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Arif A. Jamal

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THE UNITY OF CONSTITUTIONAL VALUES: A COMMENT ON ERNEST CALDWELL'S 'HORIZONTAL RIGHTS AND CHINESE CONSTITUTIONALISM: JUDICIALIZATION THROUGH LABOR DISPUTES'

ARIF A. JAMAL\*

INTRODUCTION

Ernest Caldwell wants to defend Chinese constitutionalism from criticism, coming, it seems largely at least, from Western constitutional scholars or scholars who hold up Western constitutional patterns as an ideal. Specifically, he seeks to defend the Chinese constitutional order from the charge that it is fundamentally flawed in not possessing a mechanism for judicial review of the kind found in some Western constitutional regimes, and in particular in the United States.<sup>1</sup> His argument, if I have understood it correctly, is that constitutional judicialization (which prizes judicial review and vertical rights) fails to acknowledge an intrinsic virtue of Chinese constitutionalism, which protects horizontal rights (as evidenced especially in the labor dispute cases he discusses).<sup>2</sup>

I think it is fair to say that Caldwell is making both a 'comparative' claim and a 'value' claim. The comparative claim is that Chinese constitutional law must be understood on its own terms and that on these terms it does protect rights, even if it does not do so in the same way as Western constitutional law.<sup>3</sup> The value claim is that the procedures in China's legal system satisfy value concerns captured in the term 'constitutionalism' because they show how that system respects the supremacy of constitutional norms in a way that, though different from,

\* Assistant Professor, Faculty of Law, National University of Singapore. My thanks to Arun Kumar Thiruvengadam and Victor Ramraj for input on an earlier draft of this comment and to Wang Jiangyu and Weitseng Chen for formative conversations on the issues discussed. Thanks also to Terry Nardin for providing valuable insights when a previous draft was debated in a workshop session and for his editing acumen. Of course, any weaknesses and mistakes are solely my responsibility.

1. Ernest Caldwell, *Horizontal Rights and Chinese Constitutionalism*, 88 CHI.-KENT L. REV. 63 (2012).

2. *Id.*

3. *Id.*

is not inferior to Western constitutionalism.<sup>4</sup> In this response, I want to take up and challenge both the comparative and the value claims. In particular, I want to argue, first, that one need not adopt the perspective that Chinese constitutional law must be seen entirely on its own terms and in a way that cannot be compared with Western models without generating misunderstanding (for this I rely upon the work of Chinese and other constitutional scholars) and, second, that Caldwell is mistaken in thinking that the value of judicial review can be satisfied by the horizontal rights review he finds in Chinese constitutional law. Instead, I argue that judicial review cannot be replaced by horizontal review based on a 'unity of value' argument (for this I use recent work by Ronald Dworkin).

### I. SOME POINTS IN THE ARGUMENT

I begin by highlighting a few key parts of Caldwell's argument. Caldwell states that in place of judicial review, which China does not have, it has "an alternative system which the Chinese call constitutional *supervision*."<sup>5</sup> This system locates constitutional enforcement within the legislative, not judicial, branch of government: "However, the constitution does not stipulate the method of enforcement nor what, specifically, *enforcement* actually entails."<sup>6</sup> He continues: "[f]urther complicating the matter is the complex relationship between the judiciary and the constitution, which at best can be characterized as ambiguous or at worst contradictory."<sup>7</sup> This leads Caldwell to conclude that "there is no governmental body independent of the NPC [National People's Congress; a legislative body] to hold the NPC accountable for actions that contravene the constitutional rights of Chinese citizens."<sup>8</sup> Although some (as he notes) might conclude that the Chinese legal system lacks any idea of constitutionalism, Caldwell finds a sufficient sense of constitutionalism in the system's recognition of horizontal rights. He states:

This single-axis perspective of [vertical] rights conflict, however, typically precludes an examination of constitutional development and constitutional engagement along alternative axes, namely the horizontal enforcement of constitutionally enshrined rights. Within horizontal conflict, constitutional norms transition from defensive *to*

4. *Id.*

5. *Id.* at 65.

6. *Id.* at 66.

7. *Id.*

8. *Id.* at 67.

