

# Confucian Constitutionalism: Classical Foundations

BUI NGOC SON<sup>†</sup>

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## I. Introduction

‘Constitutionalism’ is a modern term but the notion is traceable back to classical antiquity. Western scholars tend to consider the origins of constitutionalism to be endemic to the western cradle.<sup>1</sup> Are there constitutionalist wisdoms in the repository of Oriental ancient lore? In particular, are there the beginnings of constitutionalism in Confucian political philosophy?

This is an important question for the promotion of constitutionalism in China and other East Asian nations like Japan, Korea, and Vietnam where Confucianism has a long tradition. If there exist constitutionalist ideas in Confucianism, the traditional legacy may not be a cultural impediment to East Asia’s transition to modern constitutionalism. In a more positive sense, Confucianism can be used to legitimatise the transition and hence make the process more natural, and Confucianism can be explored to expedite constitutionalism in the region.

At first glance, it seems counterintuitive to search for the origins of constitutionalism in Confucianism. In Charles Howard McIlwain’s negative definition, constitutionalism is ‘opposite to despotic government,’<sup>2</sup> while Confucianism is normally incriminated as a cause of despotism.<sup>3</sup> In

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<sup>†</sup> PhD Candidate, The University of Hong Kong; Visiting Researcher, Harvard Law School; Lecturer, Vietnam National University (Hanoi). I am grateful to Professor Albert Chen at Hong Kong University for his productive instruction, Professor Tom Ginsburg at Chicago Law School and the two anonymous reviewers of the AJLP for their constructive comments.

<sup>1</sup> See Scott Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today* (1999) 5; Raymond Polin, *Plato and Aristotle on Constitutionalism: An Exposition and Reference Source* (1998); Graham Walker, ‘The Idea of Nonliberal Constitutionalism’ in Ian Shapiro and Will Kymlicka (ed) *Nomos XXXIX: Ethnicity and Group Rights* (1997) 161-62; Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (2005).

<sup>2</sup> McIlwain, above n 1, 24.

<sup>3</sup> This is traceable to the iconoclasts of the May Four Movement. In opposing Confucianism and expediting for human rights, science, and democracy,

fact, some scholars point out that Confucianism is fundamentally different from constitutionalism. For example, Chen Yu in the article entitled '*Confucianism versus constitutionalism*' explains that while constitutionalism focuses on rule of law, individualism, people's rights, and litigation, Confucianism puts emphasis on rule of men, collectivism, people's obligations, and disfavours lawsuits.<sup>4</sup>

However, in recent years, some scholars have been optimistic about the potential existence of constitutionalist ideas in Confucian intellectuals. Chaihark Hahm for example has fervidly explored 'Confucian constitutionalism' defined by him as 'the application of *li* as a regularized restraint on the ruler through disciplining his body and mind.'<sup>5</sup> Additionally, Sungmoon Kim also discovered Confucian constitutionalism of Mencius and Xunzi through comparatively analysing their respective perspectives on virtual, ritual and royal transmission.<sup>6</sup> Finally, Jaeyoon Song's explanation of the constitutionalist meaning of *Zhou Li* (*Rituals of Zhou*), a Confucian classic, should be mentioned.<sup>7</sup>

I believe that although efforts in shedding constitutionalist light on Confucian political concepts are creditable, it is far from true that a systematic and full exploration of the constitutionalist ideas in the Confucian classical philosophy has been conducted. Halm's study just deals with the practical rather than philosophical aspect of Confucian constitutionalism with a narrow concentration on the disciplinary dimension of the Confucian *li*. Kim and Song's studies provide sporadic constitutionalist ideas of the classical Confucian philosophers and works, but ignore the constitutional importance of other Confucian concepts, such as *minben* and especially the doctrine of rectification of names and its concomitant *Spring and Autumn Annuals*.

The ambition of the present paper is to initiate a cognitional odyssey to classical Confucianism, or pre-Chin Confucianism established by Confucius (551-479 BC) and developed by Mencius (372 – 289 BC) and Xunzi (312-230 BC) during the late Spring and Autumn Period (770-476 BC) and Warring States Period (475-221 BC) in the history of China, to

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Chen Duxiu and his supporters linked Confucianism to despotism. See Peter Zarrow, *China in War and Revolution 1895-1949* (2005) 134.

<sup>4</sup> See Chen Yu, 'Confucianism versus Constitutionalism' (2007) 2(2) *Journal of Cambridge Studies* 32-3

<sup>5</sup> Chaihark Hahm, 'Confucian Constitutionalism' (2000) 153.

<sup>6</sup> Sungmoon Kim, 'Confucian Constitutionalism: Mencius and Xunzi on Virtual, Ritual, and Royal Transmission' (2001) 73(3) *The Review of Politics* 371-99.

<sup>7</sup> See Jaeyoon Song, 'The *Zhou Li* and Constitutionalism: A Southern Song Political Theory' (2009) 36(3) *Journal of Chinese Philosophy* 324-38.

systematically generalise the classical theoretical foundations of Confucian constitutionalism.

For latter discussions, I will first define some words to explain the concept of constitutionalism. I will then move forward to exploring the classical philosophy of Confucian constitutionalism. My generalisation is as follows. Like any other form of constitutionalism, Confucian constitutionalism is generated due to the apprehensiveness of despotic government. In searching for an antidote to despotic government, the classical Confucians suggest a *zheng ming* government which can be understood as constitutional government. The purpose of this government is to ensure governmental responsibility for people's welfare, which is well demonstrated in the concept of *minben* (people as basis). The Confucians then propose the means to articulate the standards for rectifying the governmental power, named as *li* – a variant of unwritten constitution. To enforce the *li*, they anticipate the practice of moral self-rectification by the ruler and the external rectification of ruler by wise and virtuous scholars. The study is concluded with a summary of the main findings and some reflections on the relation of Confucianism to the promotion of constitutionalism in contemporary East Asia.

## II. The concept of constitutionalism

For a more systematic and intelligible approach, I would differentiate between the essence, the goal, and the means of constitutionalism.

To begin with, what is the essence of constitutionalism? CH McIlwain is frequently mentioned as an American constitutionalist scholar who developed the idea of constitutionalism as a mechanism of imposing restraint on the arbitrary power of government. He asserts that 'constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law.'<sup>8</sup> By 'law' or 'legal', McIlwain does not exclusively mean positive law: 'That law may be unwritten and entirely customary, as it has been for the greater part of its history; or it may be set forth in a single official document as in our state and federal constitutions, but in every case it is a law that puts bounds to arbitrary will.'<sup>9</sup>

Carl J Friedrich provides an analogous guidance. He defines constitutionalism as 'a system of effective restraints upon governmental

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<sup>8</sup> McIlwain, above n 1, 24

<sup>9</sup> CH McIlwain, *Constitutionalism and the Changing World* (1969) 244.

action.<sup>10</sup> For him, the effectiveness of the restraints does not depend on the legal formality: 'It should be evident that the existence of formal legal restraints is in no wise an indication of the existence of a constitutional order in the political sense.'<sup>11</sup> Rather, 'a restraint may be very effective and thoroughly regularized, without necessarily being embodied in positive law unless law is very broadly defined as including all custom.'<sup>12</sup>

What is the goal of constitutionalism? Influenced by liberalism, western constitutional scholars tend to conceive the purpose of constitutional government as to protect individual rights.<sup>13</sup> In fact, as Graham Walker asserts: 'Constitutionalism predates the enlightenment. Liberalism does not.'<sup>14</sup> He explains that theories of constitutionalism developed in the pre-enlightenment period by Greek thinkers like Aristotle and Polybius, Cicero and other constitutional theorists of Republican Rome, medieval scholars, and social contract philosophers do not focus on liberty. Walker concludes that the liberal definition of constitutionalism is the outcome of the modern conflation of constitutionalism and liberalism.<sup>15</sup>

The crucial point I need to underline in Walker's conception is that 'constitutionalism in its essence is not individual rights but fettered power.'<sup>16</sup> Threat to individual liberty is not the sole danger that needs limitations of the governmental power because 'from the perspective of other places and other histories, there may well be other harms to avoid, and other goods to pursue publicly, besides individual freedom.'<sup>17</sup> I find this argument pretty serviceable for understanding the foundations of constitutionalism in East Asia, where the public has not accentuated individual liberty. I believe that defining constitutionalism as limitation-of-power holders to protect individual rights can only be congenial for understanding American constitutionalism, where liberty is conceived as predominant value. In non-Christian traditions, people may commit to general values other than liberalism or individualism.

I find that Walker provides a pertinent conception to comprehend the goal of constitutionalism in general. He generalises that 'the appeal of constitutionalism, now and in previous eras, seems precisely to lie in its capacity to *ward off tyranny* by structuring public life and institutions in a

<sup>10</sup> Carl J Friedrich, *Constitutional Government and Democracy* (1950) 26.

<sup>11</sup> Ibid 123.

<sup>12</sup> Id.

<sup>13</sup> See Ronald Dworkin, 'Constitutionalism and Democracy' (1995) 3 *European Journal of Philosophy* 1.

<sup>14</sup> Walker, above n 1, 160.

<sup>15</sup> Ibid 160-64.

<sup>16</sup> Ibid 163.

<sup>17</sup> Ibid 163-64.

way that keep them *accountable to general public standards*.<sup>18</sup> By way of metaphor, an unbridled horse may become pugnacious, dangerous and unserviceable; similarly, power that has slipped the leash may easily become a Trojan horse for general public standards. Public values are vulnerable to the mercurial whims of the procrustean ruler. Public values may be in peril if whims of politicians are free from restraints, thus allowing them to wield power by character of *ipse dixit* in pursuit of their egoistic interests. In short, the state power must be effectively restrained to ensure general public standards.

For the ends of ensuring the government is responsible for general values, constitutionalism may carry diverse means designed to superimpose limitations on the state-power holders. cursory examination gives the lie to the idea that the enactment of a constitution is an ineluctable step in the establishment of constitutional government. In fact, constitutionalism is not equal to a constitution notwithstanding the etymological genealogy. Walker asserts that: 'Defining quality of constitutionalism is not having definite texts; it is the public articulation of (at least some of) a polity's normative architecture, that is, of those conventions and practices, principles and understandings that, when not simply taken for granted, are invoked to control more particular disputes. These things can be articulated via all forms of influential public discourse.'<sup>19</sup> The important point here is that the rudiment of constructing constitutionalism is 'the public articulation' which means to verbally manifest 'a polity's normative architecture'. Making a constitution is just one kind of 'all forms of influential public discourse.' Walker is not alone in proposing this kind of concept. Richard S Kay equally opines that constitutionalism necessarily entails the creation of prior rules to define and limit the power of the state and that it is necessary to invoke some fixed verbal formulation of those rules<sup>20</sup>. He then notes that 'the medium by which the formulation is preserved and communicated is not crucial. It could be oral or electronic, but for the founders of the United States Constitution, of course, it was written.'<sup>21</sup>

Finally, constitutionalism normally requires structural limits on state power.<sup>22</sup> Modern examples of constitutional government witness the prevalent practices of such structural limits as separation of power, federalism, bicameralism, presidential veto, parliamentary impeachment, and especially judicial review. It should be noted that these are structural

<sup>18</sup> Ibid (italics added).

<sup>19</sup> Ibid.

