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Symposium Proposal:

Title: Approaches to Asian Constitutionalism

Abstract:

The Project

The works selected for this symposium are drawn from a collection of papers originally delivered at a conference titled, "East Asian Perspectives on Legal Order" held at the National University of Singapore in August of 2010.

Bringing together nearly fifty scholars from East Asia, South East Asia, Europe and North America, the conference was designed to engage political and legal theorists in rethinking their ideas about legal order in the light of East Asian legal systems and traditions, and by extension, to make theoretical inquiry on law less dependent on Western ideas, practices, and intellectual traditions and in that sense less parochial. We wish to focus this symposium on a group of papers (including one commissioned paper) concerning the methodological issues surrounding the study of Asian constitutionalism.

The Format

The symposium will consist of nine papers, totaling approximately 50,000-60,000 words (depending on the Review's requirements). The papers by Tom Ginsburg, Michael Dowdle, and Ernest Caldwell will serve as primary articles and the remaining six papers will take the form of extended commentaries, two for each main article. This mirrors the highly effective format used during the conference. The conference was designed to develop a dialogue between scholars East and West, to increase the self-reflexivity when studying specific law related topics, and to provide potentially new categories of thought and practice that do not originate from a Euro-American background. Those aims also animate the proposed symposium. Each of the three main papers is written by a specialist in a specific field of Asian law. Each paper is then discussed by two commentators: (1) a specialist in Asian legal/political thought who reflects on the implications of the paper's thesis for the study of other Asian legal orders, and (2) a specialist in western legal/political thought, who reflects on the implications for the study of the western legal tradition or comparative law in general.

Editorial Information

The symposium editorial work (including language and content) will be completed by Terry Nardin and Ernest Caldwell. We have already received the initial papers (presented in full at the conference), so once a publication commitment is obtained we will send out our first round of editorial comments. The authors will be given a prescribed amount of time to complete the required revisions and return the papers to us. Then, we will send the finalized papers to the commentators, who will also be given a yet-to-be-decided amount of time to revise their existing commentaries. The revised papers will be given a final review by the symposium editors to insure that each conforms, in style and substance, to requirements of the symposium and the Chicago-Kent Law Review. We will then forward these to the managing editor of the

law review for cite checking and final editorial review. A few of the papers may contain some references in non-western languages; however, these will be kept to a minimum. Furthermore, the symposium editors will assist in the cite checking of foreign sources by asking the contributors to produce pdf pages of such citations (if needed).

Contributor Outlines:

PAPER ONE

Author: Tom GINSBURG (University of Chicago):

Title: Constitutionalism: East Asian Antecedents

Abstract:

This paper surveys constitutionalist ideas in pre-modern East Asian legal thought, including neo-Confucian and Buddhist notions of limited government, and particular institutions such as the Japanese Goseibai-Shikimoku of the Kamakura era. The idea of an alternative nascent constitutional tradition leads us to a consideration of the ideological and political functions of law in traditional East Asia.

Commentary: Asian Perspective—Arun THIRUVENGADAM (National University of Singapore)
Western Perspective—Rogers SMITH (University of Pennsylvania)

PAPER TWO

Author: P. Ernest CALDWELL IV (University of Chicago):

Title: Horizontal Rights and Chinese Constitutionalism: Judicialization through Labor Disputes

Abstract:

Western academics who criticize Chinese constitutionalism often focus on the inability of the Supreme People's Court to effectively enforce the rights of Chinese citizens enshrined within the Constitution of the People's Republic of China. Such criticism, I argue, is the result of analytical methods too invested in Anglo-American constitutional discourse. These approaches tend to focus only on those Chinese political issues that impede the institution of western-style judicial review mechanisms, and often construe a 'right' as merely having vertical effect (i.e., as individual rights held against the State). Drawing on recent scholarship that studies Chinese constitutionalism using its own categories and values, this essay examines a series of court cases involving employer-employee labor disputes, wherein lower court judges actively engaged in constitutional interpretation and openly invoked and enforced *horizontally* oriented socio-economic rights to prosecute exploitative labor practices. This analysis demonstrates that the study of Chinese constitutionalism need not be methodologically confined by the institutional paradigms or the rights discourse of Euro-American constitutionalism. Due consideration should be given to the comparative implications of the judicialization of the constitution in lower courts, as well as the possibility of a rights discourse emphasizing constitutionally enshrined horizontal (rather than only vertical) rights.

