Law & Social Inquiry
Volume 44, Issue 3, 586–616, August 2019

Law& Social Inquiry

From Remonstrance to Impeachment: A Curious Case of "Confucian Constitutionalism" in South Korea

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In his path-breaking essay that investigates the rise of judicial review in democratic Taiwan and South Korea, Tom Ginsburg presents the distinctive style of judicial review practiced by both countries in terms of "Confucian constitutionalism," at the core of which is the practice of constitutional review as remonstrance. This Article examines whether the model of Confucian constitutionalism is still relevant in Korea, especially in light of the Constitutional Court's recent decision to uphold the motion to impeach the president rather than merely offering remonstrance or warning. By associating the Court's jurisprudence characterized by highly moralistic language and style of reasoning with Confucian constitutionalism, this Article presents Confucian constitutionalism as indirect constitutionalism, *a mode of constitutionalism that aims to shape the polity's constitutional identity in a way that achieves a meaningful congruence between liberal constitutional principles and the underlying public culture that defines the polity as a distinctive moral community.*

INTRODUCTION

In his path-breaking essay that investigates the rise of judicial review in democratic Taiwan and South Korea (hereafter Korea), Tom Ginsburg suggests that "there may be a distinctive style of judicial review that accrues to countries in the Confucian tradition with presidential systems" (Ginsburg 2002, 792). He calls this style "Confucian constitutionalism," at the heart of which lies "great sensitivity on the part of the court to the preferences of the highest political authority" (ibid.). Courts in East Asia of the Confucian heritage may actively challenge lower political authorities that have breached the constitution or statutory laws but when confronted with questions involving the personal authority of the president who enjoys "imperialistic" power, they, like Confucian scholar-officials in the past, opt for remonstrance or warning rather than a direct challenge to the president, let alone an attempt to remove him or her from power. Contrary to the conventional view highlighting the cultural challenges posed to new constitutional democracies of East Asia, argues Ginsburg, Taiwan and Korea provide fascinating cases of the localization of judicial review (and the emergence of the court),

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which is of Western provenance, in a Confucian society whose authoritarian political culture is typically believed to be at odds with rule of law and judicial independence. Of special interest is that Ginsburg further explores "the Confucian model of judicial review," which justifies judicial activism undergirded by the "elite guardians of fundamental values" (Ginsburg 2002, 795) who sit in the nation's highest court.

It should be noted that when he proposed this normative model of Confucian constitutionalism, Ginsburg did not know that in a decade or so, the Korean Constitutional Court (hereafter the "Court") would not only dissolve one of Korea's political parties,[1] but, more strikingly, uphold the motion to impeach a sitting president, thereby asserting itself as the most authoritative branch of the government on matters of Korea's constitutional order.[2] In March 2004, when President Roh Mu-hyun, a staunch champion of progressive social reforms, was impeached by the National Assembly controlled by the largely conservative opposition parties, then reinstated by the Court two months later, there ensued heated debate among political scientists and legal scholars in Korea regarding the judicialization of Korean politics, with special attention to its impact on Korean democracy, although none of them—including Chaihark Hahm (2000), who coined the term "Confucian constitutionalism"—made any reference to Confucianism as the locomotive of this new political phenomenon that was apparently redefining the nature and direction of Korean politics (Chae 2011; Hahm 2012; Hahm and Kim 2005; Oh 2010; Pak 2010; Park 2004; Yi 2012). Critics of the judicialization of Korean politics notwithstanding, however, the case of Roh's eventually unsuccessful impeachment generally vindicated Ginsburg's model: while offering poignant criticisms of the president's misdemeanors and legal violations, the Court, nevertheless, reinstated him to power by finding his crimes not grave enough to fundamentally disrupt Korea's "liberal democratic basic order."[3] Put differently, albeit arguably, the nine justices of the Court did present themselves as guardians of Korea's constitutional principles, but without wielding their legal authority so far as to remove the president, whom they understood as "the symbolic existence personifying the rule of law and the observance of law toward the entire public," or, simply, as the moral exemplar for the whole nation.[4]

1. KCCR, 2013Hŏn-ta1 (December 19, 2014). What complicated the issue was that several members of the political party in question, the Unified Progressive Party, had been elected by the people in the previous general election, raising a question as to whether the Court had a power to nullify the democratic mandate conferred to the party.

2. KCCR, 2016Hŏn-na1 (March 10, 2017).

3. For a helpful survey on this case, see Lee (2005) and Hahm and Kim (2005, 35–37). For a view that the Court's admonitions were misguided and had no strong basis in the Korean constitution, see Kim (2004). I admit that my translation of the original Korean phrase "*chayugibonjilsŏ* 자유기본질서" as "liberal democratic basic order" is open to debate as an alternative interpretation is possible. For example, Lee (2005) renders the same phrase into "free democratic basic order" without explicating the ground for such rendition. Perhaps, those who are keen to the Cold War background of modern Korean history and constitutional founding may prefer to employ "free" over "liberal," highlighting Korean liberalism's anti-Communist nature and its valorization of "free society" a la Hayek. However, as noted by several Korean political theorists (Kang 2005; Jang 2005) and barring the exceptionally anti-liberal and anti-democratic legal components such as the National Security Law, it is nearly undisputable that the Korean constitution is firmly committed to liberal basic rights, duties, and opportunities, which John Rawls (1993) famously captures as liberal democracy's constitutional essentials. Though it is certainly possible to interpret the case in hand in light of the Cold War backdrop of Korean politics, I am less convinced of the plausibility of such an interpretation in making sense of the Court's reasoning, which was predicated, at least formally, on liberal jurisprudence.

4. KCCR, 2016Hŏn-na1, 5.

https://doi.org/10.1017/lsi.2018.24 Published online by Cambridge University Press

Seen in this way, the Court's recent decision to uphold President Park Geun-hye's impeachment is worth special attention—primarily because it epitomizes the ongoing trend of the judicialization of Korean politics, an important question from the viewpoint of law and politics. What makes it all the more a remarkable case is the theoretical challenges that are raised to the model of Confucian constitutionalism as suggested by Ginsburg. Can we still make sense of Korea's activist Court that removed the president in terms of Confucian constitutionalism? Perhaps more importantly and controversially, can we find a meaningful connection between the substance of the Court's jurisprudence and decision on the one hand and Confucianism on the other, especially the version that still profoundly, if not exclusively, influences the ethos of Korean civil society?[5]

Answering "yes" to both questions, this Article argues that not only did the Court fail to engage in legal reasoning that is saliently and consistently liberal in character, despite its explicit commitment to the liberal democratic basic order, but, more strikingly, its highly moralistic language and style of reasoning—atypical for the highest court of the nation that sees the essence of its task purely in terms of legal-normative, rather than moral or political, decision making—rendered itself more as an institutionalized voice of moral admonition than an independent judicial body. By associating this moralistic aspect of the Court's jurisprudence with Confucian constitutionalism, this Article submits that Confucian constitutionalism is not so much an institutional alternative to liberal constitutionalism but a cultural expression of what can be called *indirect constitutionalism*—a mode of constitutionalism that aims to shape the polity's constitutional identity in a way that achieves a meaningful, if not full, congruence between liberal constitutional principles and the underlying moral traditions and public culture that define the polity as a distinctive moral community. The Article concludes by discussing whether Confucian constitutionalism as indirect constitutionalism is normatively desirable in countries like Korea and Taiwan.[6]

POLITICAL BACKGROUND

In July 2016, allegations emerged that Korean President Park Geun-hye abused her power by forcing several major conglomerates, better known as *chaebŏl*, to donate millions of dollars to the foundations recently created to promote Korean culture

5. Although the Confucian influence on the ethos of Korean civil society has been a topic of heated controversy, the meaningful connection between Confucianism and civil society (and citizen movement) in Korea is now widely acknowledged by many scholars. See, for instance, Cho (1997), Helgesen (1998), Kim (2002), Na (2017), and Yi (2017).

6. One may wonder whether Ginsburg's framework, which was offered nearly two decades ago, is still relevant in understanding recent practice of Korean constitutionalism and constitutional review in particular. Note, however, that it is not my intent to claim that Korean society is a Confucian society in any monistic and monolithic sense, nor is it my underlying assumption that Ginsburg's framework offers the only plausible way to understand Korean constitutional practice and jurisprudence. In this regard, the goal of this Article is modest as it only aims to investigate the relevance of Ginsburg's seminal insight to the case of presidential impeachment. That being said, there is a more ambitious aspect of the current study; it attempts to provide some empirical substance as well as an attractive alternative vision for the increasingly popular notion of "Confucian constitutionalism" in the Anglophone academic world (Bui 2016; Jiang 2013; Peng 2013). Of course, whether my reasoning is convincing to the effect of vindicating the (partially but no less significantly) Confucian dimension of Korean constitutionalism is a wholly different matter.

https://doi.org/10.1017/lsi.2018.24 Published online by Cambridge University Press

and sports. In the yearly National Assembly audit that took place in the following September, this issue was raised by opposition party members but soon dismissed when both the Blue House (the Korean equivalent of the American White House) and leaders of the conglomerates (either alleged victims of extortion or culprits of bribes, depending on how the case was to be judged) staunchly denied these allegations. The issue resurfaced and caught public attention in late October when it was revealed in a series of special news coverage that not only did Park indeed exercise her power illegally by extorting large amounts of money from the conglomerates but she did so in order to help the foundations created by Choi Soon-sil, her longtime personal friend. The Korean public was in even greater uproar when they further learned that the president had relied on Choi for important presidential decisions, who, allegedly associated with a religious cult and with no experience in public affairs, reviewed and even authorized a number of government documents, many of them classified, that concerned matters spanning from foreign policy to appointment of the national intelligence director.