*positive individual rights, and the role of the state transitions from the source of the threat to an agent enforcing the constitutional rights of a citizen.*<sup>9</sup>

This perspective is about understanding China and its constitutional system on its own terms and especially in terms that are “not overly confined by Amero-centric understanding of constitutional development and design.”<sup>10</sup> Moreover, he emphasizes the importance of “examining different types of rights which may be valued differently within political regimes not conforming to the liberal democratic paradigm.”<sup>11</sup> So, in summary, his points seem to be (i) do not use (overly) Western criteria in considering China; and, (ii) appreciate the different values that the Chinese system advances. Taken together these constitute the basis of Caldwell’s argument for the existence of Chinese constitutionalism.

## II. CONSTITUTIONAL MODELS: POSSIBILITIES OF COMPARISON

In a recent work, Albert Chen identifies the elements of constitutionalism as including “rule of law, the separation of powers, political checks and balances civil liberties, a written constitution, *review of the constitutionality of governmental actions*, and peaceful transfer of power in accordance with constitutional norms.”<sup>12</sup> Chen surveys several countries in South and East Asia, including the People’s Republic of China (PRC), to illustrate that while, obviously, they do not all have similar constitutional structures, nor even what he calls similar constitutional ‘pathways’, nonetheless:

Constitutionalism, albeit originating in the Western world, seems to have a universal appeal and to address the fundamental problems of governance, government, and political power in many modern societies in Asia. A macrohistorical perspective, covering developments in Asia since the late nineteenth century, suggests that constitutionalism has broadened and deepened its reach, significantly, over the course of time . . . No distinctly Asian mode of constitutionalism or political-constitutional practices can be identified. Nor is there evi-

9. *Id.* at 75 (emphasis added).

10. *Id.* at 91.

11. *Id.* at 90.

12. Albert H. Y. Chen, *Pathways of Western liberal constitutional development in Asia: A comparative study of five major nations*, 8(4) INT’L J. OF CONST. L. 849, 849-50 n.1 (2010) (emphasis added) (note also that Chen cites in his first footnote a piece by Carlos Santiago Nino, which looks at various meanings of constitutionalism and suggests that some of the meanings include judicial review. See CARLOS SANTIAGO NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY* 3 (Yale Univ. Press 1996)).

dence that Asian culture and values are particularly resistant to constitutionalism.<sup>13</sup>

Chen is making two related points. The first is that constitutionalism has universal appeal (a point about the idea). The second is that the idea of constitutionalism can be realized or practiced in different ways (a point about the form). Additionally, it is important to note that Chen grounds these claims on a description of constitutionalism in practice as including, *inter alia*, separation of powers and review of the constitutionality of governmental actions. And all of this on Chen's reckoning has universal appeal, including within Asia. To be clear and fair to Chen's analysis as well as to the general point I am pursuing here, Chen notes that the pattern of constitutionalism in Asia is not identical and that some jurisdictions represent what he calls "classical constitutionalism" (CC), constitutionalism properly so-called; others "party-state constitutionalism" (PS); and still others "hybrid constitutional practices" (HC).<sup>14</sup> The PRC system in this schema is a PS constitutional order, as compared to Taiwan, which Chen describes as a CC order. He notes that "in the PRC, the Constitution is implemented, principally, through the making and enforcement of laws"<sup>15</sup> and that "the constitutional function of the Chinese courts is solely to try cases in accordance with the law."<sup>16</sup> Chen's assertion therefore is not that there is a singular constitutional form in Asia, but rather, that there is no distinctively Asian constitutional mode; the paradigm of constitutionalism and its values and principles as it developed in the West has been taken up, in some places and to some extent, in Asian contexts.

A similar theme can be found in the work of Qianfan Zhang. Zhang repeats Chen's concern about the current state of constitutionalism in China, stating simply that "having a constitution is not the same as making it work. Mainland China exemplifies this conventional wisdom," or, later and more bluntly, "[b]y Western standards, China's constitution is a dead letter."<sup>17</sup> While noting, therefore, that the official system has a constitution but not constitutionalism, Zhang finds that there is a populist path of constitutionalism in China outside of the official structures. It is too much to say that this populist path leads to full-blown constitutionalism, however, since, as Zhang notes, its impact

13. *Id.* at 884.

14. *Id.* at 880.

15. *Id.* at 878.

16. *Id.* at 879.