<sup>20</sup> Richard S Kay, 'American Constitutionalism' in Larry Alexander (ed) *Constitutionalism: Philosophical Foundations* (1998) 27.

<sup>21</sup> Ibid.

<sup>22</sup> See Walker, above n 1, 167.

means of mature modern western constitutionalism. Premodern and non-western constitutionalism may carry other structural limits.

### III. Confucian Constitutionalism: Classical Foundations

#### A. CONFUCIANISM VERSUS DESPOTISM

It is conventionally thought that the notions of constitutionalism are generated due to the apprehension of arbitrary power. As shown in McIlwain's negative definition of constitutionalism, it is opposite to despotism. Given that, it is necessary to descry the Confucian stance toward arbitrary rule or despotism or tyranny,<sup>23</sup> the starting point of searching for constitutionalist origins in Confucianism.

In contrast to modern criticism of Confucianism that 'it is related, as it always was, to political despotism (...),'<sup>24</sup> I contend that classical Confucianism adopts a stance critical of despotism. To begin with, the *Shu Jing* or *The Book of Historical Documents* shows a negative disposition towards despots. As indicated in the work, such revolutionists as the Tang of Shang and King Wu, who were about to capsize the despots, tended to justify their conduct on the grounds of the popular cacophony against despotic rulers.<sup>25</sup> In another Confucian classic called *Li Ji* or the *Book of Rites*, Confucius caustically compares that 'oppressive government' which is a typical indicator of despotism as 'more terrible than tigers.'<sup>26</sup>

The *Analects* provides more evidence for Confucius' aversion toward arbitrary rule. This can be firstly corroborated by his formulation of 'four bad things' pertaining to persons in authority: 'To put the people to death without having instructed them; - this is called cruelty. To require from them, suddenly, the full tale of work, without having given them warning; - this is called oppression. To issue orders as if without urgency, at first, and,

<sup>23</sup> 'Arbitrary rule', 'despotism' and 'tyranny' are terms close in meaning. 'Despot (Greek *despotes*) related to someone who resorts to arbitrary rule.' See Eric Carlton, *Faces of Despotism* (1995) 10. 'Despotism and tyranny are virtually synonymous terms for governments uncontrolled by law or custom. Power in such government is typically concentrated in the hands of a single authoritarian ruler.' See Frank N Magill (ed), *International Encyclopedia of Government and Politics, Volume One* (1996) 365.

<sup>24</sup> Xinzhong Yao, *An Introduction to Confucianism* (2000) 271.

<sup>25</sup> See James Legge, *The Chinese Classics with Translations, Critical and Exegetical Notes, Prolegomena, and Copious Indexes*, Volume III., *The Shoo King (Shu Jing)* (1960) 175.

<sup>26</sup> James Legge, 'Li Ki' ('Li Ji') in *Sacred Books of the East, Vol. XXVIII, F* Max Müller (ed) (1885) 191.

when the time comes, to insist on them with severity; - this is called injury. And, generally, in the giving pay or rewards to men, to do it in a stingy way; - this is called acting the part of a mere official.’<sup>27</sup> The first three bad things are obviously linked to arbitrary rule. with respect to the first fault, Confucius’s concern is that without public acknowledgement of ruling principles, public power can be arbitrarily practiced. The second fault, ‘oppression’, is clearly related to unpredictable and mercurial execution of public power. The spirit of the third bad thing - injury, according to Leonard Shihlien Hsu, ‘resembles that of the *post facto* law which is made unconstitutional in practically all modern states.’<sup>28</sup> In general, it can be deducted from the above language that arbitrary rule in Confucius’ percipience is a ‘bad thing.’

Equally significant, Confucius genuinely dreads uncontrolled power. One day, the Duke Ting asked Confucius: ‘Is there a single sentence which can ruin a country?’ He replied, ‘If a ruler’s words be good, is it not also good that no one oppose them? But if they are not good, and no one opposes them, may there not be expected from this one sentence the ruin of his country?’<sup>29</sup> To explain Confucius’ sally in constitutional parlance, the country can be destroyed by unchecked power.

In a more acrimonious tone, Mencius goes further to assert that bad rulers should be dismissed. In a conversation with King Hsüan of Ch’i, Mencius implicitly states that when the king drives his kingdom into a bad situation his power should be left in abeyance.<sup>30</sup> More explicitly, in another audience with the King, in replying to the King’s inquiry on the historical military events pertaining to the flagellations of King Tang and King Wu upon King Jie and King Zhou respectively, Mencius obviously supports the legitimacy of regicide in the case of executing despots or tyrants.<sup>31</sup>

In the same vein, Xunzi unequivocally asserts that a culpable tyrant is not a virtuous ruler, and deserved dethronement in favour of the worthy. He states: ‘To execute a tyrannical lord is like executing a ”solitary

<sup>27</sup> James Legge, *The Chinese Classics with Translations, Critical and Exegetical Notes, Prolegomena, and Copious Indexes, Volume I., Confucian Analects, The Great Learning, The Doctrine of the Mean* (1960) 353-54.

<sup>28</sup> Leonard Shihlien Hsu, *The Political Philosophy of Confucianism* (1975) 110.

<sup>29</sup> Legge, above n 27, 269.

<sup>30</sup> See James Legge, *The Chinese Classics with Translations, Critical and Exegetical Notes, Prolegomena, and Copious Indexes, Volume II., The Works of Mencius* (1960), 164-65 (Slightly modified).

<sup>31</sup> Id at 167.

individual.”<sup>32</sup> Xunzi, then, advocates the legitimacy of King Tang’s and King Wu’s banishment of the tyrant Jie and the tyrant Zhou respectively.<sup>33</sup>

In short, there is ample evidence in the Confucian classical works addressing the antagonism to despotism or tyranny. Importantly, if constitutionalism is negatively defined as the antithesis of despotic government, the Confucian antagonism to despotic government can be accounted as the starting point of Confucianism in explicating constitutionalist postulates. The continuing odyssey entails a deeper consideration of whether the Confucians had any alternative for despotism in any constitutionalist sense.

## B. RECTIFICATION OF NAMES AS CONSTITUTIONALISM

Constitutionalism is widely eulogised as ‘the antidote to tyranny.’<sup>34</sup> McIlwain also proclaims that: ‘the only alternative to despotism is constitutionalism.’<sup>35</sup> While passing stricture upon tyranny or despotism, do the classical Confucians envisage any ‘antidote’ or ‘alternative’ in any constitutionalist sense? I believe that the doctrine of *zheng ming* (rectification of names<sup>36</sup>), developed by Confucius and expounded by Mencius and Xunzi, is the corollary of their dread of arbitrary or despotic power. *Zheng ming* government is Confucianism’s shibboleth formulated in the hope that public power will function in a proper manner.

Many philosophical scholars have underlined the importance of the doctrine of *zheng ming* in Confucian political philosophy.<sup>37</sup> However, what has been ignored is the constitutional importance of the doctrine. Tom Ginsburg and Chai-hark Hahm are the rare constitutional scholars who pay attention to the constitutional dimension of Confucianism, but unfortunately they, while focusing on the concept of *li*, have neglected the constitutional significance of *zheng ming*. In this section, I shall argue that Confucianism’s doctrine of the rectification of names can be comprehended in constitutionalist connotation.

<sup>32</sup> John Knoblock, *Xunzi: A Translation and Study of the Complete Works, volume III* (1994) 35.

<sup>33</sup> Ibid.

<sup>34</sup> Walker, above n 1, 154.

<sup>35</sup> McIlwain, above n 9, 271.

<sup>36</sup> In this study, *zheng ming* and rectification of names are interchangeably used.

<sup>37</sup> See Chung-ying Cheng, *New Dimensions of Confucian and Neo-Confucian Philosophy* (1991) 221; Chenyang Li, *The Tao Encounters the West: Explorations in Comparative Philosophy* (1999) 63.



First, it should be noted that for Confucius, rectification of names is the doctrine advanced mainly to deal with matters regarding government. This is well illuminated by the fact that Confucius introduced the term ‘*zheng ming*’ in his repartee to Zi Lu’s inquiry on what he should do first if the Lord of Wei employs him to administer the government: ‘What is necessary is to rectify names.’<sup>38</sup>

Because Confucius presented the term ‘*zheng ming*’ in the situation related to the Lord of Wei, some are inclined to explain it on the grounds of the historical context associated with the Wei state.<sup>39</sup> The historian Sima Qian of the early Han Dynasty, for example, believed that the name (*ming*) in Confucius’ view of rectification of names (*zheng ming*) refers to the two names: ‘father’ and ‘son.’<sup>40</sup> On the other hand, for some other Han commentators, Confucius’ *zheng ming* is not restricted to the historical context of the relationship of father to son as the author of *Shi ji* believed. For example, Ma Rong (74-166) regarded Confucius’ *zheng ming* as ‘to correct the names of the one hundred affairs.’<sup>41</sup>

It may be true that when introducing the doctrine of rectification of names, Confucius was aware of the imbroglio of Wei; however, it is unclear that the *ming* (name) in his *zheng ming* is restricted to ‘father’ and ‘son.’ At the same time, the expansion of *ming* (name) to the names of all things appears to reach beyond the intention of Confucius. When initiating the doctrine, Confucius may inadvertently give support to nominalists,<sup>42</sup> but he

<sup>38</sup> Legge, above n 27, 263.

<sup>39</sup> Historically, the prince of Wei was Lord Zhe of Wei who fought with his father Kuai Kui for the rulership of the state. Kuai Kui, the eldest son of Duke Ling of Wei (d 493 BC), offended his father and was forced into exile. When Duke Ling died, the people chose his grandson Zhe to be their ruler, but Kuai Kui sought for the help of the state of Jin to gain the throne. See Zhang Dainian, *Key Concepts in Chinese Philosophy*, (Edmund Ryden trans, 2002 ed) 462.

<sup>40</sup> For more elaborations on Sima Qian’s perspective, see John Makeham, *Name and Actuality in Early Chinese Thought* (1994) 36; see also, John Makeham, *Transmitters and Creators: Chinese Commentators and Commentaries on the Analects* (2003) 334.

<sup>41</sup> Dainian, above n 39, 463.

<sup>42</sup> Xunzi dedicates a separate chapter in his work to discuss this theme. John Knoblock, *Xunzi, Volume III*, 113-138. I contend that the rectification of names in Xunzi’s philosophy is both governmental and nominal, in that Xunzi writes the chapter both for defining governmental responsibilities and for differentiating different things. The Han commentators’ expansive deconstruction of Confucius’ doctrine of rectification is attributable to Xunzi’s chapter. Today, the doctrine has been studied beyond the political sphere. The doctrine has also been the concern of linguistic and nominalistic studies. See for example, John Makeham, *Name and Actuality*.

himself, by *zheng ming*, is not a nominalist who intends to correct linguistically the names of all things. My contention is that *zheng ming* is governmental rather than linguistic. Confucius introduces the doctrine for governmental purpose and to deal with governmental matters. By rectification of names, Confucius mainly aims at rectifying the names of persons in authority.

Additionally, it should be emphasised that Confucius considers rectification of names the priority of a governmental program. Even, elsewhere in the *Analects*, he declares that: 'to govern means to rectify.'<sup>43</sup> Confucius tends to equate execution of governmental affairs to rectification of names.