Outraged by the president's legal violations and her utter incompetence as the country's leader, hundreds of thousands of Koreans took to the streets and gathered by candlelight in central Seoul every Saturday (for twenty consecutive weeks as it turned out) to protest against Park and demand her resignation. In a series of massive public protests, only comparable, in terms of size and public zeal, to the June Uprising of 1987 that eventually brought about democratization of Korea, the most important outcomes of which were direct election of the president and the establishment of the Constitutional Court (Yoon 2010), Korean citizens demonstrated remarkable self-discipline and respect of order, causing none to be injured or imprisoned despite active participation of ordinary citizens including middle and high school students, young mothers holding babies or pushing strollers, and senior citizens who would otherwise view a massive political protest as a fearful symptom of social unrest and pro-North Korea sentiments. In fact, Koreans turned these public gatherings that they voluntarily organized under no institutionalized political leadership or master plans into a sort of "festival" in which they could speak out freely and engage in a variety of forms of social protests involving visual arts, pop and traditional music, poetry and other literary writings, and, of course, public speeches and collective singing, with full respect of public order and civility (Kim 2017; Kim and Lim 2017).

The public enthusiasm to take down the president, and, more importantly, to reform Korean politics and Korean society at large, started to build staggering pressure for the opposition parties that initially showed no active interest in joining the public rallies in their prudential calculation of political interest in the midst of political uncertainty as the next presidential election was to be held a year later. Soon, however, they joined the citizens in the streets and this citizen-led grand alliance between civil society and political society built even more pressure on Park's ruling party, resulting in the creation of a new conservative party by those who decided to secede from Park's party and participate in the public protest. As the protests continued, and as Park neither explicitly acknowledged her legal violations nor showed her intent to step down despite several public apologies, citizens pushed for the political parties to formally initiate impeachment prosecution in the parliament, for which two-thirds of the votes (i.e., two hundred out of three hundred total votes) would be required.

On December 9, 2016, after nearly fifty days of public rallies and civil protests, the National Assembly of Korea officially passed, with 234 supporting votes, the motion to impeach Park, the nation's first female president and daughter of Park Chung-hee, the former military dictator and icon of Korean conservativism, for "extensive and serious violations of the Constitution and the law." More specifically, the motion passed by the National Assembly contained eight main accusations under two rubrics—first, violation of the Constitution and second, violation of the statutory laws. Under the first rubric, Park was accused of violations of (1) popular sovereignty and other duties to uphold the Constitution, (2) the constitutional principle of equality and the president's right to appoint or dismiss public officials, (3) the presidential duty to uphold free market order and the right to private property, (4) the right to freedom of speech, and (5) protection of the right to life.[7] Under the second rubric, the charges consisted of (a) abuse of power, (b) extortion, and (c) leakage of confidential documents.

Following a successful impeachment prosecution in the National Assembly, the president's powers were immediately suspended and handed over to the prime minister, one of her stalwarts, until the Court would make a decision within 180 days as to whether or not to uphold the motion.[8] While the Court was busy investigating the case in order to bring the constitutional crisis to an end, tens of thousands of people continued to rally in downtown Seoul to advocate that the Court make the "right" decision, one that would fully respect the sovereign power that they exercise collectively as democratic citizens.

TWO JUSTIFICATORY CONDITIONS

On March 10, 2017, three months after the National Assembly's successful prosecution of the impeachment, the Court, modeled after the Federal Constitutional Court of Germany with the authority to adjudicate five key constitutional matters,[9] announced its landmark decision, upholding the motion to impeach the president for the first time in Korean history. The Court, at the time consisting of only eight members due to one justice's recent retirement,[10] investigated, via two trial-like hearings, whether there had been violations by the president in the following four areas—(1) whether she had allowed Choi to interfere with state affairs, thereby abusing her powers, (2) whether she had abused her power by arbitrarily dismissing public

7. As will be discussed later, this charge was not directly related to the Choi scandal, which ignited public protests and a subsequent presidential impeachment, but rather concerned with the president's failure to respond effectively to "the *Sewol* incident" that occurred two years earlier, which caused the deaths of more than three hundred people who were on a ferry named "*Sewol*."

8. Constitutional Court Act., Art. 38.

9. The five areas are: (1) adjudicating the constitutionality of a law upon the request of a (lower) court; (2) impeachment; (3) deciding on the dissolution of unconstitutional political parties; (4) resolving jurisdictional disputes among state agencies and local governments; and (5) hearing public petitions relating to the constitution as prescribed by law (Ginsburg 2003, 218; Lee 2005, 413). On the interesting tension between the Court's European pedigree and the increasing influence of the American Supreme Court in its legal practice, see Hahm (2012).

10. According to the Constitution (Art. 111), of the Court's nine justices, three are appointed by the president, three are recommended by the National Assembly, and the remaining three are designated by the Chief Justice of the Supreme Court.

https://doi.org/10.1017/lsi.2018.24 Published online by Cambridge University Press

officials, (3) whether she had violated the news media's right to freedom of speech, and (4) whether she had failed in her duty to protect the citizens' right to life. Though finding no compelling evidence to support violations in areas of (2), (3), and (4), the Court concluded that Park clearly had committed violations in the area of (1), grave enough to warrant her removal. In this section, let us examine the justificatory conditions that the Court set for itself in adjudicating the impeachment motion, against the backdrop of which we can assess its decision more clearly.

The Court began its decision by reaffirming the two conditions that had been introduced in its previous decision of President Roh's impeachment, which together justified the presidential impeachment. The first condition stipulates that the president must have violated either the Constitution or statutes in exercising his or her official duties. The Court further explicated this condition as the following:

> The Constitution understands the impeachment procedure not as a political decision-making procedure but as a normative decision-making procedure by specifying the grounds for impeachment in terms of "violation of the Constitution or statutes" and by entrusting the decision-making power to the Constitutional Court. As an institutional procedure, impeachment aims to uphold the principle of rule of law which holds that no one is above the law and preserves the Constitution. Although serious political turmoil may likely ensue when the President, elected directly by the people, is impeached, it is the inevitable price for democracy, which the political community must pay in order to preserve a liberal democratic basic order.[11]

Worth noting here is the Court's underlying assumption that normative decision making can be severed from political decision making when the highest court adjudicates what Rawls calls "constitutional essentials." Rawls (1993) famously distinguishes public matters concerning constitutional essentials, only to which public reason applies, from other political questions in formal and nonformal public forums and justifies a purely political form of liberalism, namely political liberalism, as the most compelling form of normative liberalism under the fact of pluralism. For Rawls (and for political liberals generally), political liberalism gives rise to a special mode of normative decision making that relies solely on public reason, from which comprehensive doctrines are completely disentangled, with a view to arriving at an overlapping consensus on the principles of justice that undergird a liberal democratic basic structure.

What is interesting about the Court's reasoning is that while revealing a profound *political* commitment to a liberal democratic basic order, it presents its decision as a matter of a purely normative question solely concerned with the politically neutral principle of the rule of law. Like Rawls, the Court does not want its constitutional decision to be affiliated with a specific political group's sectarian interests (and this seems to be what they meant by "the political") but unlike Rawls, it does not clarify how the decision's purely normative nature undergirds its political and nonneutral commitment to a liberal democratic basic order. These ambiguities notwithstanding, what seems to be certain

11. KCCR, 2016Hŏn-na1, 18.

https://doi.org/10.1017/lsi.2018.24 Published online by Cambridge University Press

from the statement is that the Court upholds liberal constitutionalism, and, accordingly, its jurisprudence is expected to revolve around liberal rights and associated values.

The second justificatory condition to which the Court drew attention—which we will call *the gravity condition*—is what in the Korean constitutional jurisprudence is known as "the principle of proportionality" (*pŏbik hyŏngnyang ŭi wŏnch'ik*). It is important to note that this principle was first introduced during the previous Roh Moo-hyun impeachment and in the present case the Court has this particular version of the principle of proportionality in mind, although, quite surprisingly, it did not mention this principle in the original Korean text of the decision.[12] In the Roh impeachment case, the Court invoked the principle of proportionality in the course of clarifying the intention of Article 53(1) of the Korean Constitutional Court Act, which provides that "when there is a valid ground for the petition for impeachment adjudication, the Constitutional Court shall issue a decision removing the respondent from office." According to the Court, the principle of proportionality stipulates that the mere presence of crimes or misdemeanors committed by the president does not automatically justify his or her impeachment. What counts additionally (and necessarily) is the requirement that the gravity of the wrong clearly overrides the public costs likely to incur from the impeachment. By introducing the principle of proportionality, the Court of the Roh impeachment case required "punishment under the Constitution proportionally correspond to the obligation owed by the respondent."[13] In the present case, the Court illuminates the principle in the following way:

12. More accurately, while repeating the statement offered in the previous decision on the Roh impeachment case, stipulating the gravity condition, the Court simply omitted to mention this principle without making any substantive change to the statement itself. It is unclear why the Court did not mention "proportionality" in the present case when it otherwise was faithfully and explicitly following the legal reasoning employed in the Roh case. I offer one explanation for this omission in n. 13.

