

Chicago-Kent Law Review

Volume 88
Issue 1 *Methodological Approaches to Asian
Constitutionalism*

Article 2

December 2012

Introduction

Ernest Caldwell

Terry Nardin

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

Recommended Citation

Ernest Caldwell & Terry Nardin, *Introduction*, 88 Chi.-Kent L. Rev. 3 (2012).
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol88/iss1/2>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

INTRODUCTION

ERNEST CALDWELL AND TERRY NARDIN*

Terms such as “globalization,” “internationalization,” and “harmonization” in political and legal discourse invite two, sometimes contradictory, approaches within comparative studies: one emphasizing sameness, the other, difference. The first articulates universals derived from the dominant legal cultures as a basis for identifying similarities with “other” legal cultures.¹ This quest for “sameness” is further driven by western-derived political or legal concepts and institutions, which were exported to, imposed on, or transplanted into, non-western societies over the past few centuries. The second approach argues that global connectivity has led to increased contextual variation associated with a proliferation of hybrid systems. In place of similarity, one finds a heightened sense of global plurality concerning the very topics, concepts, and institutional frameworks informing contemporary discourses on law and politics.²

Instead of retaining static characterizations of certain western-derived concepts and institutions, scholars are now arguing that comparative law and comparative political theory should engage with non-western modes of thought and practice as potential sources of new understandings of politics, law, and society. But how does one engage the “other” so as to learn something about one’s own legal culture? That is the primary question framing the papers of this symposium. Each paper uses a distinct method to engage East Asian constitutional experience and considers what can be learned when such methods are applied.

* Ernest Caldwell is Lecturer in Chinese Law at the School of Oriental and African Studies (School of Law), University of London. Terry Nardin is Professor of Political Science in the Department of Political Science at the National University of Singapore.

1. The link between these two phenomena has been noted by James Gordley, *The Universalist Heritage*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 31–45 (Pierre Legrand & Roderick Munday eds., 2003); Esin Örücü, *Comparatists and Extraordinary Places*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS*, *supra*, at 467–92.

2. See for example, Vivian Grosswald Curran, *Dealing in Difference: Comparative Law’s Potential for Broadening Legal Perspectives*, 46 *AM. J. COMP. L.* 657, 657–68 (1998); WERNER MENSKI, *COMPARATIVE LAW IN GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA* 3–17 (2006).

The papers for this symposium issue were originally written for a workshop titled, *East Asian Perspectives on Legal Order*, held at the National University of Singapore in August 2010. The Asia Research Institute and the Faculty of Arts and Social Sciences at the National University of Singapore, with support from the Shibusawa Ei'ichi Memorial Foundation and the Social Sciences and Humanities Research Council of Canada, jointly organized the workshop. It was the second in a series of six workshops in a collaborative international project, *East Asian Perspectives on Politics: Advancing Research in Comparative Political Theory*. This workshop brought together more than thirty distinguished scholars of legal and political thought from East and Southeast Asia, Europe, and North America to explore the potential for non-western legal theories to advance studies of political and legal theory, and to interrogate many of the accepted "universals" informing such studies.

The effort to think more broadly about law in relation to political order is especially urgent in the case of East Asia, a region historically considered by Western observers to be without law (as they understood it). Such judgments reinforce Western conceptions of legal order while obscuring the sources of law in Asian societies. These include legal codes and case law – whether indigenous, borrowed, or imposed – as well as legitimizing practices such as those of Shinto in Japan or extra-judicial rituals in Taiwan. Rich sources of East Asian legal thought and practice can also be found in domains that modern Western legal theory does not typically consider to be law-related, such as kinship or religion. The "custom" that was dismissed as part of an anti-nomian "rule by man" ethos during the imperial periods is today regarded as a significant basis of political association. Under communist rule, too, activities often considered to be religious or ethical but not as "legal" in the categories of Western legal thought were upheld as sources of legitimacy and institution building. This symposium argues by example that political and legal theory should build upon the wider range of legal experience intimated by these East Asian ideas and practices.