Why is rectification of names essential for government? What is it? To understand the doctrine, it is necessary to firstly explain what names (*ming*) means in *zheng ming*. For Confucius, name is more than a linguistic medium used to identify things and people. In explaining Confucius' rectification of names, Fung Yu-lan defines name as the essence or concept of things. The name 'ruler', for example, is the essence which makes a ruler a ruler.<sup>44</sup> From this point of view, the names of people are not merely linguistic labels but, in a more substantial meaning, their essences.

The continuing matter is what constitutes the essence of a person from Confucius' perspective. Confucian humaneness (*ren*) holds that human beings are by nature social beings. Henry Rosemont Jr writes: 'in order to be a friend, neighbor, or lover, for example, I must have a friend, neighbor, or lover. Other persons are not merely accidental or incidental to my goal of fully developing as a human being, they are essential to it.'<sup>45</sup> From Confucius' point of view, the relationships that people live are not something external to them; in deepest sense, these relationships constitute the essence of their lives. Only through interpersonal relationships is one named as father, son, minister, or prince.

Hence, names like 'father', 'son', 'minister', or 'prince' are not only words to label people; rather, they encompass these relationships. For example, one is no longer called 'prince' if one does not experience the corresponding relationship with ministers and subjects. Moreover, for Confucius, each relationship that a person is involved in normally suggests

<sup>43</sup> Legge, above 27, 258.

<sup>44</sup> See Fung Yu-lan, *A History of Chinese Philosophy Vol.1*, (Derk Bodde trans, 1952), 59.

<sup>45</sup> Henry Rosemont Jr, 'Two Loci of Authority: Autonomous Individuals and Related Persons' in Peter D Hershock and Roger Tames (eds) *Confucian Cultures of Authority*, (2006) 10.

possible virtue. It is on this ground that Chung-ying Cheng defines names in Confucius' rectification of names as including 'labels for relationships between individuals and the values inherent in those relationships.'<sup>46</sup>

As names include relationships, they indicate the roles of people in which their duties and the functions are defined. The name 'prince', for example, proposes what the named is supposed to do. It should be noted that as the prince's relationships are essential to him, he lives rather than plays the roles in those relationships: in so far as he lives these roles, he is named as 'prince.' Furthermore, since name implies positive virtue, it suggests certain ways of behaviour. Therefore, the name 'prince' points out not only what the named will do but also what he ought to do. Chenyang Li helpfully generalises names as being 'both descriptive and prescriptive.'<sup>47</sup>

Having defined the meaning of 'names,' we can now clarify what rectification of names is. According to Fung Yu-lan, it means that 'the actual must in each case be made to correspond to the name, the thing's essence or concept.'<sup>48</sup> The essential spirit of *zheng ming* is the correspondence between the names and the actuality. Consequently, rectifying the names involves various actions to maintain the correspondence between the names and the actualities. Since names indicate the relationships which define the roles together with their inherent virtues, it follows that to rectify the names is to rectify the relationships, which means to maintain the socio-political order by which those who carry certain names shall act in accordance with the roles and the virtues that the names or the relationships stand for. Consider this discourse for more illustration. When the duke Ching of Chi asked Confucius about government, he replied, 'There is government, when the prince is the prince, and the minister is the minister; when the father is father, and the son is son.'<sup>49</sup> In the sentence that 'the prince is the prince,' the first word 'prince' refers to a physical prince, while the second word 'prince' refers to the relationships which define the duties and functions together with moral values that the physical prince is supposed to follow. 'The prince is the prince' means to safeguard the correspondence between the real actions of the physical prince with the roles and moral values that the term 'prince' stands for.

In negative meaning, rectification of names is to avert the situation in which the acts of those who carry social titles do not correspond with the roles and the values that the titles stand for. It is on this ground that

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<sup>46</sup> Cheng, above n 37, 222.

<sup>47</sup> Li, above n 37, 67.

<sup>48</sup> Fung, above n 44, 59-60

<sup>49</sup> Legge, above n 27, 256.

Confucius demands: 'he who is not in particular office, has nothing to do with plans for the administration of its duties.'<sup>50</sup>

From this, it can be seen that the Confucian program of rectification of names is more than precision of nomenclature. According to Chung-ying Cheng's explanation,

rectifying names demands the correspondence of names to the natural facts as well as to the implementation of values. Thus, this doctrine does not just require definitional consistency, but implies a recognition of principles; that is, recognition of standards of action, and that can be used to judge what is true, good, and right, on the one hand, and what is false, bad, and wrong, on the other. To rectify names therefore is to establish standards of the true, the good, and the right. But because moral knowledge of right and wrong in a normal situation carries a command for doing right, to rectify names therefore, is related to the program for carrying out the command for doing the appropriate thing in accordance with the proper situation.<sup>51</sup>

Put it in another way, the Confucian program of rectification of names involves the articulation and execution of standards defining the functions and the values inherent in those functions. Governmentally speaking, rectification of names means to maintain the concordance between the real actions of the governors, like sovereigns and ministers, with the standards defining their duties, authority, and expected values. As the priority of the Confucian governmental program, rectification of names therefore involves the articulation and implementation of standards for the operation of public power.

Understanding it in this sense, I contend that the Confucian rectification of names is relatively in propinquity to constitutionalism. To rectify the names means to ensure the proper operation of public power. Rectification of names therefore implies the limitation of arbitrary power. In that sense, a rectified government tends to become a limited government. In the *zheng ming* government, the power holders are required to function in concordance with their names or the standards defined by their authorities, duties, and expected virtues. Quite similarly, in modern constitutional government, the physical political institutions, such as the congress, the president, and the prime minister, are required to function in accordance with the metaphysical constitutional standards (or the constitutional names)

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<sup>50</sup> Ibid 213.

<sup>51</sup> Cheng, above n 37, 222.

commonly defined by a written constitution. The constitutional judges, by practicing the constitutional review power, guarantee this concordance. Both *zheng ming* government and constitutional government are designed for the actual correspondence of the material governmental institutions to the governmental standards to ensure the proper use of public power and to prevent arbitrary power.

To be sure, that analogy alone is not sufficient to justify the conclusion that *zheng ming* government is a constitutional government. Constitutionalism in substantial meaning is ‘about its *telos*.’<sup>52</sup> Moreover, constitutional government requires publicly articulating constitutional standards. Additionally, constitutionalist projects lead to manipulating means to ensure the concordance of the material constitutional institutions with the constitutional standards. Given that, the continuity of this odyssey requires considering how Confucianism conceptualises the *telos* of government, the institutional manifestation of standards for organising and operating state power, and the means to implement these standards and whether these conceptualisations reflect constitutionalist ideas.

### C. MINBEN (PEOPLE AS BASIS): THE TELOS OF ZHENG MING GOVERNMENT

Constitutionalism presupposes the idea of the existence of a proper relationship between the government and its subjects. The propriety of the relationship means that governmental power must be limited to general public standards. In this section, I shall argue that the Confucian concept of *minben* (people as basis) can be regarded as the source of constitutionalism in the Confucian intellectual legacy since it suggests that a *zheng ming* government must be responsible for general public standards.

The concept of *minben* has been established in the *Shu Jing*. We find these verses in the classic: ‘The people should be cherished; they should not be down-trodden. The people are the root of the country; the root firm, the country is tranquil.’<sup>53</sup> As people are the root or the base, the creation of government is for the people.<sup>54</sup> The happiness of the people is regarded as the end of government.<sup>55</sup>

<sup>52</sup> Nicholas Tsagourias, ‘Introduction- Constitutionalism: A Theoretical Roadmap’ in Nicholas Tsagourias (ed) *Transnational Constitutionalism: International and European Models*, (2007) 3.

<sup>53</sup> Legge, above n 25, 158-59.

<sup>54</sup> Ibid 254-55.

<sup>55</sup> Ibid 262-63.

Confucius goes further to develop the concept of *minben* on the foundation of his humanism (*ren*). While *ren* is understood as the love of all men, its incarnation in the political realm is the ruler's love of the people. In political meaning, to love the people means to work for their happiness. In the *Analects*, Confucius is reported to respond to the duke of Sheh's enquiry on government that 'good government obtains, when those who are near are made happy, and those who are far off are attracted.'<sup>56</sup>

From Confucius' perspective, the good government must be responsible for the welfare of the people, which includes both material and spiritual aspects. This can be well illustrated by this passage in the *Analects*: 'When the Master went to Wei, Zan Yu acted as the driver of his carriage. The Master observed, "How numerous are the people!" Yu said, "since they are thus numerous, what more shall be done for them?" "Enrich them," was the reply. "And when they have been enriched, what more shall be done?" The Master said, "teach them."<sup>57</sup> It can be seen that in Confucius' thought, the responsibilities of the government are to firstly ensure prosperous conditions for the people and to subsequently educate them.

In the political field, to love the people or to work for the benefit of the people means two things: first, not to do bad things to them; second, to do good things for them. This is demonstrated in Confucius' proclamation of four principles of bad government and five principles of good government. The four principles of bad government pertain to doing harmful things to the people that a person in authority should avoid, including: cruelty, oppression, injury, and meanness. Five principles of good government are related to doing beneficial things for the people that a person in authority should promote, including: to benefit the people without wasting great expenditure, to lay tasks on the people without their repining, to pursue desire without being covetous, to maintain a dignified ease without being proud, and to be majestic without being fierce.<sup>58</sup>

Mencius expounds and goes further to develop the concept of *minben*. Mencius famously declares that 'the people are the most important element in a nation; the spirits of the land and grain are the next; the sovereign is the lightest.'<sup>59</sup> In developing the concept of *minben*, quite different from Confucius, Mencius particularly accentuates the responsibility of the government for the material benefits of the people.<sup>60</sup>

<sup>56</sup> Legge, above n 27, 269.

<sup>57</sup> Ibid 266-67.

<sup>58</sup> Ibid 352.

<sup>59</sup> Legge, above n 30, 483.

<sup>60</sup> See also, Viren Murthy, 'The Democratic Potential of Confucian *Minben* Thought' (2000) 10(1) *Asian Philosophy* 35.

Mencius considers nourishing the people as the foremost task of the humane government. His rationale lies in the conviction that the constancy of material life is the precondition for the constancy of spiritual life.<sup>61</sup> However, Mencius by no means underestimates the importance of educating people. He asserts ‘if they [the people] are well fed, warmly clad, and comfortably lodged, without being taught at the same time, they become almost like the beasts.’<sup>62</sup> Mencius even suggests that the government should establish educational institutions for the instruction of the people.<sup>63</sup> While Mencius’ goal was to morally educate people, he paid great attention to the livelihood of the people since he believed that economically decent conditions are required for the flowering of humane mind. Given that, material conditions are the instrument for spiritual life, and nourishing the people is subsidiary to educating them.

