This article was published in the *Taiwan and International Human Rights* on May 18, 2019.

Chapter 3
Asian Values, Confucian Tradition and Human Rights

Nigel N. T. Li*

Abstract The Republic that exists and operates now in Taiwan was originally founded in China in 1911. The Constitution which was promulgated in 1947, during the civil war in China, was a first for a nation of Confucian heritage without any recognized tradition of constitutionalism. This chapter reviews the obstacles that stood in the way of the value system of constitutionalism when it was first transplanted to the barren soil of Taiwan, including at various times cultural inertia, political resistance and hostility to the rule of a constitution. The chapter also examines how the non-native system gradually evolved and took root in a land dominated by Asian values, where the government or the ruler had customarily been pronounced as the people's parent, and the fundamental notions of the rule of law, human rights, independent judiciary, separation of powers, equality, and the constitution itself, were all considered novel, foreign concepts.

"Asian values" is a common term used with no universal academic definition. But, in the eyes of Professor William de Bary, the term denotes the value system of Confucianism prevailing in most major East Asian jurisdictions, including China, Japan, Korea, Singapore, Taiwan, and perhaps Vietnam.[1]

Confucianists' sacred documents are not devoid of fundamental constitutional questions, especially those about the legitimacy of the rulers, to which answers must be sought. A chapter in Shangshu (《尚書》, literally translated as High Book or the Book of Documents) entitled "Hong Fan"〈洪範〉, translated as Grand Norms or Great Plan, tells of an event in which Emperor Wu (武王), the founding emperor of the Chou (周) dynasty, soon after overthrowing the Shang (商) dynasty, received a package of grand norms in Nine Provinces (九疇, or nine sets of general rules of thumb on the art of ruling)[2] from Ji-Tzu (箕子), a prince of the Shang (商) dynasty. The grand norms in Nine Provinces can be seen as analogous to a constitutional code addressing the issue of political legitimacy; they were teachings, or know-how, if not lessons, bestowed from above as a Mandate of Heaven (天命) upon a chosen ruler with high moral character. Theoretically, it is a form of divine right of monarchical power, but by no means without associated moral duties of being benevolent to his subjects under Heaven (天下). The ruler, empirically reigning–usually through force—with allegedly legitimate cause, who is considered or claims to be the one and only (予一人) Son of Heaven (天子), being carefully chosen by Heaven as a result of having garnered universal popular support owing to his high moral character (德), will, as he should, act as a parent-like governor to his subjects (曰天子作民父母,以為天下王).[3] It is a textbook example of the notion that the nature of the heavenly mandate is virtuous.[4]

---

* N. N. T. Li
Soochow University, Taipei, Taiwan
e-mail: nigelli@leeandli.com

1 See de Bary (1998), pp. 2–4.

2 See Nylan (2001), p. 140. The Nine Provinces of Great Plan lists the sorts of resources available to the state; Sect. 1 cites the natural resources of the empire: water, fire, wood, metal and earth; Sect. 2 constructs a parallel between those physical and personal resources (cognitive and sensory) of the ruling elite; Sect. 3 turns to the kinds of institutional resources—from markets to diplomacy to armies—that together provide material security for one's subjects; Sect. 4 rests the prosperity of the state upon astronomical data, as the basis for the agricultural calendar; Sect. 6 considers the appropriate function of punishments in state rule, after which Sects. 7, 8 and 9 list three methods (divination, portent reading, and material verification or portent-outcome) by which the ruler may ascertain the best policy in a given situation, on the assumption that what is morally right will also be of greatest utility. (《尚書・洪範》:「初一、曰五行,次二、曰敬用五事,次三、曰農用八政, 次四、曰協用五紀,次五、曰建用皇極,次六、曰乂用三德,次七、曰明用稽疑,次八、曰念用 庶徵,次九、曰嚮用五福,威用六極。」)

3 Id.

4 Chan (1963), p. 3.

1 Subjecting the Head of State to the Rule of Law

Basing a ruler's legitimacy upon the Mandate of Heaven and his moral character persisted as a fundamental political theory in China for thousands of years, until the end of the Qing dynasty.[5] The Constitution of the Republic of China, when first promulgated, however, based its legitimacy on another power. Article 48 of the R.O.C. Constitution imposes a duty upon the Republic's President, a popularly elected head of state, to take a ritual vow to observe the Constitution upon taking the office, with a line of oath stipulated in the same provision reading, "before and toward the people of the entire nation,"[6] instead of declaring observance to heaven, or swearing on the Bible. This constitutional requirement marks the beginning of the rule of law. Article 48 established, for the first time, the idea that no one, not even the head of state, considered before then the only one who was above all others, is above the law.

The first judicial constraint placed upon the President's power, in Judicial Yuan Interpretation No. 262 (hereinafter J.Y. Interpretation),[7] arose from the Control Yuan's (監察院, which the author of this chapter considers translating more appropriately as Guardian Yuan) petition (proposed three decades before the lifting of martial law but lodged only afterward), and confirms the Control Yuan's constitutional power to impeach military officers, refuting a claim that the discipline of military personnel is by the President exclusively as the commander-in-chief.

A provision of the Constitution grants immunity from criminal prosecution proceedings, except for treason charges, to the President as the head of state. This provision is reminiscent of the one and only status claimed by the Son of Heaven and may lead the head of state to believe he is above the law. The Constitutional Court tackled this issue in an interpretation (Judicial Yuan Interpretation No. 388, hereinafter J.Y. Interpretation) in response to a petition to answer whether an incumbent President enjoys the same immunity during a campaign for reelection. The answer from the Constitutional Court was affirmative, with a caveat that the immunity stipulated in the Constitution is applicable only during the term of his office so as not to hinder his job.[8] This interpretation obliquely imposed substantial constraints upon presidential power and ushered the "one and only" beast quietly back into the cage of law.