The path toward understanding these ideas and practices is not always straight or clearly marked. For example, current East Asian understandings of law sometimes translate East Asian legal ideas into invisible Western conceptual schemes, making it hard to distinguish "native" and "foreign" ideas. How can legal systems be studied comparatively without imposing categories that in the past made East

Asian societies appear “lawless”? Some East Asian states have retained European legal practices from a colonial past; Hong Kong and Singapore are only the most obvious examples. Others, like Japan in the Meiji era and China in the late imperial and early republican periods, adopted Western institutions in the absence of colonization. How have Asian and Western thinkers theorized these syncretic legal orders? What is the relationship between historical legal practices and their current forms, and what light does this throw on how law is understood in these societies?

In China and the East Asian societies influenced by their philosophical and moral heritage, East Asian debates on law and legality were often framed as revealing a tension between “Confucian” ideals of virtue and moral persuasion and “Legalist” arguments for centralized state control backed by punishment. This dichotomy figured in the historical self-understanding of imperial Confucians in China and Japan and has been invoked to chastise the Maoist leaders of China’s Cultural Revolution. It also poses a more general puzzle about the sources of legal order that have been repeatedly examined throughout Chinese history: does this legal order come from the law itself or those who enforce it? Following Western incursions into East Asia in the nineteenth and twentieth centuries, the dichotomy between virtue and punishment was reframed as one between the “rule of law” and “rule of man,” thereby affirming Western legal categories. Yet, that dichotomy fails to give due attention to the extent to which some East Asian societies have assimilated Western law. For example, Meiji Japan and China adopted German legal codes. Today, East Asian legal scholars use Western legal concepts to generate supposedly “East Asian” views of law that manifest the blending of local and foreign ideas.

By engaging with East Asian legal ideas and practices, the Singapore workshop was designed to challenge and broaden how Western-educated political and legal theorists think about law. It aimed to support this critical rethinking by considering a wider range of ideas about law and its sources, aims, and limits than are commonly in the minds of such theorists. In doing so, it hoped to render Western political and legal theorizing a less parochial and more truly global enterprise.

The papers we have selected for the present symposium give particular attention to methodological issues in the study of Asian constitutionalism. If the purpose of comparing constitutional orders is to learn something not only about the “other” but also about oneself, how

does one compare? What are the pitfalls associated with comparing western and non-western constitutional orders?

The papers by Tom Ginsburg, Ernest Caldwell, and Michael Dowdle serve as the primary point of departure for six additional papers, which take the form of extended commentaries, two for each main article. This mirrors the highly effective format used during the workshop, which was designed to (1) develop a dialogue between scholars East and West; (2) increase awareness of cultural context when studying specific law-related topics; and (3) provide new categories of thought and practice not rooted in European or American ideas or practices.

Those aims also animate this symposium. A specialist in a specific field of Asian constitutional law writes each of the three main papers. Two commentators then discuss each paper. One commentator is a specialist in Asian legal/political thought who discusses the implications of the paper's thesis for the study of other Asian legal orders. The other commentator is a specialist in Western legal/political thought who considers the implications of Asian constitutional thought and practice for the study of the Western legal tradition and for comparative legal studies in general.

The first set of papers considers the existence of nascent constitutionalism within pre-modern Asian societies and its implications for contemporary constructions and interpretations of an Asian constitutional heritage. The lead paper, Tom Ginsburg's *Constitutionalism: East Asian Antecedents*, employs a "turn-to-history" approach. It sifts through the pre-modern histories of China, Japan, and Korea seeking political and legal theories as well as particular institutional features that suggest functional similarities to modern articulations of constitutionalism. The appeal of such an approach is evident by its application in several recent studies of non-western constitutional systems. These studies focus on uncovering conceptual equivalents to, or indigenous features amenable to, liberal constitutional values, such as rule of law, check-and-balance mechanisms, and rights protection.

Ginsburg is primarily concerned with what he considers to be a necessary constitutionalist element, that of "precommitment"—defined as an "action done . . . to restrain oneself from doing something that one would otherwise do because such restraint will itself directly improve one's future welfare"—and he ascribes proto-constitutionalist values to pre-modern East Asian administrative theories and institutions that constrain and limit actions of the government or the sover-

eign.³ The value of the method he employs is supported not only by its use by western scholars, but also by a similar practice carried out by judges in East Asia. Discussing the *Capital City Case*, Ginsburg shows how the South Korean Constitutional Court majority opinion invoked constitutional authority and historical precedent from Korea's pre-modern past to invalidate a legislated resolution to move the South Korean capital from Seoul. For Ginsburg, such an historical approach, which seeks functional analogs in pre-modern non-western societies to modern constitutionalist concepts or institutions, has the potential to sharpen our understanding of the contemporary functioning of legal transplants in the non-west and better make sense of the multiplicity of constitutional practices evident in the world today.