Xunzi also defends the principle of *minben*. Quite similar to the Hobbesian perspective, Xunzi gives credence to the inherently evil human nature whose natural development will drive human life to the state of anarchism, chaos and cruelty.<sup>64</sup> However, this does not necessarily lead him to the invocation of a Leviathan government, as Thomas Hobbes did, or draconian penal laws, as his unexpected student Han Fei did. Rather, he thinks that this inborn nature can be rectified by moral education and it is for this educational task that government is established.<sup>65</sup> Hence, Xunzi asserts that the people are not created for the sake of the lord; conversely, the lord is established for the sake of the people.<sup>66</sup> Therefore, quite similar to Confucius and Mencius, Xunzi states that: ‘if the lord of men desires to be secure, no policy is as good as even-handed government and love of people.’<sup>67</sup> To love the people or to work for the sake of the people, the government must both educate them and take care of their livelihood. One of the ways of the ruler, he states, ‘lies in expertise in providing a living for people and in caring for them.’<sup>68</sup>

The Confucian concept of *minben* is teleologically linked to the doctrine of rectification of names. The welfare of the populace is the *telos* of the *zheng ming* government. Insofar as the government serves for the benefit of its subjects it is qualified as a true government. Conversely, if the government or the ruler betrays the benefit of the people, it is not a true

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<sup>61</sup> See Legge, above n 30, 147-48 (slightly modified)

<sup>62</sup> Ibid 251.

<sup>63</sup> Ibid 242.

<sup>64</sup> See Knoblock, above n 32, 150-51.

<sup>65</sup> Ibid 151.

<sup>66</sup> Ibid 224.

<sup>67</sup> Knoblock, above n 32, *Volume II*, 97.

<sup>68</sup> Ibid 181.

government or a true ruler. It is on this ground that Mencius regards the tyrant Zhou as 'a robber', 'a ruffian' and 'a mere follow' rather than a sovereign, and that Xunzi considers Tang and Wu true rulers as they 'were considered the father and mother of the people' and Jie and Zhou Xin not as true rulers who deserved to be superseded as they 'were hated as the predators of the people.'<sup>69</sup> In short, a rectified government must be the government for the people.

The Confucian *minben* has widely been explained to support democracy.<sup>70</sup> At the same time, the concept has never been read in the light of constitutionalism. At first glance, it seems counterintuitive to relate the *minben* government to the constitutional government since the *minben* concept accentuates the concerns of public good which will lead to the advance of power<sup>71</sup> while constitutional government emphasises the limitation of power.

Modern constitutional theorists inspired by the notions of individual autonomy and the state's neutrality, originating from Enlightenment's individualism and liberalism, tend to stress the reduction of public power for constitutionalist purposes. In fact, constitutionalism is not always about the reduction of a political leaders' authority. Stephen Homes is instructive on this point as he states: 'In general, constitutional rules are enabling, not disabling; and it is therefore unsatisfactory for identifying constitutionalism exclusively with limitations on power [...] Constitutions do not merely limit power; they can create and organize power as well as give power a certain direction.'<sup>72</sup> To say this in a precise way, constitutionalism is about the limitation of a particular kind of power - *arbitrary power*, not public power in general. The constitutional government cannot operate effectively without necessary instruments of puissance. Hence, there is place for empowerment in constitutionalist polity. A fortiori, proper distribution of power is a channel to avert arbitrary rule: governors must function properly within the empowered parameter.

In the deepest sense, constitutionalism is the political condition in which power is properly practiced, which in turn lies in the responsibility of the power holders. Rossiter underlines:

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<sup>69</sup> Knoblock, above n 32, 35.

<sup>70</sup> See Murthy, above n 60, 132.

<sup>71</sup> See Michael C Davis, 'Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values,' (1998) 11 *Harvard Human Rights Journal* 117.

<sup>72</sup> Stephen Holmes, 'Precommitment and the Paradox of Democracy' in Jon Elster and Rune Slagstad (ed) *Constitutionalism and Democracy*, (1988) 227-28.



Any system of government genuinely committed in theory and adhering in practice to constitutionalism of any form – and particularly to democracy – must involve the principle of responsibility in all of its meanings, including especially: answerability; duty; obligation; oversight; accountability; trusteeship; and causality.<sup>73</sup>

The *minben* concept is highly consonant with this principle of constitutionalism. Even though the advancement of public good may require correspondingly the aggrandisement of power, the Confucian theory of *minben* suggests that the ruler must be responsible in practicing his power. To work for the welfare of the people, the ruler, from the perspective of Confucianism, bears prodigious responsibilities. He should preside over people with gravity, be final and kind to all, advance the good and teach the incompetent.<sup>74</sup> He should honour the talented and virtuous, and bear with all, praise the good, and pity the incompetent.<sup>75</sup> He should love propriety, righteousness, and good faith.<sup>76</sup> He should pay reverent attention to business, be sincere, be economic in expenditure, have love for men, and employ the people in the proper seasons.<sup>77</sup> One may want to further embellish this catalogue, but these are sufficient to verify the profound Confucian concern for responsible government. In conclusion, as the *minben* concept necessarily leads to responsible government, it can be counted as the idea of constitutionalism in the Confucian intellectual world.

In addition, those who deny the constitutionalist implication of the *minben* concept may argue on the grounds of the *telos* of constitutionalism that *minben* does not include the notion of rights<sup>78</sup> while the protection of human rights are the goal of constitutional government. *Minben* accentuates generally the governmental concerns for the public good which fundamentally includes the material and spiritual needs of the people. In western constitutional theory, the claims of such good are put forward under the rubric of ‘social economic and cultural rights.’ However, Confucianism does not find it meaningful to claim such needs on the ground of a human being.<sup>79</sup> This is closely associated with Confucians’ emphasis on harmony which favours temperance in the relationship between the government and

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<sup>73</sup> Cited in Polin, above n 1, 12.

<sup>74</sup> See Legge, above n 27, 152.

<sup>75</sup> Ibid 340

<sup>76</sup> Ibid 265

<sup>77</sup> Ibid 140

<sup>78</sup> See Andrew J Nathan, *Chinese Democracy* (1985) 127.

<sup>79</sup> See Wejen Chang, ‘Confucian Theory of Norms and Human Rights’ in Wm Theodore de Bary and Tu Weiming (eds) *Confucianism and Human Rights* (1893) 132.

the people and consequently presumes that people's aggressive claims and struggles for their inherent benefits may undermine the apollonian state of the polity.

Nevertheless, the absence of a rights concept cannot be invoked to negate the constitutionalist meaning of *minben*. As illustrated by Craham Walker, the conception that the goal of constitutionalism is to champion human rights is the consequence of the modern restriction of constitutionalism which stemmed from the liberalism and individualism of the Enlightenment.<sup>80</sup> Liberalism and individualism therefore can only be considered the *telos* of western liberal modern constitutionalism. Given that, non-western and premodern constitutionalism need not be examined through a liberalistic and individualistic lens. Above all in the constitutionalist polity is the spirit of responsibility for the 'general public standards.' The constitutional government is responsible for values other than rights. To that extent, the ruler in the *minben* scheme is conceptualised to be responsible for 'general public standards' rather than to be free to pursue his egoistic interests. In this sense, the Confucian concept of *minben* satisfies the teleological requirement of constitutionalism.

#### D. LI (RITUAL): CONFUCIAN CONSTITUTION

Those who gainsay the constitutionalist meaning of *minben* may even state that the relationship between the government and the people in the *minben* scheme is paternalistic.<sup>81</sup> On the other hand, as Immanuel Kant asserts, under a paternal government, 'the subject, as immature children who cannot distinguish what is truly useful or harmful to themselves, would be obliged to behave purely passively and to rely upon the judgment of the head of state as to how they ought to be happy, and upon his kindness in willing their happiness at all.'<sup>82</sup> Such a government is the 'greatest conceivable *despotism*.'<sup>83</sup> It seems logical to follow that the *minben* government implies despotism or authoritarianism rather than constitutionalism.

It should be candidly noted that there is no lack of statements in the Confucian scriptures which compare the ruler to the parents of the people.<sup>84</sup> However, it would be a fallacy to, based on such evidence, reduce Confucian governmental inquiry to mere paternalism and hence to despotism or authoritarianism. While comparing the ruler to the parents of

<sup>80</sup> Walker, above n 1, 160-64

<sup>81</sup> See Lucian W Pye, *Asian Power and Politics: The Cultural Dimensions of Authority* (1985) 81.

<sup>82</sup> *Kant's Political Writings*, Hans Reiss (ed) (HB Nisbet trans, 1970) 74

<sup>83</sup> *Ibid* (original italics).

<sup>84</sup> See Legge, above n 27, 370; 374; Knoblock, above n 32, 35.

people, the classical Confucians by no means believe that the ruler can unilaterally and arbitrarily superimpose his discretion upon the docile people. Rather, Confucian governmental theory proposes that the ruler, in governing the people, must be limited by pre-established rules termed as *li* (ritual) in the Confucian nomenclature. In this section, I argue that the concept of *li* stands for constitutionalist ideas.

To begin with: what is *li*? *Li* has no English equivalent.<sup>85</sup> According to Homer Dubs, there are thirteen English words that translate to the word *li*, viz: religion, ceremony, deportment, decorum, propriety, formality, politeness, courtesy, etiquette, good form, good behaviour, good manners, and the rules of proper conduct.<sup>86</sup> Masayuki Sato notes that in the last two decades *li* has predominantly been translated into English as ‘ritual.’<sup>87</sup>

*Li* is a manoeuvrable concept which possesses various nuances of connotation in different periods of time. While the morphology of *li* 禮 pristinely refers to religious ritual of libation,<sup>88</sup> the evolution of the concept leads to the inclusion of other things. In the Shang dynasty, *li* mainly indicated religious liturgy, but in the Zhou dynasty and especially when the Duke of Zhou systematically codified the *li* of Zhou, *li* was expanded to incorporate socio-political institutions and norms. At the same time, in the *Book of Poetry*, reportedly created during the Spring and Autumn period prior to Confucius, *li* was conceptualised as manners and social norms. Confucius appropriates the precedent meanings of *li* and goes further to develop a novel sense, that is, the moral norm. Following Confucius, Mencius views *li* as social norms, and in particular one of the four cardinal moral values.<sup>89</sup> Xunzi pays especial attention to *li*. His distinct contribution is to elevate *li* to the cosmic principle.<sup>90</sup> Benjamin Schwartz helpfully generalises:

The word *li* on the most concrete level refers to all those ‘objective’ prescriptions of behavior, whether involving rite, ceremony, manners, or general deportment, that bind human beings and the spirits

<sup>85</sup> Hsu, above n 28, 93.

<sup>86</sup> See Homer Dubs, *The Works of Hsun Tze* (1928) 113.

<sup>87</sup> Masayuki Sato, *The Confucian Quest for Order: The Origin and Formation of the Political Thought of Xun Zi* (2003) 166.

<sup>88</sup> The pictogram *li* 禮 indicates a sacrificial vessel with two pieces of jade above it. See Yongping Liu, *Origins of Chinese Law: Penal and Administrative Law in Its Early Development* (1998) 63.

<sup>89</sup> For a comprehensive treatment on the development of the concept of *li*, see: Sato, above n 87, 173-236.

<sup>90</sup> Knoblock, above n 32, *Volume II*, p 51.

together in networks of interacting roles within the family, within society, and within numinous realm beyond [...] What make *li* the cement of the entire normative sociopolitical order is that it largely involves the behavior of persons related to each other in terms of role, status, rank, and position with a structured society.<sup>91</sup>

In short, *li* in Confucian philosophy is an extremely inclusive concept, which embraces comprehensively rituals, institutions, social and moral norms, which regulate all dimensions of the peoples' lives, ranging from personal behaviour, familial relationships, to socio-political functions and structures.

