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CONSTITUTIONALISM: EAST ASIAN ANTECEDENTS

TOM GINSBURG*

INTRODUCTION

To what degree can traditional Asian political and legal institutions be seen as embodying constitutionalist values? This question has risen to the fore in recent decades as part of a new attention to constitutionalism around the world, as well as the decline in orientalist perceptions of Asia as a region of oppressive legal traditions.¹ As constitutionalism has spread beyond its alleged homeland in the West, it behooves us to ask about the relationship between the particular ideas that emerged in enlightenment Europe and North America with the previous political-cultural understandings of non-European societies. This inquiry has implications for thinking about legal transplants, and for our understanding of how constitutions work in the contemporary world. Ultimately, it calls into question the Western narrative of exceptionalism, in which constitutionalism and the rule of law are seen as distinctive Western contributions.

In conducting this inquiry, it is important to be clear on terminology. Constitution is a slippery concept: Sanford Levinson observes that “[T]he Constitution can be said to be a model instance of what the philosopher W. B. Gallie has labeled an ‘essentially contested concept.’”² Most societies of any scale have constitutions in the Aristotelian sense of *politeia*, defined as a set of fundamental legal and political norms and practices that are constitutive of the polity. This view is echoed in Dicey, who defines a constitution as “all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state.”³ Surely if this view is adopted, East Asian societies have had

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1. Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179 (2002).

2. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 124 (1988).

3. ALBERT VENN DICEY, *LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION* 24 (1885).

well-developed constitutions, as would any sizable entity with a functioning state.⁴

In modern times, the word constitution has come to acquire a more circumscribed meaning, associated with written texts that structure government and define the relationship between government and citizenry. Written constitutions are thought to have certain defining features (such as generality, textuality and endurance) and to perform various functions, including providing ideals for the society and integrating the nation.⁵ In both the broad informal sense of constitutive norms, and the narrower sense of a formal document defining institutions, constitutions are pervasive and nearly universal in large-scale polities. Having a constitution in either of these senses therefore says little about the character of a state's legal order.

Constitutions, however, are also associated with the narrower and empirically rarer concept of constitutionalism—the ideal of limited government under law.⁶ Associated with thinkers like Locke and others, constitutionalist ideals were instantiated in the first modern written constitutions found in the United States, Poland, and France at the end of the eighteenth century. And it is this concept that some scholars have deployed in their exploration of traditional East Asian legal structures, with some finding pre-modern analogues and others finding nothing that could be identified as constitutionalist in nature.⁷

There is a large conceptual literature wrestling with the idea of constitutionalism that we cannot even summarize here. As a historical matter, constitutionalism is an idealist project of the modern enlightenment, in which notions of liberal equality are paramount. As Stephen Holmes wrote, “[i]t involved not any possible organization of political life but an ideal form of organization that subordinated political incumbents to a higher law that they were forbidden, in principle, unilat-

4. Jaeyoon Song, *The Zhou Li and Constitutionalism: A Southern Song Political Theory*, 36(3) J. CHINESE PHILOSOPHY 424, 424-25 (2009); Sungmoon Kim, *Confucian Constitutionalism: Mencius and Xunzi on Virtue, Ritual and Royal Transmission*, 73 REV. POL. 371, 373 (2011).

5. BEAU BRESLIN, *FROM WORDS TO WORLDS: EXPLORING CONSTITUTIONAL FUNCTIONALITY* (2009).

6. David Fellman, *Constitutionalism*, in 1 *DICTIONARY OF THE HISTORY OF IDEAS: STUDIES OF SELECTED PIVOTAL IDEAS* 485, 491-92 (Philip P. Wiener ed., 1973).

7. Kazuyaki Takahashi, *Why Do We Study Constitutional Laws of Foreign Countries, and Why?*, in *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* 35, 35 (Vicki Jackson & Mark Tushnet eds., 2002) (Takahashi is typical in asserting that “the idea of constitutionalism is a foreign concept to us Japanese; . . . [b]efore we learned the idea from Westerners, we did not know the idea of imposing law on rulers.”). See also Kim, *supra* note 4, at 373 (asserting that there was Confucian constitutionalism).

erally to change.”⁸ It would surely be unfair to expect to find liberal constitutionalism, with its emphasis on equality, in a pre-modern era.

But defined in the simple way as limited government under law that could not be changed through ordinary means, constitutionalism is an ancient idea and one that is pervasive in the Western legal tradition.⁹ Indeed, any natural law constraint on government might be said to fulfill the definition.

In this article, I want to juxtapose East Asian analogues or antecedents of constitutionalism with a particular set of recent theoretical understandings of the concept of constitutionalism. These theories are grounded in rational choice theory, seeking to understand not only the ideational origins and justifications of constitutionalism, but also its functions. What functions does limited government play for rulers? What problems does it solve? And how were these resolved in East Asian societies that had loosely analogous institutions, even while preserving certain absolutist ideas?

The article begins with the rationalist theory of why we would want constitutionalism, focusing on the governance problems that it addresses. It then goes into a historical review of political and legal institutions in China, Japan and Korea that might have resolved similar problems of governance for rulers, focusing especially on textual documents. The emphasis on China, Japan and Korea is justified because they have been relatively under-analyzed in the modern legal literature, even as historians have made significant advances in unearthing pre-modern institutions in those countries. Finally, the article brings the two parts together to ask 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. I argue that these were a bit more developed in Japan, with its tradition of divided authority, than in China and Korea with their unitary views of power.

I. CONSTITUTIONS AND CONSTITUTIONALISM

Let us begin with a review of recent constitutional theory. I acknowledge at the outset that any rationalist theory, including ration-

8. Stephen Holmes, *Constitutions and Constitutionalism*, THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 189, 192 (Michel Rosenfeld & András Sajó eds., 2012).

9. Edward Rubin, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE 173-83 (2007) (contrasting medieval and modern constitutionalism).

alist theories of constitutions, are incomplete. Certainly I do not seek to elaborate a complete theory of what constitutions are or what they do at all times and places. But, it is also the case that recent theoretical developments can help to clarify what is distinctive, and what is not, about the archetypical constitutionalist state.

