d ed. 1968-1975).

91. 3 PANDURANG VAMAN KANE, HISTORY OF DHARMASASTRA: ANCIENT AND MEDIAEVAL RELIGIOUS AND CIVIL LAW (2d ed. 1968-1975).

92. M. RAMA JOIS, LEGAL AND CONSTITUTIONAL HISTORY OF INDIA 579 (1984) [hereinafter JOIS, LEGAL HISTORY]

93. RAMA JOIS, SEEDS OF MODERN PUBLIC LAW IN ANCIENT INDIAN JURISPRUDENCE (2d ed. 2000).

94. *See id.* at 25.

95. JOIS, LEGAL HISTORY, *supra* note 92, at 49-50.

However, Jois makes some concessions that lead to doubts about his claims, such as the following:

> It is no doubt true that there was no forum before which any violation of the provisions of *Rajadharma* could be questioned. The king himself, who was expected to obey those laws, was the highest court, and the *Smritis* provided no forum for challenging the action of the king on the ground that it was in violation of *Rajadharma*.[96]

This calls into question, rather fundamentally, whether the principles of *Rajadharma* can be understood as constitutionalist in the modern sense, if they did not bind the kings who had to enforce them. As we have seen in Ginsburg's article, Ginsburg recognizes the importance of satisfying this requirement before attaching the label of a constitutionalist regime to a historical situation.[97]

In other places, Rama Jois makes claims about the unity of the Indian people and nation in ancient India that seem to contradict what historians, political theorists and sociologists have to say about the state of the ancient Indian polity.[98] While there were sophisticated systems of governance in place in ancient India, it is not at all clear that analogues of modern ideas of nationalism and popular sovereignty were also present within those systems. This points to a greater problem with much of Rama Jois' analysis: the sources he cites to show that modern notions were anticipated by those in ancient India are invariably textual sources. While the translations and attempts to show parallels between thinking in ancient and modern Indian contexts are interesting, without the benefit of evidence that these texts were actually applied in practice and formed the basis of actual trends in governance, the study of such texts alone provides inconclusive material for asserting whether practices of governance in ancient India conformed to what we would now call constitutionalist practices. Scholars seeking to follow Ginsburg's call for further such studies should bear these considerations of methodology and interpretation in mind.

96. *Id.* at 585.

97. *See, e.g.*, Ginsburg, *supra* note 1, at 15.

98. JOIS, LEGAL HISTORY, *supra* note 92, at 581. Jois asserts, "While it is a historical fact that the territory of India so described was divided into several sovereign states ... By virtue of the governance of the same laws on all matters including *Rajadharma*, the entire population of this country constituted themselves into one *People* or *Nation* notwithstanding the innumerable political divisions constituting separate and independent states or territories under different kings or rulers." *Id.* This statement is deeply problematic, as there is little evidence that the people who lived during the time being described here were familiar with the modern notions of citizenship, country, nation and "One People."

CONCLUSION

Although I share the broad outlook that informs Ginsburg's historically-oriented analysis of constitutionalism in East Asia, I have sought to draw attention to potential problems of making historically-grounded arguments in relation to contemporary Asian constitutionalism. American constitutional scholarship is quite familiar with the problems of the "turn to history" that it has encountered since the era of "originalism" was inaugurated in the late 1970s and early 1980s. However, a concern that does not emerge in that discourse, but is particularly salient for constitutional discourse in Asia, is the possible neglect of the important consideration—to which Ginsburg's earlier work has done much to sensitize us—that in many Asian societies, contemporary constitutional practice reveals radical departures from pre-existing traditions of law and constitutionalism. Drawing upon the Indian experience, I have sought to provide examples of three specific situations where such problems typically arise.