In the political meaning, the concept of *li* stemmed from the central doctrine of *zheng ming* government. Leonard Shihlien Hsu states that: '*li* is an applied doctrine of rectification.'<sup>92</sup> The *zheng ming* government demands the political institutions function in concordance with the established standards, which defines the limitations of their authorities and duties together with the expected virtues. This depends on the presence of a set of established standards. *Li* is formulated as the articulation of such standards.

First, *li* defines the institutional framework of government. For the classical Confucians, as Qu Tongzu asserts, *li*, among other things, 'are social and political institutions, including law and government.'<sup>93</sup> The fact the Duke of Zhou composed the Confucian work entitled *Zhouli* (Rituals of Zhou) intentionally to describe the structure of the government of the Zhou dynasty well verifies that *li* was conceived of as the institutional framework of government. It is for this reason that Kuo-Cheng Wu considers *Zhouli* as 'the Constitution of Zhou'<sup>94</sup> and Jaeyoon Song renders it as a 'meta-constitution.'<sup>95</sup> In a similar vein, Chaihark Hahm proposes that it can be referred to as 'constitutional law' in a Confucian state.<sup>96</sup> It can be concluded that in Confucian philosophy, *li* establishes the institutional limitations of the government. It defines the scope of the authorities and duties of different governmental institutions. It is on the basis of the institutional limitations set up by the *li* that the rectification of government can be practiced.

<sup>91</sup> Benjamin I Schwartz, *The World of Thought in Ancient China* (1985) 67.

<sup>92</sup> Hsu, above n 28, 95.

<sup>93</sup> Qu Tongzu [T'ung-Tus Ch'u], *Law and Society in Traditional China* (1961) 231.

<sup>94</sup> Kuo-Cheng Wu, *Ancient Chinese Political Theories* (1928) 37.

<sup>95</sup> Song, above n 7, 13.

<sup>96</sup> Chaihark Hahm, above n 5, 141.

Second, *li* defines the possible virtues which government individuals are supposed to possess. For classical Confucians, *li* connotes moral norms, apart from the governmental institutions. In this sense, *li* can be conceived of as a code of moral rules, which control the conduct of the political men. On the grounds of the code of conduct established by *li*, actions of government can be rectified.

Confucian governmental philosophy is particularly emphatic on the rule of *li*, whose locus classicus can be found in the *Analects*:

If the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame. If they be led by virtue, and uniformity sought to be given them by rules of propriety [*li*] they will have the sense of shame and moreover will become good.<sup>97</sup>

The rule of *li* means that all members of the government including the sovereign must be under the rein of *li*: 'If a prince is able to govern his kingdom with the complaisance proper to the rules of propriety (*li*), what difficulty will he have? If he cannot govern it with that complaisance, what has he to do with the rules of propriety (*li*)?'<sup>98</sup> The Confucian concept of the rule of *li* was the natural corollary of the doctrine of rectification of names. A *zheng ming* government must be under the rule of *li*. In a *zheng ming* government, different political institutions are required to function in concordance with the institutional limitations and the moral norms articulated by *li*.

Since *li* regulates all members of the polity, the rule of *li* implies the restraint of public power. It is because of this that *li* engrosses legal scholars, especially constitutional law scholars. Leonard Shihlien Hsu long ago examined the 'constitutional significance of *li*', according to which *li* is described as a principle in concordance with the 'natural law' and the will of the 'God' that defines the limits of governmental authority.<sup>99</sup> Recently, Tom Ginsburg also views *li* as 'a kind of higher natural law, constraining human positive law.'<sup>100</sup> Since the Confucian *li* presents the general principle, it is understandable that it is compared to natural law in Western legal theory. However, it seems unsatisfactory to discuss *li* under the rubric of natural law. Although the Confucians elevate *li* to general principle, they

<sup>97</sup> Legge, above n 27, 146.

<sup>98</sup> Legge, above n 27, 169.

<sup>99</sup> See Hsu, above n 28, 96-99

<sup>100</sup> Tom Ginsburg, 'Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan' (2002) 27 *Law and Social Inquiry* 794.

by no means suggest promulgating positive law consistent with the *li*. Along a different line to Hsu and Ginsburg, Chaiark Halm refutes interpreting *li* as a form of morality or a Confucian analogue for natural law. Inspired by Michel Foucault's concept of discipline, Halm particularly regards the disciplinary dimension of *li* as its constitutional significance: 'Confucian constitutionalism in this sense refers to the application of *li* as a regularized restraint on the ruler through disciplining his body and mind.'<sup>101</sup> When Halm eulogised the disciplinary facet of *li*, he did think of the Confucius' dictum in the *Analects 12:1*: 'To subdue one's self and return to propriety [*li*], is perfect virtue [*ren*].' For Halm, 'to subdue one's self' (or 'mastering oneself' as his preferable translation) can be rendered as 'self-discipline.'<sup>102</sup> I contend that the meaning of the *Analects 12:1* is actually moral. To discipline oneself in consonance with *li* to become humane is inherently a moral action. To that extent, Halm seems to fall under non sequitur while on the one hand denying discussing *li* under the form of morality and on the other hand signifying the disciplinary meaning of *li*.

I suggest that the constitutionalist significance of *li* lies in its traditionalist nature. However, it would be useful first to remember that the Confucians are traditionalists. The constitutional theorist Carl J. Friedrich in his '*Tradition and Authority*' notes that Confucians are 'perhaps the most traditionalist.'<sup>103</sup> Confucius, Mencius, and Xunzi are all admirers of the past, the model of the ancient kings, especially the civilisation of the early Zhou dynasty. Confucius himself declares that he is 'a transmitter and not a maker' and that he believes in and loves 'the ancients.'<sup>104</sup> Particularly, the master is enamoured of Zhou civilization: 'Zhou had the advantages of viewing the two past dynasties. How complete and elegant are its regulations. I follow Zhou.'<sup>105</sup> Mencius supports the *fa* (model) of ancient kings. By that, Mencius in fact gives approval to the traditional cultural heritages, regulations and institutions of Zhou.<sup>106</sup> Xunzi is also an admirer of the 'later kings' which are actually the early kings of Zhou.<sup>107</sup>

*Li* is the typical representative of Confucianism's traditionalist outlook. Herbert Fingarette points out that *li* is the medium for Confucius to 'talk about the entire body of the *mores*, or more precisely, of the authentic tradition and reasonable convention of society.'<sup>108</sup> William Alford points

<sup>101</sup> Halm, above n 5, 153.

<sup>102</sup> Ibid 79

<sup>103</sup> Carl J Friedrich, *Tradition and Authority* (1972) 14.

<sup>104</sup> Legge, above n 27, 195.

<sup>105</sup> Ibid 160.

<sup>106</sup> See Fung, above n 44, 108-11.

<sup>107</sup> Ibid 282.

<sup>108</sup> Herbert Fingarette, *Confucius – the Secular as Sacred* (1972) 6.

out that ‘thinking about...yesterday’ is a prevalent tendency in all intellectual discourse of ancient China.<sup>109</sup> Particularly, he indicates that *li* ‘embodied and expressed the most profound insights and experience of the so called- Ancients who had established society and compiled the Classics.’<sup>110</sup>

It should be noted that the rule of traditionalist *li* is not a haphazard loyalty to past facts. For Confucius, as illustrated by Herbert Fingarette, ‘the *li* and the *tao* represent deeply authenticated norms for conduct, rather than historically persistent forms of actual conduct (...) The *substantive* wisdom that Confucius taught was not loyalty to tradition but, rather, the intrinsic wisdom of certain ways of living.’<sup>111</sup> Fingarette distinguished ‘social fact’ and ‘social norms’, according to which *li* (and *tao*) ‘do not refer primarily to past social fact but to social norms, ie., rules or principles for guiding conduct.’<sup>112</sup> For Xunzi, *li* is understood as the Ways of ancient kings recorded in the classics which indicate ‘rightness’ (*yi*) or ‘what is right.’<sup>113</sup> *Li* is therefore the reflection of the general truth authenticated by the ancient sage kings. The spirit of *li* is its consonance with the common sense of rightness.<sup>114</sup> Xunzi says: ‘Ritual principles [*li*] use obedience to the true mind of man as their foundation.’<sup>115</sup> In short, the genuine meaning of the rule of *li* is the rule of norms and institutions, which are the embodiments of the reasonable principles authenticated in the tradition.

We are now in a position to examine the constitutionalist implications of *li* which stem from its traditionalist quality. As constitutionalism is opposite to personal rule, which leads to the efforts of western constitutionalist programs to superimpose the popular will upon the will of the ruler, it is conventional to regard popular sovereignty as the fundamental principle of constitutionalism. Especially the principle of the popular authorship of the written constitution, which originated in Rousseau’s theory of social contract, is considered the hallmark of

<sup>109</sup> See William P Alford, *To Steal A Book Is An Elegant Offense: Intellectual Property Law in Chinese Civilization* (1995) 9-29

<sup>110</sup> Ibid 211.

<sup>111</sup> Herbert Fingarette, ‘The Music of Humanity in the *Conversations* of Confucius,’ (1983) 10(4) *Journal of Chinese Philosophy* 335 (original italics).

<sup>112</sup> Ibid 335.

<sup>113</sup> According to Masayuki Sato, in Xunzi’s works *li* is juxtaposed to *yi* 104 times to form the two Chinese characters *liyi*. Sato also points out that when *li* and *yi* are separately used, the meaning of *li* overlaps that of *yi* to some extent. See Sato, *The Confucian Quest for Order*, 345-47. The subtext is that *li* is normally related to what is right.

<sup>114</sup> See Chang, above n 79,126.

<sup>115</sup> Knoblock, above n 32, 211

constitutional government. However, it is far from true that constitutionalism is equated to popular sovereignty and hence that a written constitution ratified by the people is the sine qua non of constitutional government. The essential spirit of constitutionalism is the victory of the popular will over the personal will. Given that, popular sovereignty which leads to a contractual written constitution is not the exclusive path to constitutionalist polity. There are other variations to maintain the political order in which the will of the governors is subjugated by the will of the populace.

The rule of tradition brings about such an alternative. Some constitutional theorists have stressed the role of tradition in constitutional theories. For instance, in the works of Carl Friedrich, tradition is of central importance.<sup>116</sup> To Friedrich, tradition is conceived not as a body of dogma to be followed unquestionably by succeeding generations but as the expression of the vital core of truth which reflects the common reason and common deliberations of the best and wisest men.<sup>117</sup> Friedrich defines constitutionalism as regular restraints of the government and tradition, as a kind of higher moral law, knowable by right reason, as one with important roots in the idea of restraints.<sup>118</sup> Robert Lowry Clinton, American scholar of constitutional law and political science, equally emphasises the constitutionalist significance of tradition.<sup>119</sup> Clinton particularly advocates the rule of tradition in a constitutionalist order because tradition presents the social consensus or 'the tastes and values of most people.'<sup>120</sup>

Returning to the case of *li*, it can be also said that because *li* is the embodiment of tradition, it presents the social consensus. The *li* as a set of norms and institutions may originally present the social elites, but as *li*, by cultural osmosis, is handed on from generation to generation as the embodiment of common truth, it becomes the expression of the popular voice. The rule of *li* is therefore designated to a political order in which the popular disposition is paramount. In a polity instilled with *li*, the popular will controls the polity. Consequently, the rule of *li* prevents the imposition of the will of a single ruler upon the society. In this sense, it can be said that the Confucian concept of *li* reflects constitutionalist aspiration.