Rationalist theories have developed out of the social contract tradition. They usually begin by imagining a pre-constitutional universe in which each individual participates directly in decision-making about public goods, defined as those likely to be severely under-produced by private markets.¹⁰ Direct self-government would involve extensive discussion and consideration of alternatives before the group made a policy choice on any given matter. Such a world, however morally attractive, faces severe problems of transaction costs and accordingly, could operate only on a very limited scale. Constitutions facilitate the hiring of representatives—a government—to make decisions about public goods on behalf of the people or other principals. This creates a problem of agency, in which the people must ensure that government acts in accordance with its instructions. In these theories, traceable at least to Madison, the constitution limits government where it can do the most harm, and empowers government in areas where it can produce the most public goods.

A second kind of rationalist theory focuses on 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.”¹¹ The basic idea is that an individual’s long-term choices may not align with their short-term choices for each period. The conventional analogy is the story of Ulysses’ request to his crew to bind himself to the mast of his ship as it passed before the Sirens. Knowing that he would be tempted, Ulysses limited his own choices, thus increasing his mid-term welfare.¹²

While the Ulysses analogy has come under some attack, the story illustrates how a constitution helps resolve certain inter-temporal

10. JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962).

11. Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 *TEX. L. REV.* 2055, 2057 (2003).

12. JON ELSTER, *ULYSSES AND THE SIRENS* (1984); STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 163 (1995); Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195, 222–23 (Jon Elster & Rune Slagstad eds., 1988).

choice problems for a polity.¹³ The founding generation binds successor generations to pre-established rules and procedures. At the most basic level, this binding makes government possible, because it establishes institutional structures that can be relatively enduring.¹⁴ Precommitment can also divert political resources from insoluble problems (such as the best religion for a diverse society) toward soluble ones (such as how much should be spent on roads).¹⁵ It can make the promises of founding leaders believable. For example, in their influential account of England's constitutional underpinning of capitalism, Douglass North and Barry Weingast noted how the constitutional structure limited the ability of English Kings to expropriate resources.¹⁶ This in turn induced private investment. Absent a strong constitutional limitation on monarchical power, there would have been less investment and less development.

Precommitment theory is also rooted in contractual thinking, though it need *not* rely on a conception of rulers as agents of the people so is distinct from the Lockean notion of the social contract. Some constitutions, for example, have the character of peace treaties among warring groups, or bargains among a small set of oligarchs. Such actors will need to make binding commitments to each other; constitutions that are inter-temporally enforceable can facilitate such commitments.

There is some debate over whether describing this binding as "precommitment" really makes sense in that it is unclear whether one is binding oneself or future agents in the system.¹⁷ If precommitment is indeed not so much about committing the self so much as future actors, then precommitment rationales really collapse into a form of agency control. Not much turns on this distinction for our purposes. In either case, the function of the constitution is to make a promise believable and to extend the preferences of the founders forward into time.

Both agency cost and precommitment theories are in some sense regime-neutral as between dictatorship and democracy. Even though agency cost theory is conceived in modern terms as one in which the

13. For a retraction of the original analogy, see generally JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT AND CONSTRAINTS 1 (2000). See also Holmes, *supra* note 8, at 192.

14. Holmes, *supra* note 8, at 192.

15. CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 6–8 (2001).

16. Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 808 (1989).

17. Elster, *supra* note 13, at 7–8.

collectively sovereign people hire government agents to overcome collective action problems, one can also view the theory as having some efficacy even where there is no literal selection of agents by the principal. The Mencian tradition fits within this framework. No one in the imperial Chinese tradition believed that the people should have any direct role in the selection of government, but it was understood that the welfare of the people was a primary purpose of government.¹⁸ Without some minimum level of economic performance, government could become illegitimate and could be targeted with legitimate protest. Such protest was not directed at changing the identity of the authorities, or ensuring self-government; rather it was directed at criticizing government behavior and providing information. It can be seen, however, as a form of constitutional enforcement in the sense of incentivizing restraints on government action.

Note that agency cost theories of constitutionalism should not be confused with agency cost theories of administrative control. Norms that limit the authority of subordinate government agents are pervasive in any government operation of any size, and arise from the fact that the sovereign is always a principal itself vis-à-vis lower level staff. All rulers need agents, and all of them utilize systems of control. Sometimes these involve law. But such systems, which are analogous to modern administrative law, have quite a different purpose from constitutionalism, *which involves limiting the sovereign itself*. Constitutions, then, involve agency control when the government is viewed as an agent of a higher sovereign.

Constitutions facilitate effective recruitment of agents if the ruler agrees to be bound by certain procedural and substantive norms so as to motivate agents. Roger Myerson's account of the Court of the Exchequer, for example, describes the central problem of the King and Court in medieval England.¹⁹ The King needs to motivate agents to work for him, but also needs the ability to discipline wayward agents.²⁰ The problem arises when an agent sees another one being punished. If she is not convinced that the punishment is appropriate, the agent will herself begin to work less hard. It is essential, then, that the norms and procedures of punishing agents be clear and public so as to generate

18. WM. THEODORE DE BARY, *THE TROUBLE WITH CONFUCIANISM* 18–19 (1991); Elizabeth J. Perry, *Chinese Conceptions of "Rights": From Mencius to Mao—and Now*, 6 *PERSP. ON POL.* 37, 39 (2008).

19. Roger B. Myerson, *The Autocrat's Credibility Problem and Foundations of the Constitutional State*, 102 *AM. POL. SCI. REV.* 125, 125 (2008).

20. *Id.*

common knowledge about the bases of discipline. In this basic sense, even a dictatorship needs to have a set of constitutional norms, promises about the bases and procedures of punishing agents.

I should further elaborate what I think constitutionalism on this account is not. Michael Dowdle has criticized as ahistorical the notion that constitutionalism necessarily involves judicial control.²¹ Both as an understanding of Western development and what we are calling the East Asian analogues, judicial enforcement of constitutional norms is the exception rather than a *sine qua non*. I agree with Dowdle that the contemporary emphasis on judicialized constitutionalism is incomplete as an account of how effective constitutions have developed and actually operate. Neither judicial review nor judicialized constraint is an essential feature of constitutionalism, though they certainly reflect the fullest development of the phenomenon as conventionally understood.²² On the other hand, *some* institutional constraint seems a requirement. If the constraints are purely normative, then it is difficult to see what distinguishes constitutionalism from a system of religion or ethics.

It is also important to distinguish constitutionalism from the requirement of legality (which again was a feature of Chinese imperial governance). “Mere” legality, as expressed through the notion of *nulla poena sine lege*, is best seen as device to constrain lower level agents, and only forms a procedural limitation on the sovereign. But it does not amount to a substantive constraint, articulated in advance, in which a ruler is prevented from doing something that he or she would like to do.