13. KCCR, 2004Hŏn-Na1 (May 14, 2004), 145. Thus understood, it is controversial whether the principle of proportionality intended to adjudicate the gravity of the president's legal violation here refers to the same principle of proportionality (*kwaing kŭmji ŭi wŏnch'ik* in Korean) that is commonly adopted in Western democracies in relation to constitutional or human rights. In Western constitutional jurisprudence, proportionality refers to "a set of rules determining the necessary and sufficient conditions for a limitation of a constitutionally protected right to be constitutionally permissible" (Bender and Sela 2015, 530) and usually the limiting condition should meet the following four requirements: (1) legitimacy of the objective pursued; (2) suitability of the means chosen; (3) violation of rights is no more than necessary; and (4) means chosen should not be disproportionate to the objective (I am grateful to an anonymous reviewer for pointing these out to me. Also see Bender and Sela 2015, 531). Here arise two questions. First, in the present case, what is at stake is not so much the desert of the respondent's crime as such but Korea's democratic system. So, it is questionable whether it is appropriate to apply the principle of proportionality (in the Western sense) to the present case where the focus is not on the respondent's constitutional right as a private citizen. Note that when the Court dissolved the Unified Progressive Party (UPP) in 2014, it applied this very principle of proportionality with all four limiting requirements mentioned above because the legal question at issue was precisely about UPP's constitutional right to form a political party (KCCR, 2013hŏn ta1 (December 19, 2014), 6). Second, though the Court's gravity test in the present case encompasses the assessment of whether the punishment is "proportionate" to the crime, this criminal analogy is likely to risk diverting our attention from the democratic constitutional system to the respondent's crime. Ultimately, the crux of the problem is that the Korean Constitutional Court has employed the principle of proportionality in a less than principled manner by employing different Korean legal terms (*pirye wŏnch'ik*, *kwaing kŭmji ŭi wŏnch'ik*, or *pŏbik hyŏngnyang ŭi wŏnch'ik*) despite their nuanced differences in different cases of jurisprudence. At a minimum, the Court of the present case seems to have understood the principle quite loosely without affiliating it with the constitutional limitations of rights or the constitutionality of a criminal law provision. During the review process, therefore, one reviewer recommended dropping the term

https://doi.org/10.1017/lsi.2018.24 Published online by Cambridge University Press

> A decision to remove the President from office must be made with great caution because it would deprive the "democratic legitimacy" delegated to the President by citizens through an election during the term of office and is likely to incur colossal national losses such as an interruption in state affairs and political chaos. Therefore, a valid ground for impeachment can exist only when it is determined that the degree of the negative impact on or the harm to the constitutional order caused by the President's violation of law is so grave that the [public] interest of preserving the Constitution, which results from the removal of him or her from office, clearly overrides the national losses caused by doing so. In other words, "the existence of a valid ground for the petition for impeachment adjudication" obtains when a grave violation of the Constitution or statutes happened, sufficient to justify removal of the President from office. There are two considerations by which to determine the gravity of constitutional or legal violations that warrant the impeachment of the President—first, that the impeachment adjudication procedure was contrived in order to preserve the Constitution and second, that the impeachment decision is to deprive the President of the trust of the people conferred [by democratic election]. From the standpoint of the first consideration, a decision to remove the President is justified when the President's violation of law is found to be grave in light of the preservation of the Constitution, enough to go through the restoration of the constitutional order which would be disrupted due to the impeachment decision. From the standpoint of the second consideration, there are grounds for impeachment when the President is found to have betrayed the trust of the people by committing crimes that are serious enough to warrant removal of him or her from office during his or her tenure.[14]

Two points are worth mentioning here. First, it should be noted that in appealing to the principle of proportionality, the Court set criminal procedure as a model in adjudicating impeachment.[15] Admittedly, the principle of proportionality plays a crucial role in criminal adjudication in determining the degree of punishment that fits the criminal's desert. Though it is a matter of controversy among scholars whether desert in criminal justice can be determined apolitically (Brettschneider 2007), it is less controversial that in criminal adjudication proportionality provides a politically neutral principle for normative balancing. In contrast, it is highly controversial whether the principle of

"proportionality" entirely and replacing it with something like "balancing." In any event, readers should be cautioned, first that the Korean Constitutional Court tends to employ the same legal language for both the principle of proportionality, with its four limiting tests mentioned earlier, and "parity of legal interests" (as another reviewer pointed out), which is commonly adopted in criminal jurisprudence, and second that as far as KCC's decision regarding presidential impeachment is concerned, (a Korean translation of) "proportionality" should be understood strictly in relation to the two considerations of the gravity condition offered by the Court.

14. KCCR, 2016Hŏn-na1, 18.

15. In fact, the Constitutional Court Act (Art. 40) states that "the statutes relating to criminal procedure shall apply mutatis mutandis together with such provisions to a case of adjudication on impeachment." Of course, this does not mean that the Court treated the case as a criminal case as I explained in n. 14. My point earlier was that when the Court employs a criminal procedure in the constitutional jurisprudence concerning the impeachment of the president, certain ambiguities arise with regard to the precise meaning and scope of "the principle of proportionality."

https://doi.org/10.1017/lsi.2018.24 Published online by Cambridge University Press

proportionality can assume a similar neutralist posture in the context of constitutional jurisprudence, especially one concerning a presidential impeachment, wherein normative balancing that determines the gravity (or desert) of the president's constitutional or legal violation takes place between the expected public interests and the likely public costs that could result from the impeachment in relation to the entire political system. Unlike the criminal determination of desert and punishment, the constitutional determination of the gravity of the wrongdoing can hardly preclude *political* judgment as the decision must take into account such morally controversial questions as what the public interests consist of, what sorts of public costs can be reasonably expected, to what extent the putative public costs are bearable, and precisely how to balance public interests and public costs, both of which are mere estimated values, subject to moral disagreement and political debate. Apparently, the second justificatory condition for impeachment, which allows the Court extensive adjudicative space in morally controversial and politically polemical questions, does not seem to sit comfortably with the Court's ambition, revealed in the first condition, to be politically neutral in dealing with constitutional essentials.

Second and relatedly, it is unclear how the second consideration for determining the gravity of the president's constitutional or legal violation can be justified by the Constitution in a similar way that the first consideration can. Notice that the Constitution does not specify precisely what sorts of violations are subject to impeachment when it states that "[i]n case the President .... ha[s] violated the Constitution or other Acts in the performance of official duties, the National Assembly may pass motions for [his or her] impeachment."[16] Nor does the Court see its task as "automatically mak[ing] a decision of removal from office in all cases where there is any valid ground for impeachment as set forth in Article 65(1) of the Constitution."[17] The problem is that it is unclear whether the second consideration can be derived from Article 65(1) that defines the (grave) wrongdoing strictly in terms of *legal* violations in the performance of the president's official duties and only in which the ground of impeachment is provided. Rather than directly appealing to the relevant clause of the Constitution, the Court here establishes the second consideration by drawing on the president's democratic legitimacy. At the heart of the Court's reasoning seems to be a series of propositions: (1) Korea is a democratic republic and the sovereign power resides in the people; (2) democratic election is a procedure by which one is authorized by the people to become and act as the president; (3) this authorization is underpinned on public trust expressed through free and equal voting; (4) the president's (grave) legal violations seriously betray public trust democratically conferred; and (5) impeachment is to officially deprive the president of public trust (and by implication his or her democratic ruling legitimacy). However, there are two problems with this reasoning insomuch as impeachment adjudication is a purely normative or (apolitical) legal decision making, as claimed by the Court.

First, the relation between the first and second considerations is ambiguous. If, as stipulated in Article 65(1), there are grounds for impeachment only when the president has committed a legal violation in the performance of his or her official duties and the

16. Constitution, Art. 65(1).
17. KCCR 2004Hŏn-na 1 (May 14, 2004), 146.

https://doi.org/10.1017/lsi.2018.24 Published online by Cambridge University Press

gravity of the violation is determined by the principle of proportionality and if *this* amounts to the betrayal of the trust of the people, there is no reason to establish the second consideration in addition to the first. The Court, however, is completely silent on this important question, that is, whether the second consideration is independent of or the logical corollary to the first consideration. This silence is quite surprising given the way the Court stipulated the two justificatory conditions for impeachment, only by meeting both of which, it claimed, the case of impeachment can be constituted.

Second, a more serious problem would occur if the Court's intent is indeed to establish the second consideration as an independent ground for impeachment with equal normative force as the first consideration. The problem in this case is that it is far from obvious what is precisely meant by "betrayal of the trust of the people" or what it consists of independent of the president's legal violation. If the normative power of impeachment does not necessarily come from the president's violation of the Constitution or other statutory laws, where does it come from? If our reconstruction of the Court's reasoning above captures what went through the minds of the justices more or less accurately, the Court must have derived the legal and normative ground for the second consideration from the principle of popular sovereignty as stipulated by Article 1 of the Constitution.[18] That is to say, the president's breach of the democratic mandate creates a new normative basis on which the gravity of his or her crimes ought to be measured.[19]

The underlying assumption here is that legal violation per se does not necessarily validate impeachment of the president who *symbolically personifies rule of law for the entire nation*, hence is more than merely the chief of the executive branch. It is additionally required that the violation in question must seriously breach the trust of the people, enough to nullify his or her democratic mandate. However, this reasoning brings the Court back to its own predicament noted earlier, that is, its ineluctable politicization. How can the Court justify the president's breach of the trust of the people in a politically neutral manner, especially when the legal violation does not automatically and sufficiently constitute such a breach? This is not to say that breach of public trust should not be employed as a normative reason by which to determine the gravity of the president's crime or misconduct. My point is that the Court's explicit denial notwithstanding, it actively invites its own politicization by interpreting its task too extensively and in a way that is difficult to justify in purely liberal terms. If the president's legal violation does not automatically give rise to sufficient reason for cancelling his or her democratic mandate and betrayal of the people's trust is additionally required to satisfy the gravity condition of impeachment, what is the normative source of this additional requirement? The principle of rule of law alone does not seem to help here, nor does liberalism.