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<sup>116</sup> Dante Germino, 'Carl J. Friedrich on Constitutionalism and the "Great Tradition" of Political Theory' in Roland Pennock & John W Chapman (eds) *Nomos XX- Constitutionalism J* (1979) 19.

<sup>117</sup> Ibid 20- 5.

<sup>118</sup> Ibid 23.

<sup>119</sup> See Robert Lowry Clinton, *God and Man in the Law: The Foundations of Anglo-American Constitutionalism* (1997).

<sup>120</sup> Ibid 55.



At the same time, to be constitutionally meaningful, any form indicating the social consensus must be publicly articulated. The primary effort of the constitutionalist project is to publicly articulate rules that will control future people in authority. According to Graham Walker, this action is a prerequisite of constitutionalism due to its objectification: ‘Most importantly, to articulate a polity’s normative architecture is to objectify it. It is to confer upon it a kind of separate existence- the separate, especially, from the immediate holders of power, even if those holders of power are ones doing the articulating. Public articulation means that the shape and the purposes of the polity are no longer hostage to vagaries of their subjectivity.’<sup>121</sup> This point of view is supported and further illuminated by Beau Breslin.<sup>122</sup> He asserts: ‘Constitutionalism now requires the *objectification* [...] of created political power.’<sup>123</sup> Constitutionalism obviously needs to objectify the structure and rules within which public power is practiced. That is because objectification produces a limiting effect: once the governors are fenced off from manipulating the polity according to their vagaries, governmental discretions can be limited.

Now, let us consider whether Confucian *li* is objective to the government. Benjamin Schwartz defines *li* as ‘*objective*’ prescriptions of behavior.’<sup>124</sup> Similarly, Chung-ying Cheng describes *li* ‘as an *objectified* principles, norms, or rule of human behavior.’<sup>125</sup> *Li* is objective to the government because of its traditionalist character. Since *li* is the norms and institutions agglomerated throughout generations and ingrained in tradition, it is rigidly anterior to the establishment of the contemporary government. Therefore, *li* averts narcissism of contemporary political figures. Consequently, once the dictates of *li* rein over the government, the destiny of the polity is not dependent on the ruler’s subjective predilection. For this, the rule of *li* induces a limiting effect upon the government. It is because of this that the Confucian theory of the rule of *li* suggests a constitutionalist notion.

Beau Breslin, when going further to develop Walker’s theory, submits that in order to secure objectification ‘a polity’s organizing charter must subscribe to the principle of *externality*’ in the sense that ‘for the conception of constitutionalism to be objective- and thus consequential- the limits impressed upon the will of the sovereign and its representative must in the first place exist separately from the political power centers.’<sup>126</sup>

<sup>121</sup> Walker, above n 1, 165.

<sup>122</sup> Beau Breslin, *The Communitarian Constitution* (2006) 112-33.

<sup>123</sup> *Ibid* (original italics).

<sup>124</sup> Schwartz, above n 91, 67 (italics added).

<sup>125</sup> Cheng, above n 37, 323 (italics added).

<sup>126</sup> Breslin, above n 122, 126 (original italics).

However, Breslin believes that only the modern written constitution can be in concordance with the externalist demand of constitutionalist polity.<sup>127</sup> In fact, in the Confucian vision, *li* is equally external to the government. Since *li* presents the traditionalist sedimentations of norms and institutions, it is fixed 'separately from the political power centers.' When *li* is outside the government, rule of *li* actually means the operation of power in concordance with external orders. For this reason, the Confucian conception of rule of *li* is congruent to the spirit of constitutionalism.

Apart from externality, Breslin posits that objectification in constitutionalist government requires the 'discernibility' of legal limitations:<sup>128</sup> One again, he contends that only through the modern single constitutional text can the external legal limitations of the governmental power become discernible.<sup>129</sup> Certainly, constitutionalism needs the transparency of legal restraints since nebulosity is the alter ego of despots. However, it is far from true that a unified constitutional charter is the sole medium for guaranteeing this discernibility. The classical Confucians equally conceptualised that *li* is the external limitations of the ruler that must be apparent to both the ruler and the common people.

*Li* in Confucian theory is intrinsically knowable, stemming from its traditionalist quality. On this regard, Alasdair MacIntyre's concept of tradition is instructive: 'For such a tradition, if it is to flourish at all [...] has to be embodied in a set of texts which function as the authoritative point of departure for tradition-constituted inquiry and which remain as essential points of reference for enquiry and activity, for argument, debate and conflict within that tradition.'<sup>130</sup> In other words, a viable tradition needs indisputably textual manifestation which are subject to interpretation, argument, and even debate. The *li* was a set of traditional norms and institutions, which the Confucians extol in their governmental inquiry, and was textually reified. *Li* was articulated under the format of the Confucian classics. To illustrate, the conventional norms and institutions of the ancient kings that the Confucians eulogise were illustrated in *The Book of Historical Documents*, *The Book of Poetry* and the *Spring and Autumn Annals* allegedly compiled by Confucius. Additionally, Confucius' particular emphasis on the rule of *li* galvanised the later Confucians in the Western Han dynasty who continually recorded the ancient *li*, which led to the advent of the *Li Ji* or *The Book of Rites*, one of five Confucian classics. In this scripture, *li* establishes the basis of the polity and defines the sphere of government's authorities and functions, the limits of governmental

<sup>127</sup> Ibid.

<sup>128</sup> Ibid 129.

<sup>129</sup> Ibid 130.

<sup>130</sup> Alasdair MacIntyre, *Whose Justice? Which Rationality?* (1988) 383

power, principles of colonial administration, and foundations for legal adjudications.<sup>131</sup>

Those who are familiar with the following dictum in the *Li Ji* may think that for the common people, the text of *li* must be esoteric: ‘the rules of ceremony (*li*) do not go down to the common people. The penal statutes do not go up to great officers.’<sup>132</sup> In fact, as has been corroborated by Herrlee Glessner Creel, these words were intentionally written by some officials as the expression of their hope.<sup>133</sup> The apocryphal passage garbles the Confucian belief. In fact, for the classical Confucians, texts of *li* must be knowable to all. As mentioned above, Confucius considered killing people without pre-instruction as an evil action of the government. The implication is that power should not operate in an opaque manner: the foundations for practicing public power should be apparent to the people. In other words, the people are required to be instructed about the *li*, which defines the scheme and the rules of the government. This leads to the Confucians’ efforts in interpreting and transferring them to the public. Confucius established for the first time in Chinese history a private school to disseminate traditional textualized *li* to the plebeians with the educational philosophy that ‘in teaching there should be no distinction of classes.’<sup>134</sup> Following Confucius, Mencius and Xunzi accepted ordinary students and educated them with the ancient *li*. In short, in the opinion of the Confucians, *li* must be discernible for everyone, and for this Confucianism particularly underlines the popular education of *li*.

While *li* defines the limits of the government, the public acknowledgement of *li* helps to safeguard the operation of the government within these parameters. Moreover, the popularly knowable *li* can constrict the ruler’s ability to neglect his responsibilities for ‘general public standards.’ It is in these senses that the Confucian theory of the rule of *li* meshes well with the constitutionalist principle of discernibility.

It would be useful to conclude this section with a reference to Edward Shils’ assertion that: ‘Confucius makes no provision for a constitution.’<sup>135</sup> This is correct to the extent that a constitution is viewed through the

<sup>131</sup> See Hsu, above n 28, 96-99.

<sup>132</sup> Legge, above n 26, 90.

<sup>133</sup> See Herrlee Glessner Creel, ‘Legal Institutions and Procedures during the Chou Dynasty’ in Jerome Alan Cohen, R Randle Edwards and Fu-mei Chang Chen (eds) *Essays on China’s Legal Tradition* (1980) 39.

<sup>134</sup> Legge, above n 27, 305.

<sup>135</sup> Edward Shils, ‘Reflections on Civil Society and Civility in the Chinese Intellectual Tradition’ in Tu Wei-ming (ed) *Confucian Traditions in East Asian Modernity: Moral Education and Economic Culture in Japan and the Four Mini-Dragons* (1996) 53.

positivistic lens as the monistic written basic law ordained by 'we the people.' But, if a constitution is understood from a Diceyan perspective as 'all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state,'<sup>136</sup> it is far from true that Confucius and other classical Confucians are silent about it. In the Confucian governmental theory, the *li* that includes traditional moral norms and governmental institutions, which establish normative standards for rectification of government, can be recognised as a variant of unwritten constitution – a Confucian constitution.<sup>137</sup>

## E. ENFORCEMENT OF LI

Once the standards for rectification of government are established by *li*, the next stage of the *zheng ming* program is to ensure the concordance of political institutions to the *li*. This stage involves enforcement of the established standards or the *li*. The classical Confucians propose two mechanisms for implementation of the rule of *li*: internal rectification and external rectification, corresponding to two components of *li* - moral norms and governmental institutions.

Moral self-rectification is the main means to implement the *zheng ming* government's requirement that those who carry certain governmental titles will act in concordance with the positive virtues of that title defined by the *li* (moral norms). Meanwhile, external rectification is the main means to safeguard the conformity of political institutions to the institutional limitations defined by the *li*. However, there may be a mixture of the two means. External rectification may be useful to the cultivation of the political morality while internal rectification may self-restrict the power holders' violation of the institutional limitations.

### 1. Internal Rectification.

In the imagination of Confucianism the sovereign should govern the country in concordance with *li* by immanent efforts. In the Confucian world, the ideal government relies not on coercion but on the self-discipline of political men.<sup>138</sup> Confucius considers self-discipline as the way to return to *li*, which is the *sine qua non* for any fully humanised person including the

<sup>136</sup> AV Dicey, *Introduction to the Study of Law of the Constitution* (1920) 22.

<sup>137</sup> This does not mean that a Confucian constitution (or *li*) was not written down. As mentioned above, many traditional norms and institutions were written in the Confucian classics. The 'unwrittenness of the Confucian constitution (*li*) means that it, like the English Constitution, was not codified in a monistic charter.

<sup>138</sup> See Wm Theodore de Bary, *The Liberal Tradition in China* (1983) 28.

sovereign.<sup>139</sup> The Confucian idea of self-rectification was particularly emphasised and explained in this famous dictum of the *Great Learning*:

The ancients who wished to illustrate illustrious virtue throughout the kingdom, first ordered well their own States. Wishing to order well their States, they first regulated their families. Wishing to regulate their families, they first cultivated their persons. Wishing to cultivate their persons, they first rectified their hearts.<sup>140</sup>

Thus, the rectification of government firstly depends on the self-rectification of the government's individuals. Moral self-rectification assures that those who hold certain positions shall act in concordance with the possible virtues of those positions. Moral self-rectification to return to the *li* therefore becomes the essential step for realising the *zheng ming* government. Moral self-rectification is of constitutionalist importance in that this helps constrict misuse of power by the ruler. Internal efforts of the ruler to comply to the code of conduct is instrumental to limit arbitrary power. In short, once the ruler constantly self-rectifies his personal morality, his practice of public power is regularly constrained.