The question here is what are the essential features that distinguish constitutionalism from the broader conception of binding norms on the one hand, and from “ordinary” law on the other. The answer I give is simple. Constitutionalist norms are those of *a legal character that constrain the sovereign itself, not merely the agents of the sovereign*. These constraints are precommitments, for they limit downstream action in a clear way, and facilitate mutual investment by both sover-

21. Michael Dowdle, *Public Accountability in Alien Terrain: Exploring for Constitutional Accountability in the People's Republic of China*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 344–45 (Michael W. Dowdle ed., 2006); Michael W. Dowdle, *On the Regulatory Dynamics of Judicialization: The Promise and Perils of Exploring “Judicialization” in East and Southeast Asia*, in ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA 24–27 (Tom Ginsburg & Albert H.Y. Chen eds., 2009).

22. William W. Van Alstyne, *Quintessential Elements of Meaningful Constitutions in Post-Conflict States*, 49 WM. & MARY L. REV 1497, 1507–11 (2008).

eign and subjects of the constitution. They are not limited to the norms associated with liberal constitutionalism.

The next sections of the paper will scour the East Asian tradition for constitution-like phenomena, particularly those involving some kind of clear precommitment or notion of agency control by an extra-governmental principal. We take China, Japan, and Korea in turn.²³ All the pre-modern governance arrangements in East Asia were authoritarian by any definition. Whether they were constitutional is another matter.

A. China

Because China is the wellspring of East Asian thinking about law, it is important to think about Chinese contributions to proto-constitutionalism. Accounts of the imperial Chinese legal system have long emphasized the combination of a theoretically unconstrained “son of heaven” at the center of the system with an elaborate system of institutionalized structures that provided actual constraint.²⁴ At an ideal level, the Confucian tradition had natural law elements, instantiated in the concept of ritual propriety, or *li* in Chinese, and scholars have analogized these constraints to constitutionalism.²⁵ The rules of decorum known as *li* provided normative constraints on the behavior of ruler and ruled alike.²⁶ Others have focused on other “constitutionalist” elements of the Confucian tradition, including the rectification of names (*zheng ming*) and the notion of rule by the sage.²⁷

Confucianism was famously opposed by legalist thought, which emphasized the value of uniform punishments, firmly administered, in the service of a sovereign ruler.²⁸ Legalist thinkers emphasize the lack of constraint on the sovereign itself; law was to be used to control

23. We leave Vietnam aside for the moment. *See generally* TA VAN TAI, *THE VIETNAMESE TRADITION OF HUMAN RIGHTS* (1988).

24. Sybille van der Sprenkel, *LEGAL INSTITUTIONS IN MANCHU CHINA: A SOCIOLOGICAL ANALYSIS* 28-38 (1977) (describing institutions). *See also* Jiang Yonglin, *THE MANDATE OF HEAVEN AND THE GREAT MING CODE* 11-13 (2011) (discussing scholarly debate over Mandate of Heaven).

25. Chaihark Hahm is a major figure in this area. *See generally* Chaihark Hahm, *Ritual and Constitutionalism: Disputing the Ruler's Legitimacy in a Confucian Polity*, 57 *AM. J. COMP. L.* 135 (2009). *See also* Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 *L. & SOC. INQUIRY* 763, 766-68 (2002).

26. Eric W. Orts, *The Rule of Law in China*, 34 *VAND. J. TRANSNAT'L L.* 43, 52 (2001).

27. Kim, *supra* note 4, at 375; Bui Ngoc Son, *Confucian Intellectual Origins of Constitutionalism*, in *GLOBAL CONSTITUTIONALISM* (forthcoming, 2012).

28. DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* 18 (1967).

agents and to exercise broader social control over the population. Legalism, then, reflects a kind of rule by law, rather than the rule of law ideal. Legalism, however, did not triumph, but was instead synthesized with Confucian institutions into a new fusion.²⁹

There were clearly several sources of ideas of naturalistic constraint that were ultimately embodied in positive law.³⁰ There was the moralistic admonition of the ruler to rule in accordance with the people's welfare, already mentioned above in the context of the Mencian tradition. In addition to orthodox Confucian sources, Huang-Lao ideas were influential in the second century B.C.E., and synthesized Legalist, Daoist, Mohist and Confucian notions of statecraft into a set of normative standards for all the major decisions of government.³¹ These included lawmaking, taxation, war and criminal justice.³² The Huang-Lao use of natural law "can be seen in part as an attempt to curtail the powers ceded a Legalist ruler."³³ Texts associated with this period have led some scholars to argue that the Chinese linkage of law with transcendent ethical standards was similar to the Greek ideas of natural law.³⁴

Beyond these ideal notions, a set of institutional structures such as elaborate bureaucratic hierarchies, meritocratic selection of state agents, rituals and duties of remonstrance among scholar-officials served to constrain the imperial will. No emperor, no matter how powerful, could ignore these institutionalized restraints. The imperial system was absolutist in form but limited in function.

The "constitutional" texts of the Chinese dynasty focused decidedly on agency control. As in Myerson's model, there was an emphasis on constraining rogue agents by elaborating clear limits on their behavior.³⁵ Furthermore, many of these constraints were embodied in legal texts. Consider several examples.³⁶ The Ch'in procedural manual, discovered in 1975, shows that from the very outset, the Chinese empire

29. *Id.* at 27-29.

30. Bodde & Morris, *supra* note 28; WM. THEODORE DE BARY, IRENE BLOOM, & JOSEPH ADLER, SOURCES OF CHINESE TRADITION 546 (Wm. Theodore de Bary & Irene Bloom eds., 2nd ed. 2000).

31. *See generally* R.P. PEERENBOOM, LAW AND MORALITY IN ANCIENT CHINA: THE SILK MANUSCRIPTS OF HUANG-LAO 27-102 (1993).

32. *Id.*

33. *Id.* at 140.

34. *See* Karen Turner, *Sage Kings and Laws in the Chinese and Greek Traditions*, in THE HERITAGE OF CHINA 86, 86 (Paul S. Ropp ed., 1990).

35. *See* Myerson, *supra* note 19.