Having written provisions of the Constitution does not necessarily lead to voluntary observance, particularly in the case of the head of state. Chiang Kai-shek (1886–1975) was the first president who found the need to have the Justices exercise their function in construing the Constitution in the 1950s. He did not file the petition in his own name or in any official capacity. Instead, he asked the then Secretary-General to the President to seek an interpretation from the Constitutional Court for him and obtained one subsequently (J.Y. Interpretation No. 76).[9]

More than one president has followed suit. On one occasion President Lee Teng-hui (1923*) had his Secretary-General seek and obtain a constitutional interpretation from the Constitutional Court for him (J.Y. Interpretation No. 470).[10] Lee had failed to answer an earlier petition by a number of legislators for the Constitutional Court's Interpretation (J.Y. Interpretation No. 419) that challenged the constitutionality of his decision to reject his Vice-President's resignation from the prime minister's office,

---

5 See the last paragraph of the Imperial Edict of the Abdication of the Qing Emperor on 12 Feb 1912: "Today,…I realize that the whole nation is expecting the republic, and such expectation has been indicated by the new mandate of heaven…. I, the Empress Dowager, therefore, together with the Emperor, hereby hand over sovereignty to the possession of all the people, and declare that the constitution shall henceforth be Republican. May it comfort those who wish for times of peace and prosperity, and comport to the belief given by sages and men of virtue that the world is for the public and shared by all." (《宣統帝退位詔書》:朕欽奉隆裕皇太后懿旨,…今全國人民心理多 傾向共和,…人心所向,天命可知。…特率皇帝將統治權公諸全國,定為共和立憲國體,近慰海 內厭亂望治之心,遠協古聖天下為公之義。)

6 Zhonghua Minguo Xianfa (Constitution of the Republic of China) Art. 48 (1946) "On assuming office, the President shall take an oath, which shall read as follows 'I do solemnly and with all sincerity swear before the people of the whole country that I will observe the Constitution, faithfully perform my duties, promote the welfare of the people, and safeguard the security of the State so as not to betray the people's trust. Should I break my oath, I will submit myself to severe punishment by the State. This is my solemn oath."

7 Si Fa Yuan Da Fa Guan Jie Shi Shizi Di 262 Hao [Justices of the Constitutional Court, Judicial Yuan, Interpretation No. 262] (11 June 1990) (R.O.C.). [hereinafter J.Y. Interpretation].

8 J.Y. Interpretation No. 388 (27 Oct 1995).

9 J.Y. Interpretation No. 76 (3 May 1957).

10 J.Y. Interpretation No. 470 (27 Nov 1998).

thereby allowing the Vice-President to remain as prime minister concurrently.[11] He twice refused to be present in the hearings before the Court.[12] The first time the head of state observed and acted as a party under the rule of law, voluntarily submitting himself to judicial review by the Court, came after Chen Shui-bian became President. Chen, like his predecessors, had his Secretary-General file a petition for him and received one interpretation from the Constitutional Court (J.Y. Interpretation No. 541) reminding him of his possible lack of standing and indicating that the Court would not ignore the standing issue the next time.[13] Thereafter, he submitted himself to the Court's jurisdiction, and in 2007, in his official capacity, signed off on a petition for the Constitutional Court's Interpretation (J.Y. Interpretation No. 627) of a matter where he had asserted his executive privilege to avoid the order to surrender certain files to the lower court.[14] At that moment, constitutionalism could be seen to be functioning on the head of state. It was then that human rights and the political or social order were set on intersecting paths.

2 The Rule of Li and the Rule of Law

Instead of the rule of law, the universe of Confucianism functions under the rule of li (禮, or rites). Li is a set of norms that, inter alia, govern five fundamental human relations, that between father and son (父子), superordinate and subordinate (君臣), husband and wife (夫婦), elder and younger brother (兄弟), and friends (朋友), on the basis of a patrilineal, class society.[15] The distinction between genders is emphasized to maintain the close family relationship of father and son, representing a divergence from the family of ancient matrilineal societies.[16] Hierarchical relations are thereby established to maintain a harmonious social order. Society under the rule of li is an oriental form of communitarian state. Families or patriarchal clans are considered the bedrock of the state (a notion literally expressed in the Chinese term for state, 國家 or "state family"). Equality between individuals is seldom emphasized; equality of man as a concept did not exist in China until the later part of the 19th century, as it falls outside of the Buddha's teachings.[17]

However, that individual citizens, irrespective of gender, religion, race, class, or party affiliation, shall be treated as equals before the law, has become a basic norm, being placed in the very first provision in the bill of rights of the R.O.C. Constitution by the framers,[18] predating the birth of the Universal Declaration of Human Rights, even if only marginally.[19] The society that was, to that point in time, accustomed to the rule-of-li then had to face the cultural, if not ideological, tests that the rules of the Constitution had set for it.

---

11 J.Y. Interpretation No. 419 (31 Dec 1996).

12 See Ministry of Justice (1999), p. 3.

13 Liu Tie Zheng Da Fa Guan Shizi Di 541 Hao Jie Shi Yi Bu Tong Yi Jian Shu [劉鐵錚大法官釋 字第 541 號解釋一部不同意見書] (Justice Tieh-Chen Liu's partial dissenting opinion in Justices of the Constitutional Court, Interpretation No. 541) (4 Apr 2002) (R.O.C.). Hsieh Tsai Chuan Xie Zai Quan Da Fa Guan Shizi Di 541 Hao Jie Xie Shie Tong Yi Jian Shu [謝在全大法官釋字第 541 號解釋協同意見書] (Justice Tsai-Chuan Hsieh's concurring opinion in Justices of the Constitutional Court, Interpretation No. 541) (4 Apr 2002) (R.O.C.).

14 J.Y. Interpretation No. 627 (15 June 2007), the Application filed by the "President" Shui-Bian Chen.

15 The Book of Documents, Zhong Yong (translated as The Mean): "The universal Way of the world involves five relations, and practicing it involves three virtues. The five are the relations between ruler and minister, between parent and child, between husband and wife, between older and younger brother, and among friends. These five are the universal way of the world." (《禮記・中庸》:「子 曰:『……君臣也、父子也、夫婦也、兄弟也、朋友之交也,舞者,天下之達道也。』」) See de Bary and Bloom (1999), pp. 336–337.