17. Qianfan Zhang, *A Constitution Without Constitutionalism? The Paths of Constitutional Development in China*, 8(4) INT'L J. CONST. L. 950, 950, 952 (2010).

might be viewed as minimal. Yet it “has made [a] decisive difference in certain situations.”<sup>18</sup> Moreover, on Zhang’s analysis, populist pressure appears to generate a type of inertial force for constitutionalism, since he notes that when the national government promulgates progressive laws, there is popular pressure to enforce these norms.<sup>19</sup>

Popular support is not, however, evenly spread since Zhang notes it does not seem to extend to criminal due process.<sup>20</sup> Nor is it stimulating quick change, as China’s progress on the path towards constitutionalism is very slow. Zhang’s conclusion is that the realization of proper constitutionalism in China will require institutional arrangements including, but not limited to, judicial review supported by active citizens willing to insist on their rights.<sup>21</sup>

Based on these claims, we can read Zhang’s analysis as supporting the cultural viability of constitutionalism (or, perhaps better, the viability of constitutionalism culturally) in China in two ways. First, Zhang wants us to understand and appreciate the popular support for constitutionalism that exists, albeit imperfectly and not always with great effect, among the Chinese people. Second, Zhang – himself a professor of law at Peking University – expresses support for specific forms of constitutional arrangements, including judicial review, among thoughtful Chinese legal actors.

This reiterates the idea, mentioned above, that constitutionalism is not as alien a value in the Chinese context as it might seem at either the popular or the academic level. Indeed, in response to a critique of his article by Michael Dowdle, in which Dowdle suggests that Zhang overemphasizes the model of American-style constitutionalism and of judicial review as a touchstone of constitutionalism,<sup>22</sup> Zhang retorts that he does not think that constitutionalism is a uniquely American phenomenon, although he does “believe that ‘real constitutionalism’ in China requires judicial review of some type . . .”<sup>23</sup> He adds that “constitutionalism does not stand for any particular kind of constitutional system, but it does stand for a system that gives meaning to the consti-

18. *Id.* at 957.

19. *Id.* at 960.

20. *Id.* at 971.

21. *Id.* at 975-76.

22. Michael W. Dowdle, *Of Comparative Constitutional Monocropping: A Reply to Qianfan Zhang*, 8(4) INT’L J. CONST. L. 977, 980-81 (2010).

23. Qianfan Zhang, *Of Comparative Constitutional Monocropping: A Rejoinder to Michael Dowdle*, 8(4) INT’L J. CONST. L. 985, 986-87 (2010).

tution by somehow making its words count.”<sup>24</sup> In some concession to Dowdle’s objection that Zhang’s argument leads to constitutional monocropping, Zhang responds that “if monocropping stands for a category of developed constitutional systems, in which constitutions are seriously implemented by judicial or other means, I do not see anything wrong with it.”<sup>25</sup>

In other words, Zhang resists Dowdle’s (and perhaps Caldwell’s) perspective that suggests that China’s constitutional norms must be understood without reference to ideas or standards coming from the West. Zhang does not say that the American (or any other Western) model is what China will or must pursue, but he would resist the argument that constitutional values derived from, or inspired by, these systems are not appropriate for China, notwithstanding that these values may be expressed in particular institutional forms requiring some form of judicial review.<sup>26</sup>

In a nuanced comparative piece that considers East Asian constitutionalism by examining the constitutional orders of Japan, South Korea and Taiwan, Jiunn-Rong Yeh and Wen-Chen Chang assess the constitutional values these orders represent individually and regionally.<sup>27</sup> They note that Japan, South Korea and Taiwan are widely recognized as constitutional democracies and are indeed functioning as such.<sup>28</sup> They further note that many scholars from these countries

embrace a universalistic view of democratic constitutionalism and human rights and stress that societies of East Asia or Asia as a whole exhibit the same capability to reflect upon universal human rights values as other societies and cultures. These scholars deem the current constitutional progress in East Asia worthy of dialogue and of eventual convergence with the values held by advanced constitutional democracies in the West.<sup>29</sup>

However, they continue:

[o]thers, however, recognize Confucianism as a distinctive tradition shared by most states in East Asia and seek to emphasize comparable liberal elements in those ancient teachings that may provide a solid foundation for democratic institutions and modern principles of rule of law and constitutionalism.<sup>30</sup>

24. *Id.*

25. *Id.* at 987.