36. Karen Turner, *War, Punishment and the Law of Nature in Early Chinese Concepts of the State*, 53 HARV. J. OF ASIATIC STUD. 285 (1993); Song, *supra* note 4, at 425.

was concerned with the problem of arbitrary decision-making by local officials; the Ch'in procedural manual also provided for agency control, providing detailed, written guidelines aimed to keep Ch'in functionaries accountable in their administrative functions.³⁷ The T'ang codes elaborated a complex structure of government and lawmaking, providing detailed limitations on what could be done.³⁸ The Q'ing codes had elaborate rules for punishing administrative officials.³⁹

Yet the formal ideas of legalized constitutionalism constraining the sovereign himself were not developed in China. One sees constraint through legality—the prior specification of rules and punishments—and an elaborate system of legal orders directed at state agents, but virtually no positive announcements of legal constraint on the will of the Son of Heaven himself. The Emperor surely has duties, and is exhorted to behave in accordance with an elaborate set of rules, many of which are written down and have the people's welfare in mind.

For this reason, few scholars have argued that anything approaching constitutionalism can be found in the Chinese tradition.⁴⁰ Indeed, this was part of the critique of 19th century reformers such as Liang Qichao and Sun Yat-sen, and is implicitly carried on by latter day proponents of building constitutionalism in China.⁴¹ Perhaps the critics overstate the case; but the overall sense is of an authoritarian legality, with limited areas of precommitment used mainly to motivate agents by ensuring their trustworthiness and fidelity.

B. Japan

1. Shōtoku Taishi

Japan's earliest "constitutional" document is the Seventeen-Article Constitution (*Jūshichijō kenpō*) of Shōtoku Taishi, the state-building patron of Buddhism of the Asuka era.⁴² Written in 604 C.E. and adopt-

37. See Katrina C. D. McLeod & Robin D. S. Yates, *Forms of Ch'in Law: An Annotated Translation of the Feng-chen shih*, 41 HARV. J. OF ASIATIC STUD. 111 (1981). See also Karen Turner, *Rule of Law Ideals in Early China?*, 6 J. CHINESE L. 1, 9–10 (1992).

38. See generally TANG LU SHU YI & MING LI, *THE T'ANG CODE: VOLUME I, GENERAL PRINCIPLES* (Wallace Johnson trans., 1979); Liang Zhiping, *Explicating "Law": A Comparative Perspective of Chinese and Western Legal Culture*, 3 J. CHINESE L. 55, 86–87 (1989).

39. THOMAS METZGER, *INTERNAL ORGANIZATION OF CH'ING BUREAUCRACY: LEGAL NORMATIVE, AND COMMUNICATION ASPECTS* 235 (1973). See also *THE GREAT QING CODE* (William C. Jones trans., 1994).

40. But see VICTORIA TIN-BOR HUI, *WAR AND STATE FORMATION IN ANCIENT CHINA AND EARLY MODERN EUROPE* (2005).

41. *BUILDING CONSTITUTIONALISM IN CHINA* (Stéphanie Balme and Michael W. Dowdle eds., 2009).

42. 1 SOURCES OF JAPANESE TRADITION 35 (Ryūsaku Tsunoda, et. al. eds., 1958).

ed as part of a broad set of Sinicizing reforms, the document reads as a Buddhist and Confucian exhortation to maintain harmony, chastise evil, and to obey authority.⁴³ It certainly plays the important function, often ascribed to modern constitutions, of helping to bind the nation and define its ideals. But its aspirational character has led to scholarly dispute as to whether or not the document can properly be considered a constitution. Carl Steenstrup, in particular, contends that Shotoku Taishi's "constitution" was not a constitution at all because it did not restrict any extant legislature.⁴⁴ He goes on to say it was not even a statute, because the will of the Soga was all that was necessary to effect or change any content.⁴⁵ On the other hand, Nakamura treats the document as constitutional, emphasizing the government's "firm establishment of exemplary ethical behavior among its officials," and utilizing higher law as a way to check the bureaucrats who operate the government.⁴⁶

Our key concepts are precommitment and agency control. There do seem to be at least two articles of the Shotoku constitution that implicate self-limitation of the government. Article XII involves the assertion of central authority of the central government: Provincial governors and district administrators are not to levy taxes on their respective peoples.⁴⁷ In a country there should not be two lords; the people should not have two masters.⁴⁸ "The Sovereign is the sole master of the people of the whole country. The officials appointed to administer local affairs are all his subjects. How can they levy arbitrary taxes on the people in the manner of the government?"⁴⁹

Art. XVI reads:

Let the people be employed (in forced labor) at seasonable times. This is an ancient and excellent rule. Let them be employed, therefore, in the winter months, when they are at leisure. But from Spring to Autumn, when they are engaged in agriculture or with the mulberry trees, the people should not be so employed. For if they do not attend to agriculture, what will they have to eat? If they do not attend to the mulberry trees, what will they do for clothing?⁵⁰

43. CARL STEENSTRUP, *A HISTORY OF LAW IN JAPAN UNTIL 1868* at 17 (1991).

44. *Id.*

45. *Id.*

46. HAJIME NAKAMURA, *HISTORY OF JAPANESE THOUGHT: 592-1868: JAPANESE PHILOSOPHY BEFORE WESTERN CULTURE ENTERED JAPAN* 8 (2002).

47. *Id.* at 242.

48. *Id.* at 12-13.

49. *Id.*

50. *Id.*

Both of these articles can be read as focusing on taxation authority. The former is a centralizing act, consolidating state tax authority. Since the character of the pronouncement is a top-down command, it is hardly constitutionalist in character, even as it “constitutes” authority. It seems to be about the sovereign asserting power and restricting agents of the sovereign in the mode of an authoritarian constitution.

The second provision, Article XVI, on the other hand, does include some substantive limitation on the sovereign, along the lines of the early Chinese restrictions on corvée labor.⁵¹ These date back at least to the Lu Buwei in the Third Century B.C.E.⁵² This article also concerns extractive authority, and presumably also limits non-sovereign governmental entities in the provinces. These can be seen as forms of agency control. However, it announces a limitation on the central government as well. Presumably, even the imperial authorities could not violate the temporal limitations on corvée labor.⁵³ This self-limitation does seem somewhat akin to modern constitutionalism—the government announces in advance one restriction on its authority. Knowing that their labor will not be subject to corvée in the productive season, people had incentives to accept the authority as non-abusive, and to invest sufficiently in their own productive activities. This provision in Shotoku’s document is quite akin to modern theories of constitutionalism and its role in promoting growth through productive investment.⁵⁴

Note a slight twist however. Whereas modern rationalist theories—in keeping with their liberal origins—emphasize a naturalized market sphere of private exchange, in which state activity is presumptively illegitimate, the East Asian tradition has a more organic view of the state. The nature of the self-limitation is driven by the conceptual duty of the state to facilitate economic well-being.⁵⁵ This Mencian notion appears to involve a specific set of constraints on the sovereign.