18. Constitution Article 1(1): "The Republic of Korea shall be a democratic republic; (2) the sovereignty of the Republic of Korea resides in the people, and all state authority shall emanate from the people."

19. Thus understood, what is at stake is not so much the Court's poor and/or inconsistent reasoning, to which it has been susceptible on several previous occasions as many critics charge, but, as will be shown later, the remarkable fact that the underlying reasoning, which distances the Court from liberal jurisprudence, shows a notably consistent, albeit non-liberal, pattern. Later I capture the essence of this pattern in relation to Confucianism. Likewise, the issue in the present case is not the mere fact that there is ad hoc discrepancy between liberal constitutional values and values held by (parts of) the justices but there seems to be an underlying moral system that motivates the justices' legal reasoning, thereby creating such discrepancy.

https://doi.org/10.1017/lsi.2018.24 Published online by Cambridge University Press

THE COURT'S DECISION

As noted, the Court supported the motion to impeach President Park by finding that she had critically violated her duty to uphold the Constitution by letting her private confidant interfere in the government and allowing her to access and edit confidential public documents, and that she had executed her power in ways that repeatedly and systematically helped her personal friend to serve her private interests, even though the Court judged the other charges brought by the National Assembly to lack legal grounds for impeachment prosecution. The Court presented its decision in three parts:

1. The president whose democratic legitimacy derives directly from the people and to whom the authority of popular sovereignty is delegated ought to exercise his or her powers legally in accordance with the Constitution and other statutes and his or her conduct of all of the public duties, except for ones that by nature require confidentiality, must be publicly transparent and subject to the people's assessment. . . . [However,] whenever allegations were made that the respondent conducted state affairs by taking advice from the so-called shadowy powers instead of formal public organizations such as the executive branch and the Office of the President, she denied them and accused those who had raised suspicions. . . . Although both the National Assembly and the press had pointed out this problem, the respondent . . . [continued to] allow for Choi's meddling in state affairs, abused the power delegated to her by the people by helping Choi and company to seek their private interests, and tried to conceal all of this completely [from public scrutiny]. This is a critical violation of the President's duty to uphold the public good as it undermines the principle of representative democracy and the spirit of the rule of law.
2. Though the respondent made an apology to the people in her first public statement made on October 25, 2016, when Choi's meddling in state affairs was first brought to public attention, it lacked sincerity as it did not tell the truth about the exact period during which Choi's meddling had taken place and what she had done during that period. In her second public statement that soon followed, the respondent pledged to make her best effort to cooperate with the investigation on all suspicions [regarding her misconduct] and further expressed her willingness to accept any form of state investigation, by the Public Prosecutor's Office or the Independent Counsel. However, [as it turned out,] not only did the respondent avoid inquiries by public prosecutors and the independent counsel but she also refused the seizure-and-search on the Office of the President, thereby obstructing an investigation on her. As such, instead of trying to regain the trust of the people that had been lost upon her violations of the Constitution and laws, the respondent rather made insincere public apologies and failed to keep her promise to the people. Given the respondent's speech and conduct . . . it is hard to verify whether she has a sincere commitment to the preservation of the Constitution.
3. In sum, it is concluded that the respondent's conduct in violation of the Constitution and laws reveal her betrayal of the trust of the people, involving grave violations of the law, which cannot be tolerated from the standpoint of the preservation of the Constitution. Since the negative impact of the respondent's legal violations on the constitutional order is grave and also considering its further-reaching [negative]

implications, it is determined that the interest of preserving the Constitution, which can be gained from removing the respondent who holds democratic legitimacy directly from the people from office overrides the national losses that may incur upon her removal. [Therefore, the Court orders that] the respondent be removed from her presidency.[20]

The Sincerity Provision?

What is striking about the Court's decision is the complete absence of reasoning that shows how it engaged the principle of proportionality and how it arrived at the decision. There is no denying that the president clearly violated the law in allowing her long-time friend to meddle in state affairs and actively helped to pursue her private interests by illegally exercising powers that were democratically entrusted by the people. Even if the fact of legal violation can be granted, it was the Court's task to demonstrate that the violation was too grave, sufficient to warrant the removal of the democratically-elected president from office. Otherwise stated, the Court had to prove the gravity of the president's crime by articulating, first, the expected public interests to be gained from the impeachment; second, the public costs likely to incur from the impeachment; and, third, how the expected public interests override the expected public costs. However, none of these points were addressed in the Court's decision. Not only did the Court fail to explicate "the negative impact of the president's legal violation on the constitutional order and its further-reaching [negative social and political] implications" but it merely asserted that the gravity condition was sufficiently met by the putative negative impact. Nor did it take time to consider, let alone articulate, the public costs that would likely incur from the decision in favor of impeachment. In short, despite the Court's bold refusal to mechanically process the impeachment motion brought by the legislature that enjoys direct democratic mandate or to automatically uphold the motion if it is simply verified that legal violation has indeed occurred, it justified its decision merely on the presence of legal violation on the part of the president.

This, however, only captures half of the Court's decision and reasoning as articulated in statement (1). According to statement (2), the president's legal violation is *also* grave because of her betrayal of the trust of the people. Earlier we noted that in offering two considerations for the gravity condition, the Court never clarified the internal relation between the first consideration emphasizing the normative importance of the rule of law and the second consideration stressing the trust of the people. It was also noted that the Court was hopelessly ambiguous in identifying the concrete nature of "the betrayal of the trust of the people," when it associated it with democratic legitimacy, whether it is merely another expression for the president's violation of democratic procedure or creates its own normative weight independently of democratic procedure as such (as well as the rule of law). In a parallel way, in its decision the Court appealed to the considerations of the rule of law (i.e., the preservation of the Constitution) and the trust of the people, but without establishing any normative connection between the

20. KCCR, 2016Hŏn-na1, 55–56.

https://doi.org/10.1017/lsi.2018.24 Published online by Cambridge University Press

two, and, all the more puzzling, without explicitly affiliating the betrayal of public trust with democratic procedure or legitimacy.

In fact, the way that the Court understood the betrayal of the people's trust, which it singled out as the defining factor in meeting the gravity condition, is difficult to explain or justify in liberal democratic and constitutional terms. The trouble arises from the Court's heavy criticism of President Park for her repeated insincere public apologies. Though it certainly does not look good when a president, allegedly implicated with crime, refuses to respond to inquiries from public prosecutors or even by an independent counsel recommended by the legislature, it seems rather far-fetched to draw a legal and normative conclusion from insincere apologies that the president has no sincere commitment to uphold the Constitution and thus deserves removal from office. Furthermore, and likewise, even if the president did make public apologies in order to merely assuage public outrage, hence without sincerity, and her subsequent refusals to actively cooperate with state investigation may further vindicate the veracity of her wrongdoing and reveal her lack of sincerity, it still remains unclear how this is betrayal of the people's trust, grave enough to fundamentally disrupt "the liberal democratic basic order." How is the president's insincerity tantamount to legal violation? Has it violated citizens' basic rights?

In this regard, it is noteworthy that the Court dismissed the charges on the president's violation of the press's freedom of speech and the people's right to life, both constitutional rights in Korea. Certainly, the president's violations of constitutional rights give rise to an important ground for impeachment as they clearly undermine the liberal democratic basic order. What could be a more serious constitutional harm in a liberal constitutional democracy than the president's violation of citizens' basic rights, which directly contradicts the very purpose of having the institution of presidency itself? Moreover, though the Court found that Park had exercised her powers illegally in forcing several owners of the chaebol conglomerates to contribute to the foundations created by her friend, it framed the legal violation in question mainly in terms of "private use of power for the sake of her private confidant's private interests" rather than in terms of the violation of the business owner's right to private property and to conduct business as such[21] and the president's active intervention in a free market order, which would have made the violation's illiberal nature much more pronounced.[22]

When the Court highlighted the president's betrayal of the people's trust with special focus on the insincerity of her public apologies and the breach of her promise to earnestly cooperate with state investigations, one may reasonably guess that there must be a so-called "sincerity clause" (obligating public officials to be sincere in their speeches and actions) in the Constitution, which would itself be found to be highly idiosyncratic from a liberal viewpoint. For it is only by referring to such an explicit legal provision

21. KCCR, 2016Hŏn-na1, 54–55. This does not mean that the Court took Park's violations of constitutional rights held by the corporations lightly. My point is that, as evidenced in its concluding statement, the Court paid far more attention to Park's abuse of private power to the serious detriment to the public interest. As shall be discussed later in this Article, this moral dyad of "private (*si* 私) versus public (*gong* 公)" is one of the defining characteristics of the Korean Neo-Confucian constitutional tradition.

22. On the classical account of rights-based liberalism, see Lomasky (2002). For a helpful overview on the evolution of rights-based liberalism, see Shapiro (1986).

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that the Court would be able to arrive at a purely legal and apolitically normative decision as to whether the president deserves impeachment. Actually, this was the stance that the Court had taken earlier when deliberating the case of President Roh's impeachment. It stated that

> no other grounds for impeachment except those stated in the impeachment resolution constitute the subject matter to be adjudicated by the Constitutional Court at the impeachment adjudication proceeding. However, with respect to the "determination on legal provisions," the violation of which is alleged in the impeachment resolution, the Constitutional Court in principle is not bound thereby. Therefore, the Constitutional Court may determine the facts that led to the impeachment based on other relevant legal provisions as well as the legal provisions which the petitioner alleges have been violated.[23]

It is an interesting question whether the Court's judicial activism in its declaration not bound by legal provisions, the violation of which was noted by the National Assembly as the legal ground for impeachment, is consistent with its normative (and *political*) commitment to a liberal democratic basis order. In the present context, what is important to note is, again, that there is no legal provision in the Constitution based on which the Court could *blame* the president for being "insincere" in her public apologies, thereby (further) betraying the people's trust in such a serious way to warrant her removal from office.