16 Guodian Chu Slips: "If men are not distinct from women, father and son would not be close to each other. If father and son are not close to each other, there would be no righteousness between superordinate and subordinate. (《郭店楚簡》:「男女不別,父子不親;父子不親,君臣無義。」)

17 The term ping-deng (平等) was not employed to depict equality until the late 19th century, except for the Buddhist idea that "all living beings are equal." (佛曰:「眾生平等。」) The rule of Li, as the core of social norms since ancient times in China, performed the critical role of distinguishing the nobility, civilians and slaves, as well as defining guanxi so that a social/political hierarchy may be established. See Li (2013), pp. 263–287.

18 Zhonghua Minguo Xianfa (Constitution of the Republic of China) Art. 7 (1946) "All citizens of the Republic of China, irrespective of sex, religion, ethnic origin, class or party affiliation, shall be equal before the law."

19 When the Universal Declaration of Human Rights was proclaimed by the United Nations General Assembly on 10 December 1948, the Constitution of the Republic of China had already been promulgated.

A number of the Constitutional Court's Interpretations coped with the challenges with a firm manner; however, the Constitutional Court sometimes regressed. An early interpretation (J.Y. Interpretation No. 365) found gender discrimination in a provision of the Civil Code that subordinated the mother's parental decision to the father's in the case of a conflict, and declared it to be unconstitutional. [20] In one of the five major relationships dealt with by Confucianist family ethics, it is taught that the wife shall follow the will of her husband (夫唱婦隨).

The provision in the Civil Code was thus dismantled and gave way to the principle of equal protection.[21] The Constitutional Court soon issued another interpretation (J.Y. Interpretation No. 372) reconstruing a legal provision in the Civil Code as allowing a spouse to sue for divorce after being the victim of domestic violence, and declaring a Supreme Court-selected precedent constitutional, only to the extent that it is understood in conformity with the intention of this interpretation. [22] The Constitutional Court's Interpretation relies upon an Amendment to the Constitution that requires the government authority to take proper and necessary action to proactively stamp out gender discrimination and to promote gender equality in everyday life. It implies that the selected precedent, if read so as not to outlaw domestic abuse in divorce litigation per se, would be omitting the obligation imposed by the Amendment. Again, the Court found a moderate judicial means to make clear that the absolute power traditional wedlock ethics gave husbands over their wives within the confines of the family, which often manifested itself in the form of physical violence and was long neglected if not endorsed implicitly by the Supreme Court, had to change and yield to the values championed by constitutionalism, that every person's human dignity, despite his or her gender, or contrary social culture, must be legally and rigorously protected in court.

Some years later, the Justices of the Constitutional Court, however, would find themselves in a serious debate over whether there is a constitutional limitation on the exercise of judicial power in urging or forcing other government branches to actively eradicate all forms of gender discrimination in the private sector. The Constitutional Court, at the end of the debate, delivered an interpretation (J.Y. Interpretation No. 728) which refused to strike down a statute that recognized the binding force among the clan members of common-place private regulatory regimes in traditional Taiwanese property guilds formed for the purpose of clan-ancestors worship. The issue at dispute was whether a common-place guild regulation that deprives all female offspring of membership can be recognized by law and enforced in court without violating the government's constitutional obligation of combating deeply rooted gender discrimination in the private sector. The majority in the Constitutional Court concluded that the statute's omission in outlawing the guild regulation does not constitute in-effect discrimination on the part of the government. Further, the judiciary is to restrain itself from crafting replacement programs and must pay deference to the legislators' discretion in devising appropriate corresponding means to intervene and overcome various gender discrimination practices in the private sector.[23]

The only legitimate explanation for the Constitutional Court's reluctance in declaring the statute as unconstitutional is perhaps that there were difficulties in finding a feasible way to sanction such practices through affirmative actions, which, in any event, would be beyond the reach of effective judicial enforcement efforts.

On a related note, an interpretation (J.Y. Interpretation No. 452) declared another civil code provision that required a married woman to take the husband's domicile as hers to be unconstitutional.[24] The Justices had not agreed with another petitioner when the law was first challenged on the grounds of gender discrimination (J.Y. Interpretation No. 413), but did not pass up the second chance to address

---

[20] J.Y. Interpretation No. 365 (23 Sept 1994).

[21] The concept of "Three Obediences and Four Virtues" (三從四德) neatly sums up the behavior that Confucians expected from women. "Three Obedience" indicates that a woman is under the authority of, or dependent upon, a male relative during all three stages of her life, reads as "Before marrying, she follows her father; after marrying she follows her husband; when her husband dies, she follows her son" (未嫁從父,既嫁從夫,夫死從子). "Four Virtues" are traits that every woman should develop, which are characterized as "wifely virtue" (婦德), wifely speech (婦言), wifely demeanor (婦容) and wifely work (婦功) as provided in Ban Zhao's Lessons for Woman (《班昭・女誡》).

[22] J.Y. Interpretation No. 372 (24 Feb 1995).

[23] J.Y. Interpretation No. 728 (20 Mar 2015).

[24] J.Y. Interpretation No. 452 (10 Apr 1998).

the issue arising out of a case where a man sued his wife for divorce because she refused to move into his old domicile and change her job.[25] The wife was thereby declared to be under the protection of the Constitution and relieved from the duty to follow her husband physically. Equality now forms the basis of Taiwan's marriage law.

However, the Justices in a later interpretation (J.Y. Interpretation No. 554) found a criminal code provision that imposes criminal punishment for adultery if the spouse initiates the charge as being constitutional.[26] Although the freedom of sexual conduct is considered as inalienable from the concept of personal liberty by the Constitutional Court, family values cemented by the institution of monogamy and reinforced by criminal penalties were praised as compatible with the value system of fundamental human rights.