26. *See generally id.*

27. Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59 AM. J. COMP. L. 805 (2011).

28. *Id.* at 807-08.

29. *Id.* at 809-10.

30. *Id.* at 810.

The latter outlook grounds the so-called 'Asian values' perspective.

Yeh and Chang, while noting in some detail different legal structures in East Asia, nevertheless assert that whether it is "[e]ssential to constitutionalism or not, judicial review has become a popular mechanism in maintaining and strengthening constitutional rule of law, especially in new or recently revived constitutions."<sup>31</sup> Even though the paths taken in the countries they study have not, however, been the same as those of the West, "they have all successfully attained liberal constitutionalism, whose specific arrangements may differ from those in the West . . ." <sup>32</sup> They acknowledge, however that the "the differences are admittedly a matter of degree."<sup>33</sup> Yeh and Chang conclude that although the East Asian model is distinct, it is neither ignorant of nor hostile to all the constitutional values coming from the West, nor, on the contrary, is it defined by 'Asian values':

The perceived Asian value of "state before self" notwithstanding, East Asian constitutional developments have been focused on constraining government power, protecting individual rights (especially of women and children) and have given voice to a vibrant civil society. Judicial statements in individual cases did not elevate collective values or public morality over civil and political rights. To the contrary, the three courts . . . had no hesitation to prioritize rights of individuals over collective morals or values.<sup>34</sup>

Admittedly, Yeh and Chang did not include China in their East Asian survey, though of course by including Taiwan they did include a Chinese culture. They do not conclude that East Asia is following, or should follow, the West. What they do say, however, is that constitutionalism and its values – including the importance of judicial review – have been recognized in East Asia both by scholars and by courts, and that too much can be made of Asian particularism, normatively and descriptively.<sup>35</sup> One can conclude from their survey that although East Asia may be different, one can discuss constitutionalism in similar normative terms, recognizing, as Zhang does, that one does not have to reject as culturally inappropriate or incomprehensible constitutional values whose origins may lie in the West.

31. *Id.* at 823.

32. *Id.* at 835.

33. *Id.*

34. *Id.* at 838.

35. *See id.* at 839.



### III. CONSTITUTIONAL VALUES: DIFFERENT IS NOT EQUAL

My second concern is Caldwell's effort to defend Chinese constitutionalism on the basis of horizontal rights. I do not disagree that horizontal rights make an important contribution to the legal system and provide values that contribute to constitutionalism. Indeed, I think Caldwell's paper is to be appreciated for the careful and thoughtful manner in which it brings out this point. My contention, however, is that horizontal rights cannot substitute for judicial review. Let me outline a theoretical line of argument (not my own) that I believe provides grounds for making this claim. Ronald Dworkin famously resisted the legal positivist assertion that there is no necessary connection between law and morality, arguing on the contrary that law is an interpretive exercise in which moral judgments are always being made, even if not always acknowledged.<sup>36</sup> In a more recent work, *Justice for Hedgehogs*,<sup>37</sup> Dworkin argues for the unity of value, or at least of ethical and moral values.<sup>38</sup> As in his previous work, he describes law as a branch of morality, saying that "law is a branch of political morality, which itself is a branch of a more general theory of personal morality, which is in turn a branch of a yet more general theory of what it is to live well."<sup>39</sup> Making this claim more concrete in political and legal terms, he argues that

no government is legitimate unless it subscribes to two reigning principles. First, it must show equal concern for the fate of every person over whom it claims dominion. Second, it must respect fully the responsibility and right of each person to decide for himself how to make something valuable of his life.<sup>40</sup>

I want to make two, related, arguments from this Dworkinian perspective. The more specific and legal argument is that these reigning principles require, even demand, that we have a mechanism to hold government accountable for any breaches of these principles and indeed to be able allege such breaches. To this end, the process of judicial

36. The Dworkinian perspective receives its fullest exposition in RONALD DWORKIN *LAW'S EMPIRE* (1998). See e.g., Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, 24 OXFORD J. OF LEGAL STUD. 1-37 (2004). Dworkin is of course responding primarily to Hart's, *THE CONCEPT OF LAW*. Hart says that "though there are many different contingent connections between law and morality there are no necessary conceptual connections between the content of law and morality; and hence morally iniquitous provisions may be valid as legal rules or principles." H.L.A. HART, *THE CONCEPT OF LAW* 268 (Oxford Univ. Press, 2nd ed. 1997).

37. RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (Belknap/Harvard Univ. Press, 2011).

38. *Id.* at 1.

39. *Id.* at 5.

40. *Id.* at 2.

review seems one of the best options we have. Through judicial review, we have the capacity for a variable range of legal remedies, including *ultra vires* declarations, *certiorari*, *mandamus*, *quo warranto*, etc. Indeed, it is difficult to think of another legal tool which offers such scope and range for testing and challenging the role of government. Horizontal rights may offer some form of enforcement of constitutional norms, but they do not present the panoply of options that judicial review makes available. This is crucial if we believe, as Dworkin does, in the importance of the principles he articulates. The second, more general point, is that Dworkin's unity of value argument suggests that we should not see the absence of some values as being compensated for by the presence of others; the argument does not allow us to pick and choose but insists, I think, that we take them as a whole. Thus, the values of constitutionalism may not be fully defined by judicial review. But, judicial review does form an important part of the equation and its value is understandable, and in fact understood, in East Asia, specifically in China, at both a scholarly and (less precisely) a popular level. I would go even further – adopting the criteria that Yeh and Chang, as well as Zhang and Chen, in slightly different ways, employ – to say that although judicial review may not be sufficient, it is *necessary* if we are to have constitutionalism in the proper sense of the term, precisely because it offers so many legal possibilities to hold government accountable and therefore, to defend Dworkin's principles of legitimate government. Judicial review therefore constitutes part of the unified value set for constitutionalism, which cannot be separated out into its component parts without doing great violence and severely compromising the value itself. The whole really is greater than the sum of its parts.

#### CONCLUSION

Ernest Caldwell's paper presents a sympathetic and well-analyzed account of the workings of Chinese public law. It makes clear that although China is without formal judicial review, and consequently, the capacity to adjudicate vertical rights, the Chinese system is able to provide for horizontal rights and the constitutional protections that these engender. That this feature of the system is part of China's constitutional order, and must be understood and appreciated for the contribution that it makes, is a point with which I have no quarrel. What I have argued, however, is that, as useful as this analysis is, there is risk in its overextension, culturally and normatively. In cultural terms, my point

is that Asian contexts – including China itself – are not so culturally impervious, nor so culturally self-contained, that we cannot reasonably and usefully compare their constitutional system with that of other, and in particular Western, contexts. To this end, I have sought support from the views of scholars in East Asia who seem content to use the analytical frameworks of, for example, judicial review and vertical rights enforcement to assess China's constitutional system.

Moreover, as Zhang notes, the values associated with constitutionalism, understood as including judicial review, while not exclusively defined by it, have popular support in China.<sup>41</sup> Other scholars, like Yeh and Chang, find these values reflected within other East Asian legal systems and, by including the case of Taiwan, in other Chinese cultural systems as well.<sup>42</sup> But let me be clear both about what I read from these scholars and its implications. I do *not* read that East Asia or China *will* follow Western constitutionalism, nor do I read that East Asia or China *must* follow Western constitutionalism. Indeed, Yeh and Chang are at some pains to assert that East Asia constitutional framework should be seen as expressing its own style and not just part of “global transnational constitutionalism.”<sup>43</sup> Nonetheless, what I do read is that the terms of constitutional assessment and evaluation, including the presence of judicial review, and the standards of constitutionalism that these suggest, are viable in East Asian contexts.

This viability relates to the second point I have sought to make, which is that Caldwell's essay seems to overextend the definition of constitutionalism. Perhaps, in fact, this might be better characterized as a thinning out of constitutionalism, so that a system where there is no possibility for the courts to effectively make use of the constitution to check governmental power might still be called constitutionalism. My suggestion is that we should not be so ready to grace such a situation with the label of constitutionalism because that label should mean something more normatively substantial. This is understood, so it appears to me, not only by scholars, but also by the peoples of Asia and of the PRC itself. To this extent, it is a value proposition that we all can, and should, take seriously.

41. Zhang, *supra* note 23, at 959.

42. Yeh & Chang, *supra* note 27, at 810, n.15.

43. *Id.* at 805, 839.