51. Corvée labor involved required work, unpaid, by people of low social status to contribute to state projects. The first Chinese emperor, Qin Shih Huang Di, was widely criticized for extreme use of corvée labor and so the Han Dynasty promulgated restrictions on its use. See Michael Loewe, *Former Han Dynasty*, in *THE CAMBRIDGE HISTORY OF CHINA, VOLUME 1: THE CH’IN AND HAN EMPIRES*, 221 B.C. – A.D. 220 at 103, 150 (Denis Twitchett & John K. Fairbank eds., 1987).

52. JOHN KNOBLOCK & JEFFREY RIEGEL, *THE ANNALS OF LÜ BUWEI* 174 (2000).

53. Loewe, *supra* note 51.

54. North & Weingast, *supra* note 16.

55. Perry, *supra* note 18.

2. Kamakura Bakufu

We now jump forward several centuries to the laws of the Kamakura period (1185–1333), the first shogunate.⁵⁶ This was a period marked by a split of authority between the emperor and shogunate (bakufu), located in Kyoto and Kamakura respectively. There was competition and conflict over power during the period. A central concern of the bakufu government was the resolution of disputes over land, particularly among the relatively new offices of *jitō* and *shugō* (translated respectively as “military estate steward” and “military governor”) that were created by the shogunate.⁵⁷ By specializing in dispute resolution among its vassals, the bakufu enhanced its legitimacy.⁵⁸

Kamakura law was characterized by a great emphasis on procedure and precedent. It was—by world historical standards—a remarkably well-developed system with emphasis on written proof, complex procedures, and a record of the judicial reasoning. As the number of disputes increased in the aftermath of the Jōkyū War (1221), the bakufu began to emphasize dispute resolution even more as a mechanism of legitimation and consolidated its central position in the governance milieu.⁵⁹ It did so largely to control its own vassals and others who were running amok in the post-war period. So dispute resolution, in this particular feudal context, had a lot to do with both social control and consolidating an administrative hierarchy.

As time went on, the Kamakura bakufu began to play a greater role in actively legislating; and this provided some need for constraints of a sort, as well as routine lawmaking procedures.⁶⁰ A key document here was the *Goseibai shikimoku* (“list of precedents”; the document is sometimes known as the Jōei Formulary) of 1232, a document enacted to govern land ownership and to guide the vassals.⁶¹ Though probably

56. Intervening Japanese legal documents such as the Taiho and Yoro codes of the eighth century were heavily influenced by the Chinese codes. The shogunate was the government of hereditary military rulers, who controlled Japan at various points in its history.

57. Jeffrey P. Mass, *The Kamakura Bakufu*, in *THE CAMBRIDGE HISTORY OF JAPAN* 46, 59 (John W. Hall et al. eds., 3d ed. 1990) [hereinafter Mass, *Kamakura Bakufu*].

58. *Id.*

59. Jeffrey P. Mass, *THE DEVELOPMENT OF KAMAKURA RULE, 1180-1250: A HISTORY WITH DOCUMENTS* 208 (1991) [hereinafter Mass, *Kamakura Rule*].

60. Mass, *Kamakura Bakufu*, *supra* note 57, at 78.

61. MIKAEL S. ADOLPHSON, *THE GATES OF POWER: MONKS, COURTIER AND WARRIORS IN PREMODERN JAPAN* 188-89 (2000); *The Laws of the Muromachi Bakufu: Kemmu Shikimoku (1336) and Muromachi Bakufu Tsuikahō 7*, 16 (Kenneth A. Grossverg ed. trans., Kanamoto Nobuhisa, trans., 1981). See translation in John Carey Hall, *Japanese Feudal Law: The Institutes of Judicature, being a transla-*

not meant to be a comprehensive law, the document conveys the authority of the vassals and also limits them. It contains rules about crimes, family relations, and especially property.⁶² The rights of non-vassal land proprietors are to be protected in the shogun's courts, insofar as they did not interfere with those of the offices of jitō and shugō.⁶³ The document also restricts the shugō's authority and defines the boundaries of their involvement.⁶⁴

Jeffrey Mass views the *Goseibai shikimoku* as a set of rules similar to a constitution.⁶⁵ He emphasizes its general rather than regulatory character, and he characterizes the *Goseibai shikimoku* as "a sketch rather than a finished blueprint."⁶⁶ It consisted of ideals and exhortations, and the underlying principle of *dōri*, which conveyed the importance of "reasonableness, not literalness."⁶⁷ But it also contained some detailed procedural rules. Mass argues that the code's objectives were "to define the parameters of the *gokenin's* [vassal's] world and to enunciate standards that would both exalt and restrain him."⁶⁸ These statements demonstrate *Goseibai shikimoku's* role in limiting government authority and thus in engaging in agency control—a particularly important feature in a feudal system. Moreover, Mass claims that the code was like a constitution, in that the code was expected to be supplemented by legislation in order to adapt to the constantly changing society surrounding the vassal.⁶⁹ He demonstrates the veritable flood of legislation that followed its promulgation.⁷⁰ Generality is a key feature in this analysis of whether or not the statute had a constitutional character.

Clearly the emphasis of the *Goseibai shikimoku* was to control agents, but it also limited the ability of government itself to overstep its bounds. Mass argues that the Jōei Formulary's general concerns—for example, announcing the desire to limit Kamakura's own and its vas-

tion of "Go Seibai Shikimoku," in 34 *TRANSACTIONS OF THE ASIATIC SOCIETY OF JAPAN* (1906). See also Steenstrup, *supra* note 44, at 84–85.

62. See Hall, *supra* note 61.

63. *Id.*

64. Adolphson, *supra* note 61, at 158–59.

65. JEFFREY P. MASS, *THE KAMAKURA BAKUFU: A STUDY IN DOCUMENTS* (1976); JEFFREY P. MASS, YORITOMO AND THE FOUNDING OF THE FIRST BAKUFU: THE ORIGINS OF DUAL GOVERNMENT IN JAPAN (1999) [hereinafter Yoritomo].

66. Mass, *supra* note 57, at 79.

67. *Id.* at 78.