Fourteen years later, in another groundbreaking interpretation (J.Y. Interpretation No. 748) based on marriage equality, the Justices clarified that neither J.Y. Interpretation No. 554, nor any other interpretations previously issued regarding the legal institution of monogamy, had ever or implicitly answered the question of whether same-sex marriage should be lawfully recognized. Therefore, the Civil Code was said to be deficient constitutionally due to the lawmakers' omission in providing for parallel institutions to heterosexual marriage so as to make "intimately, exclusively, and permanently engaged same-sex union, or wedlock, legally possible." A grace period of two years was set forth in the interpretation for the legislators to adopt remedial legislation; failure to meet the deadline would necessitate immediate official recordation of same-sex marriage at the expiry of the two-year period.[27]

This interpretation followed its precedents and took marriage, not heterosexual marriage but marriage, as a fundamental human right, access to which should be guaranteed to individuals who have the same right to marriage but whose sexual orientation, as an immutable characteristic, is different from the majority in heterosexual marriages.[28] The tenet of this case may not be so much to deviate from or even to destroy conventional heterosexual marriage but to cement and enlarge the social base of the institution of marriage as an intimate, exclusive union between two consenting adults of the same-sexual orientation. Again, here the notion of equal protection of individuals becomes the focal point that illuminates a blind spot in conventional wisdom and makes all the difference.

3 Law Means Penalties v. Judiciary Means Independence

In the universe of Confucianism, litigation is considered an inauspicious exercise (訟必終凶) and it is only wise to shun it.[29] Litigation would be triggered upon deviation from the rule of li and is bound to result in criminal punishment (出禮入 刑).[30] Law (法) in Chinese, therefore, is often used as a synonym for criminal punishment (刑). The mission of the judiciary is more to settle disputes (必也使無 訟乎) than to deliver justice.[31] Although the main function of all punishments imposed by a judge is said to be "education" (汝作士,明于五刑,以弼五教) so that punishment will not be needed anymore (刑期無刑),[32] punishment is always imposed with an aim to help establish the harmonious universe of the rule of, although sometimes it is imposed to eliminate political enemies and thereby preserve the present

---

25 J.Y. Interpretation No. 413 (20 Sept 1996).

26 J.Y. Interpretation No. 554 (27 Dec 2002).

27 J.Y. Interpretation No. 748 (24 May 2017).

28 Id.

29 According to Chapter 12 of the Analects, the Master said: "In hearing lawsuits I am just like others. What is necessary is to see that there are no lawsuits." (《論語・顏淵》:「子曰:『聽訟,吾 猶人也,必也使無訟乎!」) See Gardner (2007), p. 36.

30 The Volume of Chen-Chong in Hou Han-Shu (or "Book of the Later Han"): "When the rule of li is insufficient, criminal punishment applies. That is the complementary relationship between the rule of li and criminal punishment." (《後漢書・陳寵傳》:「禮之所去,刑之所取;失禮則入刑,相 為表裡者也。」)

31 Supra note 28.

32 The Book of Documents, Yu-Shu (translated as the "Book of Yu"), Da-Yu-Muo (translated as "the Great Counsel of Yu"): "…Owing to you being the minister of Crime and your intelligence in the use of the five punishments to assist the inculcation of the five duties, with a view to the perfection of the government, there may come to be no punishments through punishment, but the people accord with the path of Mean." (《尚書・虞書・大禹謨》:「……汝作士,明于五刑,以弼五 教,期于予治。刑期于無刑,民協于中,時乃功,懋哉。」)

regime.[33] An ancient teaching in the High Book is Emperor Wen's (文王) (Emperor Wu's father) wisdom in staying away from the business of dispute resolution. The only thing an emperor should do is find competent judges and let them do their work, a piece of wisdom that still rings true in today's constitutional state.[34] While it would indeed be a virtue for an emperor to pay deference to the independent decision of a court, judges have, historically, seldom been independent nor distinguished from other administrative functions, and the emperor was always the one to whom the judges would eventually report,[35] as the unparalleled government ruling power must be unitary onto the emperor (人無有比德,惟皇作極).[36]

Not long after the Constitution took effect, the Constitutional Court, in its first decision, responded to a challenge initiated by the Guardian Yuan (監察院) with regard to a moderate form of unconstitutionality. The Constitutional Court announced an interpretation (J.Y. Interpretation No. 86) to the effect that the Judiciary Act must place all lower courts within the judiciary so as to be compliant with the Constitution's tenets.[37] The law at issue brought courts subordinate to the Supreme Court within the purview of the Ministry of Justice. Twenty years later, the law was amended to carry out the decision.

The Constitutional Court issued another monumental decision (J.Y. Interpretation No. 392) which clearly set forth that the prosecutors under the Ministry of Justice in the executive branch are distinct from the judges in the independent judiciary branch, as the latter is a reactive, independent branch while the former the opposite,[38] despite the fact that the law has made the prosecutor's office a part of the court.[39] It is hence incompatible with the separation-of-power scheme under which the then criminal procedure rules allowed the prosecutors to detain suspects while bypassing court review. However, a writ of habeas corpus cannot be issued by a prosecutor in lieu of a court judge. As a result, the due process of law guaranteed in the mechanism of judicial review in issuing the writ of habeas corpus has become a procedural trump card vis-à-vis prosecutors unilaterally pursuing collective values in the legal order established in criminal laws. These two interpretations are milestones in the process of drawing distinctions, and thereby bringing about actual separation, of the court from the executive branch, and have created the culture of judicial independence, which would not have existed in a conventional Confucianist society.

---

33 The Book of Sayings of Confucius, Wu Shing Chieh (translated as "Understanding of the Five Offenses"): "There are five severe offenses, and homicide is the least. Those who act against heaven would be punished along with their family for five generations. Those who slander King Wen and King Wu would be punished along with their family for four generations. Those who act against ethics and moralities would be punished along with their family for three generations. Those who seek for spiritual beings would be punished along with their family for two generations. Those who commit homicide would be punished alone. Accordingly, homicide is the least of the five severe offenses." (《孔子家語・五刑解》:「孔子曰:『大罪有五,而殺人為下,逆天地者 罪及五世,誣文武者罪及四世,逆人倫者罪及三世,謀鬼神者罪及二世,手殺人者罪及其身。故 曰大罪有五,而殺人為下矣。」)

34 The Book of Documents, Lizheng (translated as "Establishment of Government"): "(Emperor Wen would not himself appear for various notifications, in litigation, or in precautionary measures of the government.) Criminal affairs should be dealt with cautiously and carefully by appointing qualified officers and pastors, whose opinions bind the Emperor. This rule should not be breached. (《尚書・立政》:「庶獄、庶慎,惟有司之牧夫,是訓用違。」) This paragraph is now understood as the origin of judicial independence in ancient thought.