The Faithfulness Provision

That said, Article 69 of the Constitution stipulates a provision—let us call it *the faithfulness provision*—that has an interesting connection with the Court's moralistic emphasis on the president's sincerity, and there is good reason to suspect that the Court had this provision in mind when finding the president unworthy of her constitutional task.[24] In fact, aside from the facts that the sincerity provision as I understand it here has no obvious statutory foundation in the Constitution and that the faithfulness provision focuses only on the president's performance of his or her official duties (of which making a public apology would not be a part), there seems to be no meaningful difference between the two provisions as they are both concerned with a state of mind that the president must possess and his or her moral attitude toward the duties and the people.

In this regard, it is remarkable to find that while rejecting the charge of the president's violation of the citizens' right to life when she allegedly failed to faithfully (or sincerely) respond to a national crisis which resulted in the deaths of more than three hundred people, mostly secondary school students on a field trip, the two justices who provided

23. KCCR 2004Hŏn-na 1, 151.

24. Article 69 of the Constitution holds that "The President, at the time of his inauguration, shall take the following oath: 'I do solemnly swear before the people that I will faithfully execute the duties of the President by observing the Constitution, defending the State, pursuing the peaceful unification of the homeland, promoting the freedom and welfare of the people and endeavoring to develop national culture.'"

https://doi.org/10.1017/lsi.2018.24 Published online by Cambridge University Press

a lengthy supplementary opinion nevertheless went on to chastise the president, again in an equally moralistic tone, for violation of the faithfulness provision, even though they concluded, quite surprisingly given the reasoning they offered as will be shown shortly, that the violation of the faithfulness provision was not grave enough to warrant impeachment. What is important in the present context, therefore, is not so much the two justices' ultimate judgment with regard to the impeachability of the president but their determination to publicly chastise her, as well as the moral language and moralistic tone that they employed, which distances the Court from a conventional liberal court.

The National Assembly's charge of the president's violation of her constitutional duty to protect citizens' right to life was based on the observation, widely held among Koreans, that the president's reaction to a national emergency caused by the sinking of a ferry named *Sewol* that occurred on April 16, 2014, a year after her assumption of presidency, was utterly inadequate and irresponsible, causing more avoidable deaths. Since our concern here is not to determine whether President Park indeed committed the alleged violation of the faithfulness provision but to evaluate the Court's reasoning and the resulting statement, which are hard to make sense of from a liberal standpoint, let us jump to the Court's supplementary opinion, the gist of which is as follows:

1. A true national leader is one who, in the moment of a national crisis, quickly grasps the situation and skillfully maneuvers oneself according to the circumstances, thereby minimizing damage. He or she is also one who shares the pain with the victims and their families and can give hope to the people that we can overcome the darkness. Of course, the fact that the President failed to live up to this ideal of a true leader does not necessarily mean that she violated the duty of faithfulness. However, it is not so much during ordinary times when all organs of the government operate well but in moments of national crisis, such as ones caused by war or by disaster, when the situation unfolds unpredictably and the government that is supposed to manage it does not work properly that urgently calls for leadership from the nation's highest political leader. April 16, 2016, the day of the Sewol disaster, was one of such days. It was a day that the entire nation, not to mention the victims and their families, were hoping in all earnestness that the president would do her best to protect the people by exercising whatever modicum of leadership she possessed.
2. However, on the date of the incident the respondent did not go to her office and instead stayed at her residence until evening. As a result, even though a major disaster of a historically unprecedented scale had occurred and the crisis alarm had been issued as "critical," the highest-level of warning, she not only came to realize the seriousness of the situation too late but also showed no sincerity, a key leadership virtue required of the president, in understanding the situation and providing support for rescue efforts. During the national emergency when more than four hundred lives were on the line, the respondent disappeared from the eyes of the people for eight hours. . . . [T]he way the respondent responded to the situation was utterly unfaithful.
3. [Though this clearly shows that the President violated Article 69 of the Constitution and Article 56 of the State Public Officials Act, both of which stipulate a public official's duty of the faithful performance of duties,] it alone cannot vindicate the fact that she lost the trust of the people in such a degree sufficient to warrant the

https://doi.org/10.1017/lsi.2018.24 Published online by Cambridge University Press

> deprivation of democratic legitimacy during her tenure, which she received directly from the people. [That being said,] we will still have presidents in the future who, being elected by the majority of the people, are supposed to carry out the same presidential duties [that were required of President Park]. The wrong impression should not be passed as our legacy [to the next generation], that it is acceptable that the President may conduct his or her official duties unfaithfully during national crises. Since the same misfortune caused by the President's unfaithfulness should not be repeated in the future in which so many people perished or were endangered, causing disappointment in the hearts of the people and the future of this country to seem bleak, we [read: Justices Kim Yi-su and Yi Chin-sŏng] are pointing out the respondent's violation of the duty to faithfully perform her official duties.[25]

What is interesting about this statement is its moralistic language and chastising tone. First of all, the justices present what they deem to be a moral ideal of political leadership in terms of an ability to successfully navigate a national crisis as well as to share the pain with the victims and their families and give hope to the entire nation. Even though this may not be intended as a comprehensive definition of political leadership, it is surprising nonetheless that no allusion is made about "the liberal democratic basic order" in relation to ideal political leadership. For the justices, central to good leadership is the capacity of empathy, an ability to respond to the people's pain and suffering in a morally adequate manner as if he or she were in their place.[26]

In the justices' view, it was not because President Park did not possess special political virtue or superior intelligence or judgment, character traits often deemed to be indispensable for political meritocracy, that she failed in her duty.[27] Nor did her faults, as they saw them, have to do with outright disrespect of liberal rights and opportunities that should have been equally available to all citizens, a fatal defect for the highest political leader of a liberal democracy. Certainly, for the justices who defined their task purely in the legal and apolitical-normative sense, the kernel of the president's fault consisted of violating specific legal provisions, only based on which they could rightfully condemn the president. But even for the justices, it appears, the violation's true nature was fundamentally moral, resulting from the president's less than virtuous state of mind or insincere attitude toward the people, which they understood as the fatal failure to live up to the moral ideal of a good political leader. More fundamentally, what generated this moral (and legal) failure was the president's callousness to the suffering of the people and her inability to empathetically engage with the victims, their families, and the whole nation.

After all, in presenting their supplementary opinion, the justices did not intend to raise a dissenting voice in order to demonstrate the president's impeachability based on her legal violation of the faithfulness provision. As the last several lines of their statement powerfully show, their real concern was to make sure that whoever assumes the office of the president in the future must not be unfaithful or insincere in conducting his

25. KCCR, 2016Hŏn-na1, 72–74.

26. On the critical importance of empathy in politics, see Slote (2001). For an investigation of the role of empathy in democratic deliberation and judgment, see Morrell (2010).

27. On the ideal and practice of political meritocracy in the East Asian context, see generally, Bell and Li (2013).

https://doi.org/10.1017/lsi.2018.24 Published online by Cambridge University Press

or her duties as the leader of the nation so that the hearts of the people never break down and the future of the country never becomes bleak. Otherwise stated, what truly motivated the supplementary statement was the justices' desire to morally condemn the incumbent president and provide moral admonition to future presidents who might be tempted to follow her bad example. Although it is hard to tell how much the Court's final decision was influenced by Justices Kim and Yi, their essentially moral reasoning helps us to make sense of (what I called) the sincerity provision presented by the Court as a critical factor that proved the president's (added) betrayal of the people's trust, and, accordingly, the gravity of her legal violations.

THE MODEL OF CONFUCIAN CONSTITUTIONALISM REVISITED

Earlier, I captured Ginsburg's idea of Confucian constitutionalism in terms of both the highest court's structural relation vis-à-vis the president and the normative model that it generates, namely the rule by "the elite guardians of fundamental values." Of course, in suggesting the model of Confucian constitutionalism, Ginsburg's guiding passion was neither to empirically demonstrate the legal reality of constitutionalism in Korea and Taiwan that is directly undergirded by Confucian philosophical doctrines or moral values nor to advocate the model as a moral vision after which the existing constitutional structures of Korea or Taiwan ought to be reconstructed. Rather, Ginsburg had quite a modest goal, namely, to suggest the model of Confucian constitutionalism as an explanatory framework to make sense of the unexpected rise of judicial review (and the judicialization of politics in the case of Korea) in societies whose Confucian political culture has long been associated with authoritarianism of various sorts (Ginsburg 2011). Does our case affirm Ginsburg's model?