68. *Id.* at 79.

69. *Id.* at 79.

70. Mass, *Kamakura Rule*, *supra* note 59, at 104.

sals' jurisdiction—were more important than the specific content.⁷¹ This highlights the constitutional character of the Jōei Formulary in providing a higher set of rules for governance. Especially around the turn of the fourteenth century, vassals utilized these provisions as shields for their rights.

To be sure, there are examples of provisions that were not uniformly enforced. One such rule was that land tenure enjoyed for 20 years could not be adjudicated in the courts.⁷² This rule likely served to secure tenure of the new vassals against older noble claimants. In practice, the application of this rule was quite flexible, and in some cases judgments were rendered that contradicted the letter of the law.⁷³ Of course, flexible interpretive moves are also the province of modern-day courts, as any student of contemporary constitutionalism knows. Flexible interpretation in response to evolving conditions does not undermine the original self-limitation of the constitution; indeed, it facilitates it by ensuring that perverse results do not occur.

In short, the Jōei Formulary seems to have some constitutional features. It is best understood as a bargain among vassals and shogunate, on which third parties (non-vassal landlords) were able to effectively rely. This limitation in power helped to legitimize the shogunate and extend its rule geographically and temporally.

The Kemmu Formulary, passed in 1336 by the Ashikaga shogun after defeating an attempt at imperial restoration, was another quasi-constitutional document.⁷⁴ The document uses the same term *shikimoku*, indicating the prestige of the earlier document.⁷⁵ It contains 17 articles, echoing the Shotoku Constitution, and generally addresses the agents of the bakufu.⁷⁶ Article 4, for example, invokes the people's livelihood in limiting commandeering of private houses, and limiting seizure of vacant lots, requiring their return to rightful owners.⁷⁷ Article 9 restated the need to admonish official negligence.⁷⁸ Article 11 requires the shogun to set an example by returning gifts presented to the court—surely a limitation of the highest office holder, and one that

71. *Id.*

72. Hall, *supra* note 61.

73. Mass, *Kamakura Rule*, *supra* note 59, at 106-07.

74. JOHN WHITNEY HALL, 1 THE CAMBRIDGE HISTORY OF JAPAN 474 (Kozo Yamamura ed., 1990)

75. Steenstrup, *supra* note 43, at 86.

76. *Id.*

77. Hall, *supra* note 61, at 22.

78. *Id.*

bound subsequent rulers.⁷⁹ The Shogun was also required to have fixed times to process lawsuits (Article 17).⁸⁰ This document surely does limit the authority of the shogun, as well as his agents, especially in dealing with the crucial land issues that were of primary interest.

Although John Haley criticizes Kamakura law enforcement for its “remarkabl[e] lenien[cy] or weak[ness],” he acknowledges that the Jōei and Kemmu Formularies were designed “to ensure greater uniformity and fairness by *bakufu* magistrates”⁸¹ He also notes that “lawmaking had become a legitimizing exercise” by the time Jōei and Kemmu Formularies were issued.⁸² However, he does not see either as constitutional. Rather, he sees them as laying the basis for later developments: in his view, “[t]he idea of the supremacy of law as command” began to take hold at the end of the sixteenth century through the emergence of the daimyo codes and the concept of *kokka*.⁸³ He writes,

[By the end of the sixteenth century] Law had become more than an instrumental adjunct of governance. Adherence to codified prescriptions and procedures of the past and basic elements of procedural fairness had become integral to legitimate rule . . . Japan hovered on the verge of a radically new political order, one that, as in Europe, could build the foundations of legitimate governance on the quality of rule by law and perhaps by gradual extension the rule of law.⁸⁴

From the point of view of effective precommitment, however, the ideas seem to develop earlier. The feudal order itself can be seen as a set of substantive limitations on the sovereign and always, in some sense, involves quasi-constitutional features. When these restraints are instantiated into a legal document, such as the formularies, it makes sense to speak of a genuine, albeit nascent, constitutionalism as early as the Kamakura period.

C. Korea

The most enduring dynasty in any East Asian country was that of the Chosŏn (1392–1910). Korean scholars have not been hesitant to find constitutionalist analogies in the neo-Confucian institutions of the

79. *Id.*

80. *Id.*

81. JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 43, 44 (1991).

82. *Id.* at 43.

83. *Id.* at 49.

84. *Id.*

Chosŏn dynasty.⁸⁵ These institutions were embodied in written codes, closely modeled on the Ming codes, which Korean scholars argue limited the authority of rulers.

A crucial early figure in Chosŏn thought was Chong To-jon, whose 1394 treatise *Chosun Kyonggukchon* (Code of Administration of the Chosŏn Dynasty) marked a critical programmatic attempt to build a coherent normative system.⁸⁶ Chong's writings evidence great concern with administrative reform, emphasizing the need to discipline lower officials in all aspects of governmental work. Indeed, one of his distinctive moves was to treat all aspects of governmental activity—traditionally divided into six areas of personnel, ritual, tax, military, criminal law, and public works—as needing legal regulation.⁸⁷ Otherwise officials might stray from the path.

Ritual was both a regulatory device and itself a tool to be regulated and promoted through law. Martina Deuchler writes that, "Chōng recognized the significance of elementary social actions . . . in the well-being and stability of the state" and "stressed the importance of ritual as a general standard by which authority and status were delineated and differentiated."⁸⁸ By providing guidelines to conducting rituals that defined social order, Chong's work paved the way for instituting constitutional governance later on during the period.

The key steps were taken over the next century as codes were promulgated. Deuchler points out that works like Cho Chun's *Kyongje yukchon* (The Six Codes of Administration) of 1397 and Ha Yun's *Sok yukchon* (Amended Six Codes) of 1413 expressed legal concepts of the legislators under Taejong.⁸⁹ She states that these legislative writings, along with *Tae myongyul chikbae* of 1395—which was a literal translation of the Ming criminal code—were considered "a kind of dynastic

85. YOUNG WHAN KIH, *TRANSFORMING KOREAN POLITICS: DEMOCRACY, REFORM, AND CULTURE* 47 (2005). See Chaihark Hahm, *Constitutionalism, Confucian Civic Virtue, and Ritual Propriety*, in *CONFUCIANISM FOR THE MODERN WORLD* (Daniel A. Bell & Hahm Chaibong eds., 2003). See generally Chaihark Hahm, *Law, Culture, and the Politics of Confucianism*, 16 *COLUM. J. ASIAN L.* 253 (2003); Chaihark Hahm, *Negotiating Confucian Civility Through Constitutional Discourse*, in *POLITICS OF AFFECTIVE RELATIONS: EAST ASIA AND BEYOND* 277 (Chaihark Hahm & Daniel A. Bell eds., 2004); Hahm, *supra* note 25; Byung-joo Shin, *Kyongguk Taejon, Choson's Constitution that Framed Governance By the Rule of Law*, *SEGYE ILBO*, Jun. 28, 2010, <http://www.segye.com/Articles/NEWS/CULTURE/Article.asp?aid=20080715002249&subctg1=&subctg2> (Ji Won Kim trans.).