This turn-to-history methodology – which poses functional analogues between isolated pre-modern Asian theories and institutions, on the one hand, and a modern (often Eurocentric) conceptualization of constitutionalism, on the other – is not without critics, however.⁴ In his comment, Rogers Smith expresses strong sympathy to both the approach and goal of Ginsburg's paper but argues for a more nuanced, contextual understanding of the indigenous political and legal values attached to these historical theories and institutions – to which Ginsburg ascribes merely proto-constitutionalist value. Relatedly, Smith highlights the interpretive problems that arise from the teleology implied in labeling historical theories and institutions as “proto-” or “nascent” constitutionalism. In line with Smith's concerns, Arun Thiruvengadam voices a similar skepticism regarding the objectivity of such a methodology. By examining the sole dissenting opinion in the South Korean *Capital City Case* in conjunction with several Indian Supreme Court cases which make “historical” or “traditionalist” claims, Thiruvengadam highlights the inherently fraught and political nature of *history*, which bears weighty implications for its interpretation and application to constitutional debates.

The second set of papers focuses on methods of interpreting contemporary constitutional practice in East Asia, particularly China. Where the methodology advocated in Ginsburg's paper was predicated upon the pursuit of functional similarities, the lead paper for this sec-

3. Tom Ginsburg, *Constitutionalism: East Asian Antecedents*, 88 CHI.-KENT L. REV. 11, 14 (2012) (quoting Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 TEX. L. REV. 2055, 2057 (2003)).

4. For an overview of the functionalist methodology in comparative law, see Michele Graziadei, *The Functionalist Heritage*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS, *supra* note 1, at 100–27.

tion, Ernest Caldwell's *Horizontal Rights and Chinese Constitutionalism: Judicialization through Labor Disputes*, seeks to highlight the potential contributions of Chinese constitutional practices that are often perceived to be different from their Western counterparts.⁵ Caldwell observes that much of the criticism leveled at China's constitutional development is the result of analytical methods too invested in normative claims grounded in an American-centric constitutional paradigm.⁶ Such methods focus on Chinese political issues that impede the institution of US-style judicial review, which typically construe rights "vertically."⁷ These methods also fail to compare China's constitutional developments to those emerging from European constitutionalism (particularly the constitutional mechanisms of Scandinavian or Continental nations).

Caldwell examines a series of Chinese court cases involving employer-employee labor disputes in which lower court judges actively engaged in constitutional interpretation and openly invoked and enforced *horizontally* oriented socio-economic rights to prosecute those engaged in exploitative labor practices. Such interpretations are clearly different from the more commonly studied constitutional practice of judicial review. However, Caldwell links this practice of horizontal enforcement to the developing constitutional doctrine of "indirect effect" found specifically in Germany and increasingly elsewhere in Europe.⁸ Caldwell's analysis demonstrates that the study of Chinese constitutionalism need not be confined methodologically to the institutional paradigms or the rights discourse of American constitutionalism. His paper further shows that by broadening the comparison of China to include the constitutional systems of Continental Europe, the pursuit of difference can open unexplored realms of similarity.

5. Other scholars have noted the need to rely less on assumptions of continuity and argued that when conducting comparative research one should take the existence of difference seriously. See e.g., Curran, *supra* note 2; Pierre Legrand, *The Same and the Different*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS*, *supra* note 1, at 240-311.

6. For similar critiques of the Amerocentric dominance in comparative legal discourse, see Antoine Garapon, *La place paradoxale de la culture juridique Americaine dans la mondialisation*, in *EUROPEAN WAYS OF LAW: TOWARDS A EUROPEAN SOCIOLOGY OF LAW* 71-92 (2007). For a critique focused on such dominance as it relates to the study of China, see Michael Dowdle, *Of Comparative Constitutional Monocropping: A Reply to Qianfan Zhang*, 8 *INT'L J. CONST. L.* 977, 977-84 (2010).