At the core of "the distinctive style of judicial review" that Ginsburg attributes to the Korean Constitutional Court is the role that it has been playing in relation to the president, the modern-day equivalent of the emperor, similar to that played by the Confucian ministers "remonstrating the emperor, sometimes suggesting or advising but not demanding action" (Ginsburg 2002, 792).[28] According to Ginsburg, "constitutional law as remonstrance" has been most evident in political cases in Korea in which the Court had to adjudicate cases that involve serious conflict of interest between the president and the legislature and thus would likely challenge the president's authority. In such cases, argues Ginsburg, the Court's "ability to 'remonstrance' [has been] facilitated by the adoption of the German institution of levels of unconstitutionality" (Ginsburg 2002, 792), which helps it to avoid a black-and-white decision that may intensify the conflict between the president and the legislature. One of these different levels of unconstitutionality is to find the act "nonconforming with the Constitution" (*Unvereinbar* or *hŏnpŏp pulhapch'i* in Korean), which "essentially is to recognize the unconstitutionality of the law in question but let it stand until a given deadline for the legislature to enact a new legislation compatible with the Constitution" (Hahm

28. More specifically, the Korean Constitutional Court can find the act (1) unconstitutional, (2) nonconforming with the Constitution (*unvereinbar*), (3) partially unconstitutional, (4) constitutional but applied in an unconstitutional way (or "unconstitutional limitedly"), (5) conformable limitedly (*Beschränkete Verfassungskonforme Auslegung*), and finally (6) constitutional (Ginsburg 2003, 219).

https://doi.org/10.1017/lsi.2018.24 Published online by Cambridge University Press

2015, 44 n. 8). The original rationale of this decision is twofold: first, to avoid a legal vacuum that can be created by a sudden invalidation of a law, and second, to ensure the principle of separation of powers "requir[ing] the Court to respect the National Assembly's power and freedom to legislate" (ibid.). In controversial political decisions that involve the conflict between the president and the legislature, this mode of decision can convey to the president that his or her siding with the law in question is wrong without directly challenging him or her by returning the case to the legislature and allowing it to enact a new law. In this way, the president can save face in front of the public. In Ginsburg's view, therefore, decisions like "nonconforming with the Constitution" have this additional—i.e., Confucian constitutional—effect other than what was originally intended by the liberal constitutional rationales.

At first glance, our case markedly differs from "constitutional review as remonstrance" (which may perfectly explain the case of President Roh's impeachment as mentioned at the beginning of this Article) in that the Court went so far as to remove the president from office rather than merely admonishing her. However, it would be too quick to conclude that the model of Confucian constitutionalism does not hold because then it would structurally preclude from Confucian constitutionalism an institutional option of removing the president who committed a legal violation from office, which is against the Korean Constitution as well as the principle of separation of powers. In the present case, we have noted that both the Court's decision appealing to the (unwritten) sincerity provision and the supplementary statement provided by Justices Kim and Yi that drew attention to the president's violation of the faithfulness provision fulfilled the constitutional function of moral admonishment, not only chastising the incumbent president who is now being removed, but also warning future presidents.

Now, it is worth mentioning that the second supplementary opinion offered by Justice An Ch'ang-ho, which we have not discussed so far, also took part in the Court's admonishing role, both by chastising the incumbent president, like the Court's decision and the first supplementary opinion, and more interestingly, by critiquing the entrenched political structure of "imperial presidency" that had long bedeviled Korean politics and offering specific suggestions for constitutional reforms, a highly unconventional move for a Constitutional Court Justice to take. As was the case with the first supplementary statement, what is noteworthy about Justice An's statement is his underlying motivation and the mode in which he presents his critical reflection on the Korean constitutional structure and Korean politics in general.

> The President is "the symbolic existence personifying the rule of law and the observance of law toward the entire public." … There is a saying by the ancient worthy that "if the ruler's unlawful act is forgiven, how can one make the people do the right thing? (*fan jin meng en he wei zheng* 犯禁蒙恩何爲正)," which stresses the importance of the leader's observation of the law, including the President. Therefore, the President's act of legal violation exerts far more negative impact on the constitutional order than those committed by ordinary people and thus must be taken much more seriously. … Moreover, the spirit of our time as revealed in the process of impeachment prosecution of the President calls forth decentralization, cooperative governance [across ideological differences], and transparent and just exercise of

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> political power. The transformation from imperial presidency to cooperative decentralization in a way embodying the spirit of our time can help us to remove the entrenched vices of the hierarchical and authoritarian culture of our society and other undemocratic elements widely found in every corner of our politics, economy, and society. . . . The present case that aims to adjudicate the impeachment of the President transcends ideological differences between conservatives and progressives as it concerns the question of how to realize constitutional values and preserve the constitutional order. Furthermore, the aim of impeachment adjudication is not merely to deliberate whether the President's past actions involve legal violations or she should be removed from office but also to determine the normative standard of [new] constitutional values and order that the Republic of Korea ought to aim for in the future.[29]

Given the Court's purely legal self-understanding, it is surprising that Justice An's concern is not with impeachment adjudication as such. Rather, his much deeper concern lies in the diagnosis of the institutional origin of the current constitutional crisis and the search for a new normative standard for constitutional order and culture that can guide the future of Korea. Thus understood, the justice's statement is more a comprehensive moral critique of Korean politics than a legal judgment.[30]

Justice An's ostensible interest in constitutional reforms notwithstanding, what makes the moral nature of his statement more salient is his firm belief that it is on the political leader's moral character that the quality of constitutional order and culture critically hangs, when he cited a saying by an anonymous ancient worthy, which emphasizes the crucial importance of the ruler's willingness to abide by the law as one crucial aspect of his moral character and its moral impact on the ordinary people and the moral climate of the society. Although Justice An did not provide the exact reference of the quote,[31] his intent was clear enough and it was undoubtedly Confucian. Consider the following statement by Xunzi, one of the ancient Confucian masters:

29. KCCR, 2016Hŏn-na1, 84–87.

30. The idiosyncrasy of Justice An's supplementary opinion is far more pronounced in comparison with the legal practice of the federal courts in the United States in which justices are prohibited under Article III of the US Constitution from offering "advisory opinions" as they are required to judge only concrete cases that require a legal resolution (Carberry 1975). I am grateful to one of the journal's reviewers for drawing my attention to this interesting contrast. Undoubtedly, this idiosyncrasy has partly to do with the relative underdevelopment of the separation of powers in the Korean constitutional system but, as shall be discussed later, it appears to have more to do with the unique moral status of the constitutional justices as "super-citizens" in Korea's Confucian legal and political culture.

31. In the absence of Justice An's (and the Constitutional Court's) response to repeated queries regarding the source of the quote, many Korean scholars versed in classical Chinese texts struggled to find its textual support, to no avail, and this led them to conclude that the justice mistakenly cited the quote in question from a questionable source, which he could not provide. Some argued that the Chinese wording of the quote had some limited resemblance with the first several lines of Book 15 (entitled *Zhong Ling* 重令, "On the Importance of Heavy Orders") of the *Guanzi* 管子, broadly known for its eclectic nature with strong influence by Legalism (*fajia* 法家), but could not relate the apparently Confucian interpretation of the quote by the justice with Guanzi's Legalistic message that stresses the importance of the laws in ensuring the safety of the state or the ruler himself.

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> [R]ules cannot stand alone, and categories cannot implement themselves. If one has the right person, then they will be preserved. If one loses the right person, then they will be lost. The rules are the beginning of order, and the gentleman is the origin of the rules. . . . Without the gentleman, even if the rules are complete, one will fail to apply them in the right order and will be unable to respond to changes in affairs, and thus they can serve to create chaos. (*Xunzi* 12.1)[32]

The point Xunzi is trying to make is that the rules and legal categories (*fa* 法), however important they are in ordering the state, cannot stand alone independent of the "right person" who can operate them properly. Likewise, Mencius, another ancient Confucian master, submitted essentially the same argument when he stated that "[g]oodness alone does not suffice for the conduct of government; laws alone do not implement themselves" (*Mencius* 4A1).[33] That is, for Mencius, both laws and the ruler's moral character require each other and together they constitute what can be called "Confucian virtue politics," a unique mode of politics that relies on the ruler's moral character for its effective operation. Therefore, noting the fundamental importance of the ruler's moral character in operating the legal and political institutions, Eric Hutton captures the gist of Confucian politics in terms of "virtue ethics," at the core of which is the stipulation that "[i]f there are people who do have robust character traits and are resistant to situational variation, they can design and reliably maintain the broad range of institutions and situations that facilitate good behavior for everyone else" (Hutton 2006, 50).

In Confucian virtue politics, the purpose of politics is understood to be the enhancement of the well-being of the people and the proper political leadership for this task is captured in terms of the ruler's ability to extend his care to the people. According to Mencius, a good government can be achieved by "treating the elders in [the ruler's] own family as elders should be treated and extending this to the elders of other families, and by treating the young of one's own family as the young ought to be treated and extending this to the young of other people's families" (*Mencius* 1A7). As Mencius sees it, the key to the ruler's ability to "extend" his care to others is his capacity of empathy. Most tellingly, in his conversation with one of the rulers of his time, Mencius notes that the fact that the king, in seeing an ox being taken to serve as a blood sacrifice, ordered to spare it because he could not bear its trembling, powerfully revealed his innate goodness in the sense of possessing a commiserating heart and in order for him to become a good ruler all that was required of him was to extend this heart, namely the capacity of empathy, to the people (ibid.).[34]

Though Confucius did not articulate his idea of virtue politics under the philosophical assumption of the goodness of human nature, he, too, was strongly convinced that the locomotive of Confucian virtue politics is the ruler's self-rectification in goodness. Thus, Confucius famously said, "To 'govern' (*zheng* 政) means to be 'correct' (*zheng* 正). If you set an example by being correct yourself, who will dare to be

32. The English translation of the *Xunzi* 荀子 is adopted from Xunzi (2014).

33. The English translations of the *Mengzi* 孟子 are adopted from Mencius (2009).

34. For a philosophical analysis of Mencius's conversation with King Xuan of Qi as a form of moral self-cultivation, see Ivanhoe (2002).

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incorrect?" (*Analects* 12.17)[35] A ruler who has been morally corrected by, as Mencius later elaborates, developing his or her nascent moral sentiments and extending them to others through empathetic engagement does not prioritize sufficient food or sufficient armaments, which many consider essential for a strong state. For Confucius (and Confucians), "a state cannot stand once it has lost the trust [*xin* 信] of the people" and it is the ruler's trustworthiness that garners the confidence of the people in the government and thus makes the state well-ordered.