86. MARTINA DEUCHLER, *THE CONFUCIAN TRANSFORMATION OF KOREA: A STUDY OF SOCIETY AND IDEOLOGY* 120–21 (1992); Kihl, *supra* note 85.

87. Deuchler, *supra* note 86, at 121.

88. *Id.*

89. *Id.*

constitution that could be supplemented, but not changed" by Sejong's time.⁹⁰ But, although these codes involve normative limits on state authority, they do not seem to involve precommitment per se. Ideologically, the King was unconstrained in his ability to exercise authority. Practically, however, he was quite weak and had little role in policy, which was dominated by the bureaucratic *yangban* class.

A key document in the Chosŏn constitution was the *Kyongguk Taejon*, of 1471, which served as the base of governance, and built on earlier comprehensive statutes like the *Kyongje Yukchon*.⁹¹ Korean scholars have nearly uniformly attributed this document with constitutionalist meaning. For example, Chung claims that *Kyongguk Taejon* was a symbol of state governance based on constitutionalism.⁹² Other scholars purport that *Kyongguk Taejon* is an evidence of proto-constitutionalism by stating that it "provided a legal framework within which society could function, as far as that function was directly relevant to the state."⁹³ The *Kyonguk Taejon* provided basic rights for certain groups, established the principle of legality, restricted punishment and torture, and provided rights for timely trials.⁹⁴

Chaihark Hahm argues that in addition to the *Kyongguk Taejon* and the *Myongyul* (or Ming Law Code), *Kukcho Oryeoi* constitutes one of the fundamental law codes of the Chosŏn dynasty.⁹⁵ The normative structure of the codes, which were not seen as positive legislation but rather as embodying ancient norms, had the authority of antiquity.

The thrust of Hahm's argument is that paying attention to the category of ritual is important in understanding the Confucian analogue to constitutional law, meaning the norm that regulates and restrains the activities of the ruler. Ritual, of course, involves the cultivation of discipline and self-limitation. The fact that there was no formal institutionalized constraint on the emperor in the form of a judge or other actor who could challenge his failure to act according to ritual does not mean that there is no constraint at all. The crucial mechanism of remonstrance facilitated correction of the sovereign by loyal officials.

90. *Id.*

91. *Id.*

92. Chung, *supra* note 85, at 49.

93. Deuchler, *supra* note 86, at 122.

94. Chaihark Hahm, *Rule of Law in Korea: Rhetoric and Implementation*, in *ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE, AND THE U.S.* (Randall Peerenboom ed., 2004)

95. *See id.*

At the same time, there was frequent use of statutory and judge-made law: law was seen as a tool to remake society in accordance with this ancient wisdom, and was in fact used to deal with various policy issues. This “lower” lawmaking was a distinctive feature of the Chosŏn dynasty as compared with its predecessor Koryŏ dynasty.⁹⁶ There were routine procedures for the making of new law: legislative proposals could be made by the throne or by officials, and were subject to extensive deliberation.⁹⁷ The King was also the formal promulgator of new law and without his assent things could not have legal force.⁹⁸ But legislation also had to pass through ratification by the censorate and certification by the Board of Rituals, and these bodies sometime delayed legislation and returned it to the discussion phase.⁹⁹ We thus see that lawmaking was institutionally constrained through a kind of *ex ante* constitutional review. This does meet the test of an institutional constraint.

William Shaw asks the crucial question: was the Korean Throne bound by its own law?¹⁰⁰ He answers in the affirmative, at least in a qualified sense, and demonstrates that this served the interests of an autonomous bureaucratic-scholar class: “In the context of rivalry between the upper bureaucracy and the throne, which characterized the Yi period, the symbolic legitimating value of a ‘royal’ law could be useful to the bureaucracy only to the extent that the king could be prevented or at least discouraged from appropriating that value for his own ends.”¹⁰¹ Deliberation provided a real set of constraints on the throne.

It is worth noting further that these constraints of remonstrance, deliberation and institutionalized *ex ante* review are arguably as extensive as any institutional constraint found in modern constitutional democracies. Perhaps falling into the trap identified by Dowdle, many analysts see judicial review as the *sine qua non* of constitutionalism.¹⁰² But empirical studies of constitutional courts, in Asia and elsewhere,

96. William Shaw, *Social and Intellectual Attitudes of Traditional Korean Law 1392-1910*, in *TRADITIONAL KOREAN LEGAL ATTITUDES* 15, 28-29 (Institute of E. Asian Studies ed., 1980) [hereinafter Shaw (1980)]; WILLIAM SHAW, *LEGAL NORMS IN A CONFUCIAN STATE* 35-36 (1981) [hereinafter Shaw (1981)].

97. Shaw (1980), *supra* note 96; Shaw (1981), *supra* note 96.

98. Shaw (1980), *supra* note 96; Shaw (1981), *supra* note 96.

99. Shaw (1980), *supra* note 96, at 28.

100. Shaw (1981), *supra* note 96, at 37.

101. *Id.*

102. Van Alstyne, *supra* note 22.

emphasize the relative weakness of courts as constraining actors.¹⁰³ A powerful political force usually gets its way when it wants to; courts are rightly seen as the least dangerous branch. Mostly, what courts do in the exercise of constitutional review is facilitate a second look at policies, and require deliberation. And this is perhaps best understood as a form of remonstrance in which the courts are encouraging deliberation in policymaking.¹⁰⁴

Does the Korean system meet our definition of constitutionalism? Certainly the normative commitment to the rule of law was present; and the nature of the constraints was legal: rituals and constraints on the use of power were both legalized. The number of codes produced by the Chosŏn government's efforts to regularize and systemize governance is quite impressive. Still, the codes mostly deal with administrative issues and not "constitutional" issues. There is little formal expression of a substantive constraint on the King's authority, even while the institutional constraints were elaborate and imbued with the substance of ritual. The Chosŏn codes seem to be an example of constitutionalism in practice. The King, in some sense, was an agent of the bureaucracy, used to legitimize their rule, and so the King was controlled through the constitutional codes. But it was hardly in the interest of such principals to emphasize substantive limits on the King's authority. We have, then, a complex bargain between elements of an authoritarian state, in which each was effectively limited by its constitutional role.