Commentary: Asian Perspective—Randall Peerenboom (La Trobe University)
Western Perspective—Arif Jamal (National University of Singapore)

PAPER THREE

Michael DOWDLE (National University of Singapore):

Constitutional Listening

This essay proposes a novel way of approaching comparative constitutional analysis that I call “constitutional listening”. Constitutional listening, which derives from a particular interpretive methodology known as the “principle of charity”, involves taking seriously the discourses that surround constitutional issues in other countries, including particularly countries whose political systems seem at first blush to be largely incompatible with standard measures of constitutionalism. The advantage of this approach is that it helps us perceive a fuller range of the possibilities and potentialities of constitutionalism as a human phenomenon. Applying this approach to the discourse that surrounds the much disputed “Asian values” hypothesis serves to demonstrate this point.

Commentary: Western Perspective—Roy Tseng (Sun Yat-sen University, Taiwan)
Asian Perspective—Leigh Jenco (National University of Singapore)

Bios of Contributors:

Ernest CALDWELL is a PhD candidate at the University of Chicago. He holds a B.A. in Asian Studies and History, an M.A. in Chinese Literature, and an LL.M in Asian Legal Studies. His research addresses the legal history of China on its own as well as within the context of comparative legal history. More specific interests include legal pluralism in China, the relationship between traditional Chinese theories of law and theories of writing, and the study of ancient legal manuscripts. He is currently completing his dissertation titled “Codifying Change in Ancient China: The form and function of *lü* (statutes) in Qin legal culture.”

Michael W. DOWDLE is an Assistant Professor of Law at the Singapore National Universities. Prior to that, he was Chair of Globalization and Governance at Sciences Po in Paris. His publications include the edited volumes *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, 2006) and *Building Constitutionalism in China* (Palgrave Macmillan, 2009) (with Stéphanie Balme), and some forty chapters and articles on matters of comparative public law and public law development.

Tom GINSBURG is Professor at the University of Chicago Law School and a visiting fellow at the American Bar Foundation, where he co-directs the Center on Law and Globalization. He is a graduate of the Jurisprudence and Social Policy Program at the University of California at Berkeley, from which he also holds B.A. and J.D. degrees. A member of the Law and Society Association since 1994, he was on the planning committee of the East Asia CRN’s inaugural meeting in Hong Kong earlier this year. His recent coauthored book, *The Endurance of National Constitutions* (2009), won the best book award from Comparative Democratization Section of APSA. His other books include *Administrative Law and Governance in Asia* (2008), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (with Tamir Moustafa, 2008) and *Judicial Review in New Democracies* (2003). He currently co-directs the Comparative Constitutions Project, an NSF-funded data set cataloging the world’s constitutions since 1789.

Arif JAMAL is an Assistant Professor of Law in the Faculty of Law, National University of Singapore. Prior to this, he was a Teaching Fellow in the Faculty of Laws, University College London (UCL) and the School of Law at the School of Oriental and African Studies, London (SOAS). He studied law and

politics in Canada (BA, McGill); JD (Toronto), and was called to the Bar of British Columbia. Thereafter, he undertook post-graduate work in Islamic Studies and Humanities, and read for an LLM degree, focusing on Islamic Law at SOAS. Arif has been a Visiting Researcher with the Islamic Legal Studies Program at Harvard Law School and Senior Instructor at the Aga Khan University, Institute for the Study of Muslim Civilizations. His prior publications have appeared in the *Yearbook of Islamic and Middle Eastern Law* and he has recently published a chapter in G Marancini, ed., *Muslim Communities and the Challenge of Secularism* (Springer, 2010). Arif completed his doctorate on the relationship between religion, the state and the public sphere in Muslim contexts in the Faculty of Laws at UCL.