7. That is, as individual rights held against the State.

8. There are several studies examining the phenomenon of 'indirect effect,' 'horizontal effect,' or 'privatization of the constitution.' See e.g., JÖRG FEDTKE & DAWN OLIVER, *HUMAN RIGHTS AND THE PRIVATE SPHERE: A COMPARATIVE STUDY* (2007); Christoph Beat Graber & Gunther Teubner, *Art and Money: Constitutional Rights in the Private Sphere?*, 18 *OXFORD J. OF LEGAL STUD.* 61, 61-73 (1998); Mattias Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 *GERMAN L.J.* 341, 341-369 (2006).

Like the methodology employed by Ginsburg, the methodological concern with difference that Caldwell advocates is also not without criticism. In his comment, Victor Ramraj acknowledges the value of destabilizing long-held, dominant interpretive paradigms when conducting comparative analyses, but he challenges Caldwell's continued reliance on a court-centric approach to the study of constitutionalism. Ramraj advocates exploring the potential for viable Chinese constitutional discourses and practices outside of the courts and even outside of the state. In contrast, Arif Jamal's comment attempts to draw Caldwell's argument supporting China's constitutional difference back into a normative debate over whether or not China's constitutional practice, devoid as it is of a judicial review mechanism, can indeed be representative of "true constitutionalism." Each of these comments forces us to reflect on the limitations of scope and of conceptual terminology when conducting comparative research.

The third set of papers directly engages the question of methodology, not just for the study of Asian constitutional thought and practice, but also for the greater field of comparative constitutional law. In the lead essay in this section, Michael Dowdle critiques the traditional approaches to comparative constitutional law – which he views as architecturally dominated by the liberal tradition – and proposes an alternative way of approaching comparative constitutional analysis that he calls "constitutional listening." Constitutional listening derives from a particular interpretive method developed by Donald Davidson, the principle of charity. It involves taking seriously the indigenous constitutional discourses of countries other than one's own, particularly countries whose political systems seem at first blush to be largely incompatible with standard (and presumed to be universal) criteria of constitutional government. By examining the constitutional discourse surrounding China's Draft Property Law, Dowdle argues that one advantage of the constitutional listening approach is that it helps us to better comprehend a fuller range of constitutional possibilities, which are often precluded by the assumed fixity of Eurocentric concepts of constitutionalism.

In their commentaries, Roy Tseng and Leigh Jenco strongly agree with Dowdle on the need to refine existing methodologies used to study non-western constitutionalism, and they join him in calling for more nuanced interpretive perspectives capable of balancing the view of the global with a contextualized vision emanating out of the local. But, each suggests some limitations in Dowdle's own method of consti-

tutional listening. Tseng believes that Dowdle paints a rather essentialist picture of liberalism and its dominance in constitutional discourse, arguing that it is in fact a multivalent tradition containing differing understandings of comparison, purpose, and practice. Tseng argues that if Dowdle is to contrast his constitutional listening approach with the liberal approach, a more refined understanding of the latter is necessary. Tseng also raises concerns over the ethical value of employing a morally neutral comparative methodology, such as constitutional listening. For Tseng, such moral judgments *should* be part of any cross-cultural examination.

For her part, Leigh Jenco argues that Dowdle's "constitutional listening" is itself embedded in Western assumptions – particularly an Enlightenment-informed concept of reason – that might obstruct its ability to achieve the goals it sets for itself. Furthermore, Jenco argues, similarity and difference should not be understood as *a priori* givens but as constructs created by the very act of comparison. She suggests that by incorporating this mode of self-reflexivity and by increasing receptivity to conceptual de-centering, Dowdle's method of constitutional listening could be instrumental in transforming the very terminology and conceptualization of constitutionalism.

Taken together, these papers suggest both the need to expand our understanding of constitutionalism and the difficulties of doing so. Not only are constitutional regimes less well insulated from one another than in the past but, the emergence of transnational and even global legal orders puts additional pressure on those regimes to respond to external influences. Moreover, constitutional thinking in all societies today is influenced not only by what is going on in other societies but by the transformation of the global legal order from one regulated by public and private international law into a complex hybrid of international, transnational, and supranational legal regimes. In understanding this emerging global order we would be wise to bear in mind that the constitutional ideas contributing to it are unlikely to be those of the west alone.