CONCLUSION

There is a certain danger in applying categories derived from modern Western experience to pre-modern East Asia. There is a long history of scholars, both within and outside East Asia, using the lack of the formal features of Western constitutions to argue that Asia needs to engage in a particular set of modernizing reforms.¹⁰⁵ At the same time, a careful consideration suggests that there are some materials in the East Asian tradition that do approximate those features associated with the modern concepts of constitutions and constitutionalism. This

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

104. Ginsburg, *supra* note 25, at 773-74.

105. Karen Turner, *Rule of Law Ideals in Early China?*, 6 J. CHINESE L. 1, 3 (1992) ("The Western notion of the Rule of Law has often served as a benchmark for evaluating early Chinese legal culture.").

is especially true if we focus less on the enlightenment norms of liberal rights and more on the structural features of precommitment.

The examples of China, Korea and Japan demonstrate sophisticated schemes of governance. Hegel's oft-cited characterization of China as a timeless oriental despotism bears no relationship with the East Asian institutions that we have examined, which featured complex constitutional arrangements.¹⁰⁶ Certainly all East Asian societies had elaborate constitutions in the Aristotelian sense. But they also had proto-constitutionalist institutions that embodied substantive precommitments by the sovereign. They 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.

China's institutional structure featured some tension between a formally infallible emperor, in whom undivided sovereignty resided, and an extensive natural law tradition of normative rules accompanied by institutional constraints that constrained the actual exercise of authority. Law was not used to constrain the sovereign, but was an effective instrument of controlling lower level agents, and this facilitated (or constituted) the operation of government.

In the case of Japan, constitutional principles were sustained through a long tradition of divided governance and, from the Kamakura period, legalized dispute resolution that enforced a bargain between the shogun and its vassals for the benefit of broader social actors. This scheme involved self-limitation of the shogun and provided the basis for effective extension of bakufu power. Though not extensive, there were some substantive limitations on shogunal authority, and so at least a very provisional form of constitutionalism can be identified. Perhaps this was related to the oft-noted feature of divided authority in Japan, in which the emperor reigned but did not rule.¹⁰⁷ This contrasted with the Chinese theory of undivided sovereignty.

The Korean case is different, and much closer to the Chinese tradition. Formally, there were no substantive limits on the King's authority, but the Chosŏn institutions provided very extensive *de facto* limits, on the basis of ancient norms of a natural law character. Remonstrance and deliberation were elaborately institutionalized, and provided very

106. GEORG WILHELM HEGEL, *THE PHILOSOPHY OF HISTORY* 116 (J. Sibree trans., 1956).

107. Yoritomo, *supra* note 65.

real limits. Ritual formed a normative and behavioral anchor.¹⁰⁸ Viewing the King as a kind of agent of the bureaucratic class, one can see in this scheme evidence of the agency theory of constitutionalism, though again the analogy is imperfect.

There is a good deal at stake in this analysis, for in Korea at least the issues raised herein are very much alive. If the *Kyongguk Taejon* was itself constitutional, then arguably the Korean Constitutional Court case was correct to invoke it in the 2004 case invalidating the special capital law unconstitutional.¹⁰⁹ In that case, Roh Moo Hyun sought to fulfill a campaign promise by moving the country's capital, and the Court was called on to rule on the constitutionality of the relevant legislation.¹¹⁰ With no constitutional language designating Seoul as the capital of the nation, the Court relied on the notion of an unwritten "customary" constitution that played the same function.¹¹¹ Because Seoul had been the capital since the Chosŏn dynasty, the Court concluded that it should remain so.¹¹² In contemporary South Korea, a successful constitutional democracy, the normative power of the Court's assertion is enhanced on an understanding of the Chosŏn regime as not merely a constitutional one, but a constitutionalist one.

A final note is that the analysis herein can be extended to other East and Southeast Asian Societies. Consider the *Mangraisat* of the Lanna Kingdom of Northern Thailand, one of the few pieces of evidence that we have of law in Thailand before the current dynasty.¹¹³ This document provides a similar rule to that seen in the ancient Chinese texts and Prince Shotoku's Constitution, limiting the King's ability

108. Sor-hoon Tan, *Rights or Rites?*, in *CONFUCIAN DEMOCRACY: A DEWEYAN RECONSTRUCTION* 183-94 (2003).

109. Constitutional Court [Const. Ct.], 2004Hun-M554 & 556 (consol.), Oct. 21, 2004, (16-2(B) KCCR 1) (S. Kor.) ("There is no express provision in our Constitution that states 'Seoul is the capital.' However, that Seoul is the capital of our nation is a continuing practice concerning the life in the national realm of our nation for a period of over six-hundred years since the Chosun Dynasty period. Such practice should be deemed to be a fundamental matter in the nation that has achieved national consensus from its uninterrupted continuance over a long period of time. Therefore, that Seoul is the capital is a constitutional custom that has traditionally existed since even prior to the establishment of our written Constitution, and a norm that is clear in itself and a premise upon which the Constitution is based although not stated in an express provision in our Constitution. As such, it is part of the unwritten constitution established in the form of a constitutional custom.").

110. *Id.* at 118.

111. *Id.* at 133.

112. *Id.*

113. David K. Wyatt, *Laws and Social Order in Early Thailand: An Introduction to the "Mangraisat,"* 15 J. SOUTHEAST ASIAN STUD. 245 (1984). See also David Feeny, *The Decline of Property Rights in Man 1800-1913*, 49 J. ECON. HIST. 285 (1989).

to use *corvée* labor.¹¹⁴ It also includes tax subsidies for investment, providing three years of tax relief for those who have brought new land under cultivation.¹¹⁵ These terms are clearly constitutionalist in character, though are embedded with many others that focus on agency control. It is likely that other texts have similar clauses embedded in symbolic and rhetorical material.

114. Wyatt, *supra* note 113, at 248 (“Ten days in the King’s Service, followed by ten days working at home, is in accord with the ancient Dharma.”).

115. *Id.*