Seen in this way, Confucian virtue politics is predicated on several core propositions that give rise to distinctive constitutional principles and practices. First, the state exists to serve the well-being of the people. Second, in order to commit himself to the well-being of the people rather than his own self-interest, the ruler ought to develop a formidable moral character, at the heart of which lies care for the people. Third, a good ruler who relies on his (empathetic) moral character for effective government resorts only minimally to penal code, punishment, and other coercive measures, and this helps elicit voluntary compliance from the people.[36] And finally fourth, political order can be achieved when there is trust between the ruler and the ruled and only if each member, starting with the ruler, fulfills his ritually ordered social roles and obligations faithfully.[37]

The kernel of classical Confucian constitutionalism consists in the creative intersection between "rule by virtue" (*dezhi* 德治), stressing the critical importance of the ruler's moral character (benevolence or *ren* 仁 in particular) for good government, and "rule by ritual" (*lizhi* 禮治), focused, above all, on the moral and institutional constraint of the ruler's arbitrary use of power,[38] and this intersection creates what Bui Ngoc Son calls (the principle of) *constitutional rectification* (Bui 2016, 61). As Hahm's pioneering study on Confucian constitutionalism powerfully shows, during Korea's Chosŏn dynasty (1392–1910) Confucian rituals (*li* 禮) played a pivotal political role as the source of constitutional norms and they were frequently invoked by the Confucian scholar-officials whenever they attempted to discipline (or rectify) the ruler (Hahm 2015).

Though both Bui and Hahm pay special attention to various discursive sources that facilitated rule by ritual in the premodern Confucian polity such as the way of the former kings, Confucian classics, and the ancestral precedents, they tend to gloss over the critical importance of Korean Neo-Confucianism that provided (ritual-based) Confucian constitutionalism with a deeper metaphysical foundation. Roughly stated, Korean Neo-Confucians believed that ritual order is and ought to be grounded in the moral and cosmological principle—called Heavenly Principle (*tianli* 天理)—that interconnects all things in the universe into a seamless whole, rejecting the separation

35. Throughout this Article, the English translations of the *Lunyu* 論語 are adopted from Confucius (2003). In my view, Justice An's intent in citing the anonymous ancient worthy's saying can be far better and unequivocally captured by this statement.

36. In *Analects* 2:3, Confucius offers what can be called the paradigm statement of Confucian virtue politics, when he says, "If you try to guide the common people with coercive regulations (*zheng* 政) and keep them in line with punishments, the common people will become evasive and will have no sense of shame. If, however, you guide them with Virtue, and keep them in line by means of ritual, the people will have a sense of shame and will rectify themselves."

37. For more detailed discussion on the core stipulations of Confucian virtue politics, see Chan (2014, 35–59).

38. Confucius claims that one can become virtuous (*ren*) by conducting oneself according to ritual propriety (*Analects*, 12.1).

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between politics and ethics, and that ritual order, as pivoted on the all-encompassing moral principle representing the Public Way (*gong dao* 公道), should not be understood as a mere political convention that is subject to the ruler's capricious will and private interest (*si yu* 私慾). In Korean Neo-Confucianism, therefore, the state was far from the ruler's private possession; rather, it was envisioned as the political embodiment of the Public Way, committing the polity directly (i.e., passing the ruler's private interest) to the well-being of the people, the telos of Confucian virtue politics.

When reformulated by Neo-Confucianism, Confucian virtue politics gains a firmer constitutional foundation which consists of the following core stipulations: (1) a Confucian polity exists to serve the well-being of the people; (2) the state is predicated on the Public Way, hence not the ruler's private possession; (3) as a public entity, the state should be responsive to the need of the people who vicariously represent the will of Heaven; (4) in order to enhance such public responsiveness as well as to prevent the state from becoming a mere means to satisfy the ruler's private interest, political power ought to be shared by the king and the Confucian scholar-officials, who, immersed in Confucian classics and moral self-cultivation, collectively represent the "public opinion" (*gonglun* 公論), an opinion embodying the Heavenly Principle; and (5) there should be supplementary institutional mechanisms such as the Royal Lecture and the Censorate through which the Confucian scholar-officials can educate, remonstrate with, and hold accountable the ruler in the name of the Public Way (Mo, 2003).[39]

This brief excursion to Confucian virtue politics and traditional Confucian constitutionalism enables us to see strong resonance between the core stipulations of Confucian virtue politics and Justice An's moral reasoning. In fact, similar resonance is generally found between traditional Confucian constitutionalism and the Korean Constitutional Court's overall moral reasoning (including the first supplementary opinion), which, as we have seen, is difficult to make sense of in purely legal terms and from the perspective of "the liberal democratic basic order."

First, the Court's repeated but somewhat ambiguous appeal to the people's trust can be perfectly understood with reference to Confucianism's strong emphasis of the ruler's virtue of trustworthiness as an ability to draw confidence from the people. Recall that the gist of ambiguity in the Court's appeal to the people's trust from both legal and liberal-democratic viewpoints had to do with whether the president's legal violation, which signals a betrayal of the democratic mandate by the people, refers to the betrayal of the people's trust or has an independent moral weight to determine the gravity of the president's wrongdoing. From the Confucian standpoint, however, the president's unlawful conduct gives rise to a serious normative violation because they betray both the people's democratic trust, conferred via free and equal election, and their moral trust in her as the moral exemplar who deserves their respect and allegiance.

Second, the Court's sincerity provision (as I named it) can be explained by the justices' unspoken subscription to the core assumption of Confucian virtue politics.

39. These five stipulations are reproduced, with slight modifications, from my other work (Kim forthcoming). On the constitutional implications of the Public Way during the Chosŏn dynasty, see generally Kim Y. (2008). Note that though Neo-Confucian constitutional thought was originally advanced by Chinese Neo-Confucians during the Song dynasty (960–1279), it was Korean Neo-Confucians who actually put it into a political practice by designing Chosŏn's Confucian polity directly according to Neo-Confucian ideology (Chung 1985).

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As noted, the problem with the Court's appeal to the president's insincerity in her public apologies as the evidence attesting to her "grave" betrayal of the people's trust was that there was no clear statutory ground for it. The trouble was that from a purely legal perspective, it was difficult to understand how the president's "insincerity" in her public apologies, which are not even part of her official duties, has anything to do with her legal culpability and how it weighs in the calculation of proportionality. We remain untold precisely how the president's insincerity made her legal violation grave, sufficient to override the public costs reasonably expected from her impeachment. Confucianism provides the very source of the unspoken legal provision that, at least partly, determines the gravity of the president's betrayal of the people's trust. From the viewpoint of Confucian virtue politics, the president's insincerity repeatedly found in her public statements intended to apologize to the people for her misconduct powerfully demonstrates her utter failure in moral self-cultivation, disqualifying her from the heavy responsibility of the presidency.

Finally, third, the Confucian paradigm of virtue politics helps us to understand the moral ground on which Justices Kim and Yi paid special attention regarding the ideal of political leadership in their supplementary statement. Again, political leadership idealized by the justices had little to do with liberal constitutional values and norms; rather, it was conceived primarily in terms of the leader's moral ability to engage empathetically with others, not only the victims of disasters and their families but also the entire nation. While liberal democratic leadership rarely draws attention to the importance of the capacity of empathy, the proper operation of Confucian virtue politics is practically inconceivable without the presence of political leaders equipped with it. Mencius vilified rulers who were callous to the suffering of the people as "nonbenevolent" (*bu ren* 不仁) and found them no different than tyrants who actively harmed the people (*Mencius* 4A2; 1A3).[40] For the justices, although the president's failure to live up to the moral ideal of political leadership did not create sufficient grounds for impeachment, they thought that it was worth mentioning because it involved a critical violation of what good government stands for, which Mencius captured in terms of "benevolent government" (*ren zheng* 仁政).

Seen in this way, the Court's decision and the two supplementary opinions affirm the model of Confucian constitutionalism not only from the standpoint of the Court's structural relation to the president as the office of remonstrance, but as just revealed, in terms of the substance of their argument and the mode of moral reasoning. This leads to our final question, whether the Confucian style of judicial review in Korea, as confirmed thus far, also vindicates Ginsburg's observation of the justices of the Korean Constitutional Court as the "elite guardians of fundamental values," or, put differently, whether the justices' self-imposed role as the guardians of fundamental values gave rise to Confucian constitutionalism.

But what values are we talking about? Interestingly, in capturing judicial review in Korea (and Taiwan) from the perspective of Confucian constitutionalism, Ginsburg

40. Also see *Mencius*, 1A3: "The king's dogs and pigs eat food intended for human beings and he does not know enough to prohibit this. On the roads there are people dying of starvation, and he does not know enough to distribute food. People die, and he says, 'It was not I; it was the year.' How is this different from killing a person by stabbing him and then saying, 'It was not I; it was the weapon?'"