35 The Book of Sayings of Confucius, Shing Cheng (translated as "Criminal Affairs"): "Penalties are preliminarily determined by Li (吏), who will report the tentative penalties to Cheng (正). After Cheng receives the report, he/she will report to Da Szu Kou (大司寇), who will then report to the emperor. The emperor will ask three ministers to comment on the tentative penalties and reduce the penalties if any doubts are raised. After the procedure, the emperor will finally decide the conviction and the sentence." (《孔子家語・刑政》:「成獄成於吏,吏以獄成告於正,正既聽之, 乃告大司寇聽之,乃奉於王;王命三公卿士參聽棘木之下,然後乃以獄之成疑于王,王三宥之以 聽命,而制刑焉,所以重之也。」) The paragraph shows the elaborate procedure leading to a conviction, the multiple instances, and the lack of real independence of the ancient judicial system.

36 Hongfan of Shangshu, The Nine Provinces of Great Plan. See supra note 2.

37 J.Y. Interpretation No. 86 (15 Aug 1960).

38 Zhonghua Minguo Xianfa (Constitution of the Republic of China) Art. 80 (1946), "Judges shall be nonpartisan. They shall try cases independently, in accordance with law, and be free from any interference." Zhonghua Minguo Xianfa (Constitution of the Republic of China) Art. 81 (1946), "Judges shall hold office for life. No judge shall be removed from office unless he has been guilty of a criminal offense or subjected to disciplinary action, or declared to be under interdiction. No judge shall, except in accordance with law, be suspended from office, transferred, or liable to salary cuts."

39 J.Y. Interpretation No. 392 (22 Dec 1995).

The Constitutional Court, for obvious reasons, is averse to striking down unconstitutional criminal law provisions unless there is no more appropriate way to read them in light of the Constitution.[40] In so doing, the Court treads the fine line between introducing constitutionalist values and the difficult task of preserving the traditional Confucian legal culture of relying on criminal law as the primary means of maintaining social order under the rule of li.

Being tolerant of the criminal sanctions against adultery is but one example of this. Another example is provided by a defamation case where the Constitutional Court adopted a modified version of the actual malice test established by the U.S. Supreme Court[41] in the case of New York Times v. Sullivan of 1964 in construing a law of criminal sanction (J.Y. Interpretation No. 509).[42] A chapter of the criminal code professing to protect the interest of reputation often charges the court to sanction abusive or indecent language, in fact making judges the enforcers of social moral codes.[43] The legal provision providing that a defendant is excused if proven to be stating the truth was read by the Constitutional Court in the context of the freedom of expression as not placing on the defendant the burden to prove the truth, nor aiming to punish defendants who have reasons to firmly believe their false statements to be true.[44] The Court, however, also confirmed that the Constitution would allow criminal sanctions to be applied to deter defamation should the congress find monetary damages not a sufficient legal remedy.

The Constitutional Court has also construed a criminal provision that sanctions "obscene" materials in a way that does not impinge constitutional protection of the freedom of speech, while giving the term a carefully crafted and modified, but narrower, definition as developed and adopted by the U.S. Supreme Court in the case of Miller v. California of 1973.[45] The Taiwanese version (J.Y. Interpretation No. 617) breaks "hard-core obscenity" into three specific categories, all of which can be constitutionally prohibited by law, if the material bears no value in the respective realm of art, medicine or education; the rest falls within the Miller-type definition as "soft" obscenity, which cannot be prohibited by law if appropriate measures or devices are in place to bar access by minors.[46] A criminal offense on the abstinence list for "offending social morals" in a Confucianism state, existing since ancient times, is also finally circumscribed by the constitutional safeguards of an individual's fundamental human rights to express and receive messages of sexual desires.

A criminal provision that incorporates the age-old concept of retribution did not pass the Constitutional Court's review as it was not deemed to be an acceptable means of achieving the end set in a law. The law at issue is one that imposes upon an informant who falsely accuses others of drug trafficking the same criminal penalty reserved for the drug traffickers themselves.[47] The Constitutional Court struck it down as an unacceptably retributive punishment of an extent unrelated and thereby not suitable for the offensive conduct (J.Y. Interpretation No. 551). But, the Constitutional Court has, on more than one occasion, before and after martial law was lifted in the country, concluded that the death penalty is a constitutionally acceptable means of eradicating the rampant drug trafficking in Taiwan (J.Y. Interpretation No. 194 and J.Y. Interpretation No. 476).[48] The Constitutional Court passed on the issue of whether a drug user can be subject to the same punishment as a drug trafficker would,[49] maintaining that a healthy social life and order are considered as compelling government interests that eclipse the value of safeguarding individual human lives.[50] The Constitutional Court overwhelmingly supported,

---

[40] When disputes regarding the constitutionality of certain laws are raised before the Justices, if the disputed laws fall within the domain where legislators enjoy wide discretion and Justices could find multiple ways to interpret the laws, the Justices may choose to adopt an interpretation that permits the disputed laws to be read in harmony with the Constitution. See Xu Yu Xiu Da Fa Guan Shizi Di 582 Hao Jie Shi Xie Tong Yi Jian Shu [許玉秀大法官釋字第 582 號解釋協同意見書] (Justice Yu-Hsiu Hsu's concurring opinion in Justices of the Constitutional Court, Interpretation No. 582) (23 July 2004) (R.O.C.), which gives a clear explanation of the legal interpretation of constitutionality (Verfassungskonforme Auslgung, 合憲性解釋).

[41] New York Times Co. v. Sullivan, 1964 U.S. 1500, 376 U.S. 967, 84 S. Ct. 1130, 12 L. Ed. 2d 83 (1964).

[42] J.Y. Interpretation No. 509 (7 July 2000).

[43] Zhonghua Minguo Xingfa (Criminal Code) (Taiwan) Arts. 309 and 310.

[44] The Constitutional Court interprets Article 310 of the Criminal Code in the ways of constitutionality.

[45] Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419, 1973 U.S. 149 (1973).

[46] J.Y. Interpretation No. 617 (26 Oct 2006).