Leigh K. JENCO received her BA from Bard College, and her MA and PhD from the University of Chicago. Before heading to graduate school, she attended the Johns-Hopkins-Nanjing Center in Nanjing, China, for a year, and in 2007-2008, she was appointed Postdoctoral Research Fellow at the Political Theory Project, Brown University. Her primary field of research is modern Chinese political thought, but her other interests include classical Confucianism, cultural theory, and interpretive methods. She is particularly interested in how Chinese thought can throw light on methodological and cultural impasses within contemporary political theory, and in this vein has begun to explore a series of ongoing Chinese debates concerning theories of cross-cultural interpretation and borrowing. Her articles on these topics have appeared in the *American Political Science Review*, *Political Theory*, and the *Journal of Asian Studies*. Her book *Making the Political: Founding and Action in the Political Theory of Zhang Shizhao* is forthcoming in June 2010 from Cambridge University Press. Her paper, "Thoreau's Critique of Democracy" (Review of Politics, Summer 2003) won the Foundations of Political Theory best paper award in 2003, and her dissertation won the 2008 Leo Strauss Award for best dissertation in political philosophy, awarded by the American Political Science Association.

Randall PEERENBOOM is a law professor at La Trobe University and an associate fellow of the Oxford University Center for Socio-Legal Studies. He was a professor at UCLA Law School from 1998 to 2007 and director of the Oxford Foundation for Law, Justice and Society Rule of Law in China Programme. He has been a consultant to the Asian Development, Ford Foundation, EU-China, UNDP and other international organizations on legal reforms and rule of law in China and Asia, and is the Co-Editor in Chief of *The Hague Journal of Rule of Law*. He is also a CIETAC arbitrator, and frequently serves as expert witness on PRC legal issues. His recent sole-authored and edited books include *Judicial Independence in China* (2010); *Regulation in Asia* (2009); *China Modernizes: Threat to the West or Model for the Rest?* (2007); *Human Rights in Asia* (2006); *Asian Discourses of Rule of Law* (2004); and *China's Long March toward Rule of Law* (2002).

Rogers M. SMITH is the Christopher H. Browne Distinguished Professor of Political Science at the University of Pennsylvania and Chair of the Penn Program on Democracy, Citizenship, and Constitutionalism. He teaches American constitutional law and American political thought, with special interests in issues of citizenship and racial, gender, and class inequalities. He is the author or co-author of many essays and six books, including *Stories of Peoplehood: The Politics and Morals of Political Membership* (2003) and the forthcoming *Still a House Divided? The Structure of American Racial Politics* (with Desmond S. King; Princeton University Press, 2011). His 1997 book *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* received "best book" awards from the American Political Science Association, the Organization of American Historians, and the Social Science History Association and was a Finalist for the 1998 Pulitzer Prize in History. Smith received a B.A. degree from James Madison College, Michigan State University in 1975 and a Ph.D. from Harvard University in 1980. He is a Fellow of the American Academy of Arts and Sciences and chaired Penn's Political Science Department from 2003 to 2006.

Arun THIRUVENGADAM is an Assistant Professor at the Faculty of Law, National University of Singapore. He obtained his formal legal education from the National Law School, Bangalore (B.A., LL.B (Hons.), 1995; LL.M, 2001) and New York University School of Law (LL.M, 2002, J.S.D., 2007). After completing his undergraduate education in 1995, he served as a law clerk to Chief Justice A.M. Ahmadi at the Supreme Court of India for eighteen months. Between 1997 and 1999, he practiced in the fields of administrative, constitutional and commercial law before the High Court of Delhi and the Supreme Court of India. His doctoral thesis was in the area of comparative constitutional law and theory, and focused on the use of foreign decisions in constitutional adjudication. His other teaching and research interests include public law in India, constitutional law in Singapore, legal theory and law and development.

Roy TSENG is Professor of Political Theory and Director of the Sun Yat-sen Research Center for Social Sciences at National Sun Yat-sen University, Taiwan. He holds a Ph.D. in Government from the London School of Economics and Political Science. He is the author of *The Sceptical Idealist: Michael Oakeshott as a Critic of the Enlightenment* (2003), and *Subject and Reason: a Conservative Interpretation of Liberalism* (2009, in Chinese). His research interests focus on the history of British political thought, British Idealism, contemporary political philosophy and comparative political theory.

Terry NARDIN is Professor and Head, Department of Political Science, at the National University of Singapore. He was formerly UWM Distinguished Professor at the University of Wisconsin in Milwaukee and a visitor in the School of Social Science at the Institute for Advanced Study in Princeton. He is the author of *Law, Morality, and the Relations of States* (Princeton 1983) and *The Philosophy of Michael Oakeshott* (Penn State 2001), and has had editorial responsibility for many books on international law and relations. He is a member of the Steering Committee of the project East Asian Perspectives on Politics.