## 2. *External Rectification: 'scholastic constitutionalism.'*

The classical Confucians are never so naïve as to sacrifice the polity to the introspective rectification of the power holders. Beyond that, they propose that in order to enforce the *li*, political power must be checked by an external force. In classical Confucianism, the role of external rectification of the ruler in concordance with the institutional limitations established by the *li* is particularly the responsibility of the virtuous and wise scholars, which I coin as 'scholastic constitutionalism.'

In Confucianism, as Daniel A Bell points out, 'only ethical and intellectual elites have a vocation to lead society [...] Only those who acquire knowledge and virtue ought to participate in government, and the common people are not presumed to possess the capacities necessary for substantial political participation.'<sup>141</sup> If Bell can read Confucian elitism so as to support democracy, can it equally be done to support a constitutionalist purpose? I believe that in the vision of Confucianism, the elites are conceived to play a constitutional role, since they are external forces to curb the arbitrary power of the sovereign.

<sup>139</sup> See Legge, above n 27, 250.

<sup>140</sup> Ibid.

<sup>141</sup> Daniel A Bell, *Beyond Liberal Democracy: Political Thinking for an East Asian Context* (2006) 153-54.

To begin with, it should be underlined that the scholars occupy a special position in the Confucian governmental inquiry. The scholars, because of their virtue and wisdom, are viewed as even more valuable than the ruler.<sup>142</sup> Therefore, the ruler should respect them and govern the nation through their advice. The scholars are not the servitors of the royalty; rather, they, on the ground of their *sui generis* merits, should be treated as the friends or even the teachers of the ruler.<sup>143</sup> Consequently, the scholars are not subject to the ruler's arbitrary summons. 'When he [the ruler] wishes to consult with them, he goes to them'<sup>144</sup> as a student. Moreover, if the ruler wishes to be served by the scholars he should show 'the utmost respect and all polite observances' and agree to 'carry their words into practice.'<sup>145</sup>

Confucianism suggests that the virtue and talent of scholars should be honoured by the ruler so that 'he is preserved from errors of judgment.'<sup>146</sup> Hence, the scholars are conceptualised as external means to rectify the misuse of power committed by the ruler. The savants of *li* are necessitated to advise the ruler to govern the kingdom in accordance with the dictates of *li* and prevent him from the infringement of *li*. They can play this constitutional role via either political participation or free scholarship.

#### *Scholars-Officials: Remonstrance*

Confucian scholars are taught to participate in the political province typically as ministers. However, a Confucian scholar engages in ministerial relationships not to sacrifice his life to royal whims, but to fully humanise his own living and to help the others humanise their living.<sup>147</sup> Meanwhile *li* is the civilised guidance for these humanising relations. It follows that the rule of *li* in all relationships is required for the process of humanisation.<sup>148</sup> Hence, for the sake of humanisation, it is the responsibility of the scholar-officials to safeguard the rule of *li*. This leads to the fact that the minister, insofar as he is a true Confucian scholar instead of a sycophant, should be loyal not to the ruler but substantially to the *li*. Consequently, if the ruler transgresses the *li*, the humanising onus is upon the minister to remonstrate with him and if he, even in this case, fails to return to the *li*, the minister should end the relationship with the ruler.

<sup>142</sup> Legge, above n 30, 213-14

<sup>143</sup> Ibid 387

<sup>144</sup> Ibid 214

<sup>145</sup> Ibid 445.

<sup>146</sup> See Legge, above n 27, 409.

<sup>147</sup> See Legge, above n 27, 297; Legge, *Mencius*, 458.

<sup>148</sup> Wei-ming Tu regards *li* as the process of humanisation. See Wei-ming Tu, 'Li as Process of Humanization' (1972) 22(2) *Philosophy East and West*, 187-201

Furthermore, the concept of scholars-officials' remonstrance is based on the Confucian conviction of the reciprocity of human relationships. Henry Rosemount Jr elucidated that, according to Confucianism, all of the relationships – spouses or lovers, neighbours, subjects, colleagues, friends, and more – are reciprocal.<sup>149</sup> So is the relationship between the prince and the minister.<sup>150</sup> It should be recalled that Confucius' dictum on rectification of names states that 'there is government, when the prince is the prince, and the minister is the minister.'<sup>151</sup> To say this in another way, if the prince is not the prince, then the minister is not the minister. The master holds that 'a prince should employ his ministers according to the rules of propriety (*li*); ministers should serve their prince with faithfulness.'<sup>152</sup> Given that, if the prince is devoid of *li* toward his ministers, then they are not obliged to be faithful.<sup>153</sup> In concordance with this spirit, Mencius acrimoniously asserts: 'When the prince regards his ministers as his hands and feet, his ministers regard their prince as their belly and heart; when he regards them as his dogs and horses, they regard him as another man; when he regards them as the ground or as grass, they regard him as a robber and an enemy.'<sup>154</sup> In short, the ruler-minister relationship is mutual rather than unilateral. The reciprocity of the relationship is the foundation for the possibility of the ministerial censure.

We now explore how the concept of remonstrance is demonstrated. It should be remembered that it is Confucius' opinion that it would be a debacle for a nation in which no one dared oppose the wrong words of the ruler. Therefore, it is necessary for the ministers to censure the wrong words and misconduct of the ruler. In fact, the relic of Confucius' concept of remonstrance can be found in his *Spring and Autumn Annuals*,<sup>155</sup> but he theorises the constitutional principle of remonstrance in the *Analects*. Confucius differentiates 'the great minister' from 'the ordinary minister.' Accordingly, the former is the one 'who serves his prince according to what is right, and when he finds he cannot do so, retires' while the latter is no more than the minion who 'will always follow their chief' except from the case of 'parricide or regicide.'<sup>156</sup> Confucius then goes further to suggest that preferably ministers should not dupe the ruler by having a veneer of loyalty, but should more importantly candidly remonstrate with him. When a

<sup>149</sup> See Rosemont Jr, above n 45 11.

<sup>150</sup> See Chang, above n 79, 171-141.

<sup>151</sup> Legge, above n 27, 256.

<sup>152</sup> Ibid 161.

<sup>153</sup> See Li Fu Chen, *The Confucian Way*, (Shih Shun Liu trans, 1986) 489

<sup>154</sup> Legge, above n 30, 318.

<sup>155</sup> See Hawking L Yen, 'A Survey of Constitutional Development in China' (PhD Diss: Columbia University, 1911) 85

<sup>156</sup> Legge, above n 27, 245-46.

Confucian disciple asked how a ruler should be served, the Master replied, 'Do not impose on him, and, moreover, withstand him to his face.'<sup>157</sup>

As a student of Confucius, Mencius vehemently advocates the ministerial restraints of the ruler. He says: 'Is it a fault to restrain one's prince? He who restrains his prince loves his prince.'<sup>158</sup> Mencius goes further to develop the principle of remonstrance. According to him, there are two kinds of high ministers: 'There are the high ministers who are noble and relatives of the prince, and there are those who are of a different surname.'<sup>159</sup> With regard to the high ministers who are noble and relatives of the prince, Mencius suggests: 'If the prince have great faults, they ought to remonstrate with him, and if he do not listen to them after they have done so again and again, they ought to dethrone him.'<sup>160</sup> As far as the ministers who are of a different surname are concerned, he states: 'When the prince has faults, they ought to remonstrate with him; and if he do not listen to them after they have done this again and again, they ought to leave the State.'<sup>161</sup> Mencius may go beyond Confucius to assert that in the case of the royal ministers, if the prince fails to follow their remonstrance, it is legitimate to dethrone him. In exceptional cases, Mencius even avers the legitimacy of a minister's banishing his ruler.<sup>162</sup>

In a similar vein with Confucius and Mencius, Xunzi also defends the remonstrance principle. He defined remonstrance as the capacity of a great officer or senior advisor to advance to the throne and address the lord concerning his transgression and leave if the advice is not implemented.<sup>163</sup> He thinks that in the case of a sage lord, remonstrance is unnecessary but it is definitely needed in the case of a mediocre lord.<sup>164</sup> Moreover, Xunzi considers only men capable of remonstrance to be qualified as true ministers.<sup>165</sup>

There are concrete requirements for practicing ministerial remonstrance. First, only the worthy ministers can reprove the prince. To say this in a negative definition, they must not be mercenaries, careerists, or pedants. According to Confucius, they must be the 'great ministers.' Mencius also opines: 'It is not enough to remonstrate with a sovereign on account of the mal-employment of ministers, nor to blame errors of

<sup>157</sup> Ibid 285.

<sup>158</sup> Legge, above n 30, 161.

<sup>159</sup> Ibid 392.

<sup>160</sup> Ibid 392.

<sup>161</sup> Ibid 393.

<sup>162</sup> Ibid 467.

<sup>163</sup> See Knoblock, above n 32, *Volume II*, 199.

<sup>164</sup> Ibid 200.

<sup>165</sup> Ibid 199.



government. It is only the great man who can rectify what is wrong in the sovereign's mind.'<sup>166</sup> In fact, the 'great ministers' in the Confucian vision are politicising scholars prepossessed with moral principles and wisdom. Second, only the ministers who are in the confidence of the prince can admonish him. In the *Doctrine of Means*, Confucius is reported to have said: 'When those in inferior situations do not possess the confidence of the superior, they can not retain the government of the people.'<sup>167</sup> The *Analects* recorded a Confucian student as saying that 'having obtained the confidence of his prince, one may then remonstrate with him. If he have not gained his confidence, the prince will think that he is vilifying him.'<sup>168</sup> Finally, remonstrance should be exclusively given with respect to important matters. The ministers should avoid remonstrating paltry issues since 'frequent remonstrances lead to disgrace.'<sup>169</sup>

In short, remonstrance is the pivotal constitutional principle in Confucian governmental theory. The remonstrance by the ministerial clerisy is the external force that rectifies power holders in concordance with the institutional limitations established by the *li*.

*Free Scholars: Spring and Autumn Annals and Confucius as a De Facto Constitutional Judge.*

The Confucian scholars, by their wisdom and virtue, may play the constitutional role without participating in the government. The ruler may 'go to see them' as a student as Mencius suggests. Lectures given by the didacticians who are knowledgeable of *li* are useful for rectification of the ruler in consonance with *li*. However, even if the ruler refuses to 'go to see them', the scholars can also insert constitutional limitations upon his practice of power by other alternatives. The constitutional importance of the *Spring and Autumn Annals* and the role of Confucius in this classic as a de facto constitutional judge should be understood in this light.

*Spring and Autumn* or *Chunqiu*, one of five Confucian Classics, is a chronicle of Lu, which was arguably created by Confucius.<sup>170</sup> Confucius composed this lucubration after his fiasco of itinerant searching for a governmental position. Hence, he authorised the chronicle not as an official historiographer but as a free philosopher. To speak in constitutional

<sup>166</sup> Legge, above n 30, 310.

<sup>167</sup> Legge, above n 27, 406.

<sup>168</sup> Id at 342.

<sup>169</sup> Ibid 172.