[47] J.Y. Interpretation No. 551 (22 Nov 2002).

[48] J.Y. Interpretation No. 194 (22 Mar 1985); J.Y. Interpretation No. 476 (29 Jan 1999).

[49] J.Y. Interpretation 476 (29 Jan 1999).

[50] Id.

without even one dissenting opinion, the moralities and conventional values championed in the regime of capital punishment and did not budge in the face of the death penalty abolishment movements sweeping through the European community.

After J.Y. Interpretation No. 509, which delineated the constitutional limitations on the criminal sanctions for defamation, the Constitutional Court encountered another petition challenging a civil code provision which allowed the court to demand the publication of an apology in newspapers to rectify the dissemination of defamatory remarks.[51] The demand for written public apologies can be seen as the signature relief commonly applied by the courts in Confucian jurisdictions. The Constitutional Court's Interpretation (J.Y. Interpretation No. 656) on the constitutionality of the legal regime of court-ordered public apologies is the third such judicial exercise in Asia on the topic, following those issued by Japan's supreme court in 1956 and Korea's constitutional court in 2003.[52] The Korean judiciary viewed the court-ordered public apology as an unconstitutional exercise undermining the freedom of conscience, a branch of fundamental rights not explicitly adopted in the constitutional documents of Taiwan as it is in Korea's. The Court refused to strike down the law to preserve the right to remain silent under the umbrella of the freedom of speech. The only restriction the Constitutional Court identified from the Constitution as applicable to any court-ordered public apology is that it does not offend the defendant's dignity when it is published in the vindictive plaintiff's name and at his expense.

On that score, Confucianism's emphasis on the virtue of moral self-reflection under the rule of li, as exemplified in the making of public apologies for one's misconduct, is able to beat back the antithetical constitutionalist value of individual autonomy in judging right and wrong, free from government compulsion by judicial powers. Interestingly, if not ironically, what the Constitutional Court has ignored is that this Confucian virtue not only underpins a voluntary exercise of self-reflection, but perhaps shapes the very history of the freedom of conscience, whose birth as a branch of human rights in the Universal Declaration of Human Rights of 1948 was an immediate result of discussions initiated by Peng-Chun Chang (張彭春 1892–1957), a scholar-diplomat, together with his deputy, John C. H. Wu (吳經熊 1899–1986), another world-renown legal philosopher. Chang led the delegation from the Republic of China to successfully insert the ancient, Eastern Confucianism-championed notion of humaneness (仁), translated in the document as the innate individual conscience (良知), into the draft Declaration, starting from the first provision.[53] There existed little reason for the Constitutional Court to find the freedom of conscience at odds with the bill of rights simply because the term was not in it.

4 Education as a Government Function

At the heart of "High Vows (泰誓)," a core chapter in the High Book (尚書), are messages in the following passage. "And Heaven so cares to protect all under Heaven that an emperor is chosen for them to be their teacher leader, the one and only able to assist Heaven to bring to them orderly peaceful life with care." (天佑下 民作之君作之師惟其克相上帝寵綏四方.) It is said that Heaven, being like parents to all creatures, bestows a mandate upon the one and only chosen emperor to act as the parent to his subjects, because mankind is the foremost among all creatures, and the emperor the foremost among all man.[54] (惟天地萬物父母惟人 萬物之靈亶聰明作元后元后作民父母)

It is therefore no surprise that one major function of the government under the ruler, as expected by the Confucianists, is to educate the ruler's subjects (in Chinese 子民 "children subjects") as parent-like educators or teacher-like parents, while administering kindness and intervention in equal measure (恩威並施).[55] This image is innocuous until it becomes an issue, fulfilling the fundamental constitutionalist's assumption that the ruler would sooner or later act in his own interest and abuse the

---

51 J.Y. Interpretation 656 (3 Apr 2009).

52 See Oguri v. Kageyama, 10 Minshu 785 (Supreme Court, Japan 1956), the concurring opinion by Justice Kotaro Tanaka; See also 89 Hun-ma 160 (Constitutional Court, South Korea 1991) (decision on the constitutionality of law classified in file "e").

53 Sun (2016), p. 209.

54 The Book of Documents, Tai Shi (translated as the "Great Vows"). (《尚書,泰誓》).

55 Xunzi, Li-Lun (translated as "The Theory of Li"): "The Book states that a man with noble character may be the parent of the people. The father is to give birth but not to foster. The mother is to foster but not to teach. A man with noble character is able to foster and to teach." (《荀子・禮 論》:「詩曰:『愷悌君子,民之父母』。…父能生之,不能養之;母能食之,不能教誨之;君者,已 能食之矣,又善教誨之者也。」)

power placed in his hands, becoming a menace to his subjects. The Confucianist teachings are not short on warnings that the emperor may do harm to the people. Mencius has asked, "When a supposedly parent-like ruler becomes a beast-like leader devouring his subjects, where is the parent-like being in him?"[56] (為民父母行政,不免於率獸而食人,惡在其為民父母也?) But this corruption of a ruler may be considered an extreme case and is seldom an issue systematically addressed by the mainstream theories. After all, Heaven is considered infallible and would not erroneously choose one who is corruptible. It is therefore inconceivable that the carefully chosen ruler would descend into depravity, although in a pragmatist's eyes the descent, when it happens, must be confronted. So, an accountable, benevolent, model emperor can and will behave appropriately, and must play the role of an educator in all walks of life and through all aspects of his conduct. In sum, education is the main function of the government under the one and only chosen ruler.

The Constitutional Court started to review the boundary lines between the state and universities in terms of educational functions in the late 1990s. The first rule the Constitutional Court set in an interpretation (J.Y. Interpretation No. 380) is that without any clear statutory mandate, the Ministry of Education is not constitutionally allowed to impose mandatory course requirements for university students to receive college degrees, as such requirements intruded on the universities' self-governance which is guaranteed under the umbrella of academic freedom by the Constitution.[57] In the next interpretation, again for the sake of preserving academic freedom, the Constitutional Court declared a law that required all universities to establish an office of military affairs in charge of military and medical training on campus as being unconstitutional (J.Y. Interpretation No. 450).[58] The intention of these interpretations, although not explicitly stated, is to promote a more liberated, liberal and diverse educational milieu without stifling or undue government control, something not uncommon in the traditional Confucian dynasties, but now considered incompatible with a constitutional democracy.

Meanwhile, the Constitutional Court revealed its view of the government's role in education in a case where it declared a court precedent denying a student's standing to sue a city-owned college for undue involuntary withdrawal as unconstitutional (J.Y. Interpretation No. 382).[59] As a more recent interpretation of the Constitutional Court confirmed (J.Y. Interpretation No. 736), all public schools are deemed equivalent to government agencies discharging educational functions, while all private schools are deemed as having been delegated governmental educational functions by law.[60] Wrongful discharge of a student is comparable to an illegal government act and therefore subject to challenge and is reviewable in an administrative court. The Constitutional Court failed to explain why the length of basic schooling guaranteed by the Constitution should be extended by the government, and all levels of formal education, both public and private schools, are taken as being a part of the government's educational function. Maybe in the mind of the Justices no explanation is needed, as judicial notice can be taken from the already prevalent understanding in a state with Confucian traditions.

Yet another interesting turn, propelled by the traditional concept of education, followed in a more recent interpretation by the Constitutional Court (J.Y. Interpretation No. 702).[61] It was a case where a legal provision was challenged for lacking the clarity as otherwise required in the Constitution, when applied by the school as the legal basis for disciplining one of its teachers for his misconduct in class. The law was found to be soundly composed and able to pass constitutional review. Its terms are superficially abstract and general but sufficiently specific for a teacher to understand the boundaries of occupational conduct as set for teachers, who are traditionally expected to follow the "teacher's way" (師道), and be a model for and earn high respect from students, without unfitting, abusive conduct while teaching.

5 Transforming the Absolute-Power Relationship into Constitutional Relations

---

[56] Mencius, King Hui of Liang: "Mencius replied to King Hui of Liang: …It is only heard that a brutal man was killed. I had never heard that King of Zhou was killed unlawfully." (《孟子・梁惠 王》:「…聞誅一夫紂矣,未聞弑君也。」)

[57] J.Y. Interpretation No. 380 (26 May 1995).

[58] J.Y. Interpretation No. 450 (27 Mar 1998).

[59] J.Y. Interpretation No. 382 (23 June 1995). The author believes that the reason why the Constitutional Court took it for granted without any cited basis is due to the effect of traditional culture.

[60] J.Y. Interpretation No. 736 (18 Mar 2016).

[61] J.Y. Interpretation No. 702 (27 July 2012).

In the Confucian universe it is inconceivable for a son to sue his parents, a student to sue teachers or a subordinate to sue superordinates. The pre-World War I German theory of the special power relationship (Das besonderes Gewaltverhältnis or 特別 權力關係, hereinafter "the SPR theory") is defined as an absolute obedience relationship between, inter alia, a public functionary and his superior, or a student and his teacher or school.[62] The SPR theory was easily transplanted into Taiwan during Taiwan's transition from a Confucian jurisdiction into a newly developing regime under the rule of law, with a carved-out turf under the rule of man.

On the eve of the lifting of martial law, the Constitutional Court took the first of many steps to dismantle the SPR theory in Taiwan. The first move was an interpretation (J.Y. Interpretation No. 187) where the past judicial practice was questioned. [63] A number of court decisions had adopted the SPR theory to dismiss on the grounds of lack of standing, with no statutory basis, any administrative action filed by a government functionary to challenge a decision or order made by his superiors, as well as any administrative action filed by a student against the school over a decision made by his teachers or the school authority. The petitioner was a military officer who sought to collect his full pension payment following an alleged wrongful denial and who had no access to court for the matter. He was vindicated on the issue in that his right to receive his pension upon retirement was a claim protected by constitutional litigation; the Constitutional Court concluded the claim could not be categorically barred simply because of his occupation or government affiliation alone. Thereafter, a series of interpretations followed (J.Y. Interpretation No. 201, 243, 298, 323, 338, and 382),[64] chipping away at the SPR theory until a new theory emerged with an interpretation (J.Y. Interpretation No. 430) on a case where a military officer was barred from lodging an action, again for lacking standing, over a disputed calculation of his pension-based years.[65]

J.Y. Interpretation No. 430 knocked down another Supreme Court-selected precedent as it unconstitutionally deprived the petitioner of his right to seek redress from the court. The Constitutional Court for the first time defined the relationship between the state and its public functionaries as a duty-oriented relationship under public law (公法上職務關係). This interpretation was to rid Taiwan of the SPR theory, yet the new relationship does not quite constitute a public-law employment contract between two equal parties, as so deemed in some common-law jurisdictions that do not distinguish between the administrative courts' jurisdiction over administrative law cases and that of the ordinary courts over civil and criminal cases.

The theory of the duty-oriented relationship under public law supplanted the SPR theory in Germany, under a public-law doctrine of "high power in the hands of administration" (schlichthoheiliche Verwaltung 高權行政), a doctrine that the Constitutional Court found easier to adopt than the contractual theory, which supposedly applies to equals, because it is consonant with the Confucian concept of the unequal relationship between a superordinate and subordinate. In a dissenting opinion by Justices Pi-hu Hsu (1948*) and Pei-Hsiu Yeh (1947*) in J.Y. Interpretation No. 658, explanations were provided on the doctrinal difference between the two. The most notable difference is that the "high power in the hands of administration" doctrine is underpinned by an obligation-to-obligation relationship, instead of a right-to-obligation relationship, because monetary payment as a consideration under a contractual relationship is not what the public functionaries pursue in exchange for their services in government. This view in fact corresponds with traditional Confucianism, which takes as the core value in any significant relationship duty (義) instead of monetary gains (利). What the two Justices failed to address in their dissent, though, is the exchange of considerations for the fulfillment of a citizen's human right to participate in government and the services extended to the government by the public functionaries, which would in fact provide justification for the doctrine of contractual theory.

---

62 Wu (2015), p. 196. The SPR theory is defined as "legally adding special obligations through unilateral measures of executive power." Under the special power relationship, administrative power is not bound by any restriction set forth by law and thus has wider discretion, while individuals are required to obey administrative power and may not claim remedies. See J.Y. Interpretation No. 266 (5 Oct 1990) and J.Y. Interpretation No. 430 (6 June 1997).