<sup>170</sup> See James Legge, *The Chinese Classics with a Translation, Critical and Exegetical Notes, Prolegomena, and Copious Indexes., Volumes V - Ch'un Ch'in [Chunqiu]* (1960) 1.

language, Confucius composed the *Spring and Autumn* to deal with the problem of arbitrary power. Explaining the reason Confucius produced the work, Mencius says: 'Again the world fell into decay, and principles faded away. Perverse speakings and oppressive deeds waxed rife again. There were instances of ministers who murdered their sovereigns, and of sons who murdered their fathers. Confucius was afraid, and made the *Spring and Autumn*.'<sup>171</sup>

The volumes of *Spring and Autumn* are considered to be the practical applications of the Confucian doctrine of rectification of names.<sup>172</sup> As Mencius says, 'Confucius completed the *Spring and Autumn*, and rebellious ministers and villainous sons are struck with terror.'<sup>173</sup> In application of the rectification of names, the *Spring and Autumn* together with the *Commentaries*,<sup>174</sup> according to Hsu's generalisation, provides four important functions, viz, giving names and definitions to phenomena; defining the fundamental principles of organisation of the state and outlining the limits of individual spheres of action in political and social organisations; passing critical judgment ('praise-and-censure') upon the actions of men; and illustrating the possible tendencies of various phenomena.<sup>175</sup> In fact, these functions were not separately classified in the classic. The functions are implied in the fact that Confucius used correct names to record the historical events. As mentioned above, names, according to Confucius, are more than words to identify people and things; they indicate the relationships, the roles of people and inherent values. Therefore, by accurate terminology, Confucius implicitly gave definitions to political actions, defined basic principles of organisation and operations of the government, adjudicated political actions, and showed causes and effects that demonstrate political tendencies.

It is my contention that the aforementioned functions of the *Spring and Autumn* are relatively similar to the modern functions of constitutional judges in exercising their judicial review power. Hsu states that '*Spring and Autumn* assumes the position of the chief justice of a supreme court deciding upon the actions and laws of sovereigns, princes, and ministers.'<sup>176</sup>

<sup>171</sup> Legge, above n 30, 281-82.

<sup>172</sup> See Hsu, above n 28, 54.

<sup>173</sup> Legge, above n 30, 283.

<sup>174</sup> Because of its condensational and even Delphic style, a number of commentaries have been written to explain and expand the meanings of the *Spring and Autumn*. Most noticeable are the *Commentary of Kong-yang*, the *Commentary of Ku-liang*, and the *Commentary of Tso* which form the so-called '*Three Commentaries on Spring and Autumn Annuals*'. See Legge, above n 70, 22-38.

<sup>175</sup> See Hsu, above n 28, 54-8.

<sup>176</sup> Ibid 56.

*Spring and Autumn*'s function of accuracy of terminology is analogous to the constitutional judges' function of constitutional interpretation. In addition, the role of the *Spring and Autumn* in judging political actions is seemingly equal to the function of the constitutional judges in adjudicating the constitutionality of the political institutions' actions. Hsu compares: '*Spring and Autumn* performs the function of rational judgment. To point out the good as good and the bad as bad means, in modern terminology, the final judgment as to whether or not the law is constitutional, whether or not the action is legal, or whether or not the man is criminal. It eulogizes those who obey the law and condemns those who violate it. This is rectification.'<sup>177</sup> Hence, it can be said that Confucius, by composing the *Spring and Autumn*, qua a free scholar, functioned as a de facto constitutional judge. The master in fact exercised the constitutional review power.

By the case of the *Spring and Autumn* and the role of Confucius as a de facto constitutional judge, it can be concluded that Confucianism widely opens the door for 'scholastic constitutionalism.' The practice of limited government may not be totally dependent on internal governmental mechanisms. By emphasis on the role of the elites, Confucianism suggests that governmental scholarship can play the role of limiting the government. The free judicious scholars can do this role by defining political terms, clarifying the foundational principles of political institutions, praising and censuring the actions of power holders on the grounds of legality, and anticipating the political tendencies that can help align the practice of public power and rectify the governors' malfeasances. The scholars' de facto practice of the 'constitutional review power' is constitutionally meaningful in part because it serves as the cicerone for the formal practices. When official people execute their power with a scholastic orientation, their arbitrariness can be inhibited. Moreover, 'scholastic constitutionalism' is reasonable in the sense that the scholarship may usefully raise the popular awareness of constitutionalist values which in turn helpfully popularises the constitutionalist community.

#### **IV. Concluding Remarks.**

This paper has systematically generalised the classical intellectual foundations of Confucian constitutionalism. By manifesting the Confucian intellectual reservoirs of constitutionalism, the paper wishes to draw western attention to eastern constitutional jurisprudence and advocates reorienting the promotion of constitutionalism in East Asian societies.

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<sup>177</sup> Ibid 56-7.

Can Western liberal constitutionalism provide the best solutions for East Asian societies like China and Vietnam to modernise their constitutional systems? In China, according to Professor Tong Zhiwei, the way Chinese constitutional law scholars comprehend Chinese constitutional matters 'is shaped by their understanding of an idealized constitutional system, such as that of the United State or that of Germany. They do not question whether or how such systems are relevant to China's situation. They simply import alien institutions into China's constitutional system in an ahistorical way.'<sup>178</sup> Similarly, in recent years in Vietnam, domestic constitutional scholars and other commentators have vehemently called for the establishment of a constitutional court in the nation.<sup>179</sup> It seems to me that they have simply gravitated towards heterochthonous institutions without circumspectly taking into account the autochthonous context.

David T Butle Ritchie points out that, given the history of the state in Central and Eastern Europe in recent past, it is by no means clear that the fetishisation of western liberal political concepts (which many accept uncritically) is the best way to account for continually changing conditions in contemporary pluralist and diverse societies.<sup>180</sup> That is because Western liberal constitutionalism can properly function under its individualist Christian cultural foundations<sup>181</sup> but may malfunction in other cultural contexts which do not accentuate individuals.

It is indubitable that, in the contemporary world, legal transplantation is an important means for different countries to develop their legal systems. At the same time, without the support of the local culture, transplanted institutions may not function efficaciously. As Robert Cover asserts, 'no set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.'<sup>182</sup> In the particular field of constitutional

<sup>178</sup> Tong Zhiwei, 'China's Constitutional Research and Teaching: A State of the Art' in Stéphanie Balme and Michael W. Dowdle (eds) *Building Constitutionalism in China* (2009) 106.

<sup>179</sup> See Mark Sidel, *The Constitution of Vietnam* (2009) 191-207. See also, John Gillespie, 'Juridification of State Regulation in Vietnam' in John Gillespie & Albert Chen (eds) *Legal Reform in China and Vietnam*, (2010) 89.

<sup>180</sup> David T Butle Ritchie, 'Critiquing Modern Constitutionalism' (2004) 3(37) *Appalachian Journal of Law* 38-9

<sup>181</sup> Carl J Friedrich, *Constitutional Government and Democracy*, 126. 'The governments of Western civilisations [have] tended toward the constitutional pattern. This tendency may justly be attributed to the Christian concern for the individual and his personal salvation.'

<sup>182</sup> Robert Cover, 'Nomos and Narrative' in Artha Minow, Michael Ryan & Austin Sarat (eds) *Narrative, Violence, and the Law: The Essays of Robert Cover* (1992) 95-6.

studies, scholars have proved that the success of constitutional government significantly depends on its consistency with the local culture.<sup>183</sup>

It is my contention that societies with non-western traditions should develop their constitutional government under their familiar foundations instead of blindly imitating western constitutional institutions. By doing this, I do not mean to imply any disparagement of the transplantability of some notions and institutions of Western liberal constitutionalism outside the Western world because the transplants can be effective if they experience a process of indigenisation. What I really wish to propose is that since the triumph of a constitutional government depends significantly on the support of local culture, its foundations must be something hospitable to the indigenous people. Given that, it is reasonable for East Asian societies like China and Vietnam to delve into their own traditions to search for the foundations for the development of constitutionalism.

Confucianism provides such foundations. I believe that the constitutionalist ideas in classical Confucianism can be creatively transformed in the contemporary project of promotion of constitutionalism in East Asian nations like China and Vietnam. In fact, Chaihark Hahm has developed a rather similar argument. He suggests that constitutionalism should be grounded in a society's culture, and in contemporary East Asia, constitutionalism must resonate with the Confucian idea of *li* (ritual).<sup>184</sup> Conceiving constitutionalism as an educative project, he calls for a democracy in which the citizenry is educated through *li* and this will ensure that those who hold the power will spontaneously be so disciplined.<sup>185</sup> Hahm believes that 'once the citizens of modern East Asian countries begin to emulate their Confucian scholar-official ancestors, who first disciplined themselves with ritual propriety and then demanded the ruler's discipline, their country will become constitutionalist states.'<sup>186</sup> In giving too much 'educative' credit to the *li*, Chaihark Hahm pays little attention to the possibility of modern institutionalisation of the Confucian political ideas.

<sup>183</sup> Christopher Tiedeman, *the Unwritten Constitution of the United States: a Philosophical Inquiry into the Fundamentals of American Constitutional Law* (1974) 18; Daniel P Franklin and Michael J Baun (eds), *Political Culture and Constitutionalism: A Comparative Approach* (1995) 222; Graham Hassall and Cheryl Saunders, *Asia- Pacific Constitutional Systems* (2002) 42-3; Donald S Lutz, *Principles of Constitutional Design* (2006) 16.

<sup>184</sup> Hahm, above n 5, 295.

<sup>185</sup> Chaihark Hahm, 'Constitutionalism, Confucian Civic Culture, and Ritual Propriety' in Daniel A Bell & Hahm Chaibong (eds) *Confucianism for the Modern World* (2003) 53.

<sup>186</sup> Ibid.

I propose that instead of blindly imitating western liberal constitutionalism, the Confucian nations like China and Vietnam should develop a sort of neo-Confucian constitutionalism by creatively institutionalising some constitutionalist ideas in classical Confucianism. In fact, Jiang Qing, the most prominent neo-Confucian in contemporary China, has proposed a tri-cameral parliament, which consists of the House of Confucians (*Tongruiyuan*), the House of Nation (*Quotiyuan*), and the House of People (*Shuminyuan*).<sup>187</sup> In this project, the House of Confucians actually stems from the Confucian emphasis of the role of the wise and virtuous scholars. In quite the same vein, Daniel A Bell has suggested a plan of bicameral legislature with a democratically elected lower house and a Confucian upper house (*Xianshiyuan*) composed of representatives selected on the basis of competitive examinations.<sup>188</sup> Qing's *Tongruiyuan* and Bell's *Xianshiyuan*, which propose the institutionalised forum for the Confucian scholars to check the law-making process, are actually the Confucian institutionalisation of what I call 'scholastic constitutionalism.'

However, Qing and Bell have just focused on the relation of Confucianism to the design of the legislature. How does Confucianism relate to a mechanism for reviewing the constitutionality of the statutes by the legislature and other political acts which have been put forward in China and Vietnam in recent years? In this regard, the possibility of the formulation of a Confucian council of constitutional protection should be considered, which will constitutionally rectify the legislature and the executive by remonstrating against statutes and political acts that are arguably unconstitutional. Further development of this idea deserves a separate treatment.

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<sup>187</sup> For a collection of essays discussing Jiang Qing's political Confucianism, see Ruiping Fan (ed), *The Renaissance of Confucianism in Contemporary China*, (2011). For Jiang Qing's writings to be introduced in English, see Jiang Qing, *A Confucian Constitutional Order: How China's Ancient Past Can Shape Its Political Future*, Daniel A Bell & Ruiping Fan (eds) (Edmund Ryden trans 2012) (Forthcoming).

<sup>188</sup> Bell, above n 141, 165-6.