63 J.Y. Interpretation No. 187 (18 May 1984).

64 J.Y. Interpretation No. 201 (3 Jan 1986); J.Y. Interpretation No. 243 (19 July 1989); J.Y. Interpretation No. 298 (12 Jun 1992); J.Y. Interpretation No. 323 (18 June 1993); J.Y. Interpretation No. 338 (25 Feb 1994); J.Y. Interpretation No. 382 (23 Jun 1995).

65 J.Y. Interpretation No. 430 (6 June 1997).

Following the chain of interpretations questioning the SPR theory that began with J.Y. Interpretation No. 187, which focused on the state-public functionary relationship,[66] J.Y. Interpretation No. 382 freed the student-school relationship from the theory. This interpretation, however, indicated that students are entitled to challenge any of the school's decisions that resulted in changing the student's status as a student, instead of all decisions that are allegedly illegal.

This decision was explicitly modified by a subsequent interpretation (J.Y. Interpretation No. 684). A graduate student filed an action against his university because his campaign poster on campus for a state presidential candidate in the popular election was banned by the school authority. The administrative court cited J.Y. Interpretation No. 382 to dismiss the action on the grounds that the student had no standing, that his student status had hardly been changed. The Constitutional Court accepted his petition for a new interpretation on the same issue and decided that a student is entitled to lodge an action against the university authority if significant human rights, such as freedom of speech in the case, are at stake, even if the student's status is not changed.[67] The interpretation encourages the establishment of on-campus pre-litigation due process mechanisms to resolve disputes between students and the school authority.

Now, the constitutionalist rule of law has found its way into educational institutions as well as other places, adding the concept of procedural due process to the conventional rule of li, thereby revising the fabric of substantive moral norms of conduct under it.

The concept of the rule of li may be seen as coinciding with that of the rule of law inasmuch as both govern the relationship between the emperor and his subordinates. However, the term special power relationship in its German literal meaning implies violence as it connotes absolute power that cannot be challenged, and authority in absolute power is force, or in Lord Acton's words, "Authority that does not exist for liberty is not authority but force." Or, "Absolute power demoralizes." It explains why absolute power relationships between the superordinate and subordinate or that between teachers and students, as without exception in the millennia preceding the Republic, cannot prevent the abusive exercise of violence.

What is relevant here is again the Constitutional Court's J.Y. Interpretation No. 388.[68] Before the interpretation was made, the provision in the Constitution that grants immunity to the President from criminal prosecution proceedings except for treason charges might be read under the SPR theory as giving the head of state, who is concurrently appointed by the Constitution as the commander-in-chief of the entire armed forces of the Republic, an absolute power to execute his enemies, subordinates or his subjects, at will, thus making him a serious threat to human rights. Without endorsing the SPR theory, J.Y. Interpretation No. 388 precluded any misreading for absolute immunity, banishing absolute power, along with the associated evil, from the rule of law. Interestingly, the Constitutional Court's J.Y. Interpretation No. 702 identified violence inflicted upon students as abuse in education and allowed disciplinary measures against teachers by the school authority, further stamping out the SPR theory while preserving the substance of the rule of li under the constitutionalist's state of the rule of law.[69]

References

Chan W-T (1963) A source book in Chinese philosophy. Princeton University Press, Princeton de Bary WT (1998) Asian values and human rights: a Confucian communitarian perspective.

Harvard University Press, Cambridge de Bary WT, Bloom I (1999) Sources of Chinese tradition: from earliest times to 1600. Columbia University Press, New York

Gardner D (2007) The four books: the basic teachings of the later Confucian tradition. Hackett Publishing Co., Cambridge

Li N-T (2013) From obscurity to light—tracking equality's rise in the making of Chineseconstitutions. J Leg Hist Stud 24:263–287

[66] J.Y. Interpretation No. 187 (18 May 1984); J.Y. Interpretation No. 382 (23 June 1995).
[67] J.Y. Interpretation No. 684 (17 Jan 2011).
[68] J.Y. Interpretation No. 388 (27 Oct 1995).
[69] J.Y. Interpretation No. 702 (27 July 2012).

Ministry of Justice [法務部] (1999) Fu Zong Tong De Fou Jian Ren Xing Zheng Yuan Yuan Zhang Deng Shi Xian Xiang Guan Zi Liao Ji Yao [「副總統得否兼任行政院院長」等釋憲 相關資料輯要] (Case Materials of the Interpretations of the Constitution: May the Vice-President hold the concurrent post of Premier of the Executive Yuan). Ministry of Justice, Taipei

Nylan M (2001) The five "Confucian" classics. Yale University Press, New Haven

Sun P-H (2016) Pengchun Chang's contributions to the drafting of the UDHR. J Civil Leg Sci 5:209–217

Wu G [吳庚] (2015) Xing Zheng Fa Zhi Li Lun Yu Shi Yong [行政法之理論與實用] (Administrative Law: the Theory and the Practices). Sanmin Publishing Co., Taipei

Nigel N. T. Li received his LL.M. degrees from Harvard in 1983 and National Taiwan University in 1980, after obtaining an LL.B. degree from Soochow University in 1977. In addition to his role as a practicing attorney specializing in dispute resolution and arbitration, media law, human and civil rights, international litigation and constitutional law, he is also an adjunct professor at both the Graduate School of Law of Soochow University and the Department of Political Science of National Taiwan University. He teaches Constitutional Law, Human Rights, ADR and International Arbitration. Nigel also served as Chairman of the Chinese Arbitration Association, Taipei from 2007 to 2014. He has made considerable effort in raising the quality of transnational arbitration and has contributed greatly to cross-Strait and international exchanges. Over the years, Nigel has dedicated himself to pro bono work. He has served as President of the Taipei Bar Association and now sits on the Board of the Judicial Reform Foundation. His determination to preserve human rights and justice has led to his involvement in numerous cases applying for the Constitutional Court's Interpretation of the Constitution and his appointment as a member of the Presidential Advisory Committee on Human Rights.