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does not answer this important question, merely assuming that "the fundamental values" that the Court aims to protect or promote are the constitutional values to which the Korean polity is formally and directly committed. In this assumption, the fundamental values signify liberal democratic values, mainly consisting of liberal rights, liberties, and political equality. However, as we have seen, the values that the Court aimed to promote were not limited to liberal democratic values. In fact, it upheld with equal enthusiasm key Confucian values such as benevolence (*ren*), capacity of empathy (*ce yin zhi xin* 惻隱之心), sincerity or faithfulness (*cheng* 誠), and trustworthiness (*xin* 信), although it never mentioned "Confucianism" in so doing or made it its formal task to explicitly promote Confucian values. In a sense, it is by appealing to Confucian values that the Court was able to protect Korea's democratic constitution that is liberal in its formal structure.[41]

Likewise, the Court's self-imposed role as the elite guardians of fundamental values can be better understood against the backdrop of its strong, albeit informal, influence by Confucianism. That is to say, just as the Court's moral reasoning was importantly informed by Confucianism, so was its self-understanding inspired by the Confucian ideal of elite intellectuals. At the heart of this ideal is what Thomas Metzger aptly calls "optimistic epistemology" which posits that "the objective public good can be fully known" (Metzger 2001, 211). Recall that the Court upheld the legislative motion to impeach the president on the basis of public interests resulting from such a decision without demonstrating precisely what they consist of and how they override the expected public costs to be incurred by the same decision. The Court did not even ask the prosecutor (the chairman of the National Assembly's Legislation and Judiciary Committee) and his team made up of several members of the National Assembly to articulate the expected public benefits of the impeachment, as if the question of the public good was beyond the "political," which was in their view nothing but sectarian controversy. In the same vein, when Justices Kim and Yi chastised the president in light of the moral ideal of a good political leader, they proceeded as if that ideal is taken for granted, hence dismissing the possibility that it can be subject to moral controversy. All the more puzzling, Justice An's second supplementary opinion justified its recommendation of constitutional reforms as a moral demand from "the spirit of our time" (*Zeitgeist*), without acknowledging its moral contestability under the circumstances in which people subscribe to different interpretations of what the guiding historical spirit is or ought to be in the

41. One may challenge by arguing that the constitutional justices' self-understanding as "the guardians of fundamental values" is not peculiar to the Confucian culture as the self-image of "godlike" justices is also found in the German Federal Constitutional Court or in the US Supreme Court (I am grateful to an anonymous reviewer for drawing my attention to this point). Indeed, in the American context, democratic theorists such as Wolin (1989), Barber (1988), and Walzer (1981) have forcefully criticized the valorization of the impartial apolitical philosophical posture that the Supreme Court assumes vis-a-vis democratic politics as well as the justices' self-image of "super-citizens." After all, the increasing wariness on the part of democratic theorists, popular constitutionalists (Bellamy 2007; Kramer 2004; Tushnet 1999), and, more important, citizens toward judicial activism and the judicialization of politics more broadly has deeply do to with this seemingly perennial tension between philosophy (and law) and politics, which traces back to Plato's famous allegory of the cave. My point is that even in this otherwise universal problem there is an important cultural dimension and unless we understand what sort of philosophical and moral system undergirds the constitutional justices' self-understanding, we will never be able to grasp the distinctive nature of their jurisprudence.

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present time. Metzger's illumination of optimistic epistemology that characterized traditional Confucian China seems to be directly germane to our Korean case.

> [In traditional China,] the dominant moral rhetoric was not that of ordinary people seeking freedom by calling for limits on the power of the centralized state but that of moral virtuosi, super-citizens claiming to embody the conscience of society, looking down equally on the degeneration of state institutions and the private pursuit of economic profits, and continuing to search for some way to restore the ancient saintly *Gemeinschaft*. In other words, the utopian, top-down view of progress as based on the moral dynamism of super-citizens able to influence a corrigible state was never replaced by an un-utopian, bottom-up view of progress as based on the efforts of ordinary free citizens fallibly pursuing their economic interests and organized in a practical way to monitor an incorrigible state. (Metzger 2001, 224)[42]

On this account, the justices of the Korean Constitutional Court (Justice An in particular) "look[ed] down on the degeneration of state institutions" and the president's and her confidant's pursuit of "private profits" from the perspective of "super-citizens claiming to embody the [public] conscience of society." The only difference between traditional Chinese (or Confucian) elites and the Korean justices is that for the latter, liberal values as well as Confucian values constitute the fundamental values that undergird the conscience of Korean democratic society. As "super-citizens," constitutional justices in Korea could define the moral ideal of political leadership, appeal to *Zeitgeist*, call for constitutional reforms (seemingly transgressing the legal and political authority of the legislature), chastise the president's insincerity, lack of empathy toward the people, and her (moral as well as legal) betrayal of public trust, and, ultimately, remove the president from office on the grounds of her legal violations as well as moral failures that made the former more serious and wrong.

In the end, what we find here is a lingering influence of traditional (Neo-) Confucian constitutionalism on constitutional jurisprudence in contemporary Korea.[43] Both the fact that the Court did not explicitly cite terms such as "Heavenly Principle, "the Public Way," and "the Public Opinion" and the fact that none of the justices were formally trained in or self-consciously committed to Neo-

42. For a similar "ethical" account of the Confucian state and civil society, see Nosco (2002).

43. During the review process, an anonymous reviewer challenged that even if my analysis thus far is consistent with some kind of moral arguments, this does not prove that they are necessarily Confucian. To be sure, Korea is not a Confucian state in the way it used to be during the Chosŏn period and, as I noted, there is no evidence that the justices were fully committed to any specific Confucian comprehensive doctrine. And it is also true that every society has (or may have) moral arguments that can (even aim to) constrain political leaders. However, this does not mean that the moral arguments of constitutional implications are culturally blind or neutral. As I noted in n. 41, my guiding passion in this Article is to illuminate the distinctive cultural dimension of such moral arguments and how it is meaningfully, if not holistically, Confucian. In my view, if a moral discourse that aims to constrain the ruler consists of a more or less intelligible constellation of values involving benevolence, empathy, sincerity, trustworthiness, and moral rectification, especially in a society that still remains the most Confucian among East Asian societies (Tu 1991), it can be reasonably called "Confucian." Elsewhere I called this Confucian political theory's *intelligibility condition* (Kim 2016, 15–16). Of course, this means that my interpretive judgment is open to reasonable disagreement by an alternative interpretation that meets the intelligibility condition of a different sort.

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Confucian moral metaphysics and political theory may likely lead one to deny this surprising continuity between traditional Confucian constitutionalism and contemporary Korean, otherwise liberal, constitutionalism. After all, it is commonly noted that in the course of democratic consolidation the Court has actively nullified statutes that critically violate Korea's core constitutional values such as human dignity, gender equality, and the pursuit of (individual) happiness, thereby asserting itself as a bulwark of liberal progressivism. In many of its landmark decisions including the abolition of the family head (2005), often characterized as the grand showdown between liberal individualism (or liberal feminism) and traditionalist Confucianism, it was almost always the former that won the legal victory. Or so has been the common observation (Hahm 2003; Yang 2006). As recent scholarship forcefully attests, however, it was not so much a one-sided victory but rather cultural reinterpretations and contestations in which, as Chaihark Hahm puts it, "the very definition of Confucian civility [has been] renegotiated through legal discourse" (Hahm 2004, 284). In the 2005 case of abolition of the family head, for instance, what actually happened can be better described as the negotiation between formal constitutional principles such as human dignity and gender equality, commonly understood as liberal values, and Confucian values such as ancestor worship, respect for elders, filial piety, and harmony in family, thus producing a "Confucian yet democratic" citizenship (Kim 2016, 124), a mode of hybrid citizenship in which traditional Confucianism has been adapted to democratic principles and social conditions while liberal values of the Western provenance have likewise been accommodated to the Confucian conception of the good life.

What makes such cultural negotiations more or less successful in constitutional jurisprudence in Korea is the special normative position that the constitutional justices occupy not only in Korea's legal system but, more importantly, in the Korean cultural atmosphere deeply embedded in Neo-Confucian mores and values. Though their formal training is hardly Confucian, like Neo-Confucian scholar-officials in premodern Korea, the constitutional justices successfully passed the national bar examination, admittedly the contemporary equivalent of the civil examination, and their nonpartisan stance and supposedly impartial commitment to the common good strongly echo "super-citizenship" of the kind exercised by their Neo-Confucian predecessors struggling to uphold the Public Way, especially those in the Censorate whose main task was to put the ruler back in the right track (i.e., the Way or *dao* 道) of the government when he went astray from it by communicating to him what they deem to be the "true public interest." In fact, and as Ginsburg's model suggests, albeit implicitly, the relative ease with which the Court has been able to establish itself rapidly as the most trusted public institution in post-democratic Korea, which is in marked contrast with the deplorably low public trust in political parties,[44] can be made more intelligible when approached against this cultural backdrop.

The "true public interest" in question, however, has not been singularly dictated by concerns with liberal rights, freedoms, and opportunities that drive liberal

44. In the 2017 public opinion survey on the "confidence in public institutions," co-conducted by Seoul National University's Pollab and *Seoul Daily*, the Constitutional Court ranked highest (with 42.4 percent of approving rate), outranking National Election Commission (37.5 percent), Seoul National University (27.5 percent), and the Ministry of Justice (20.4 percent). This information can be found in http://pollab.co.kr/seoul_gov_trust.

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constitutionalism in the West. Even when the Court abolished the notorious family-head system, it never disowned traditional Confucian values including filial piety and respect for elders wholesale; quite the contrary, it publicly reclaimed the pivotal importance of such (and related) values by noting, to some radical feminists' dismay, that they would (and should) remain intact even after the abolition of the family-head system.[45] The point is that if high public trust in the Court in Korea is based on its pronounced impartiality and commitment to true public interest, as far as actual constitutional jurisprudence is concerned, what constitutes the very content of impartiality or public interest is not determined by liberal values alone. Rather, as our case reveals, it is often the creative amalgam between liberal values and Confucian values that has guided the Court's so-called impartial public judgment.

Here arises a question. If Korean constitutionalism, despite its formal commitment to liberal constitutional norms and values, is not solely propelled by liberalism as such but also motivated by Confucian values and moral reasoning, how can we make sense of this curious cohabitation? How can we make sense of the Confucian side of Korean constitutional jurisprudence that coexists with the Court's liberal commitment? I conclude this Article by turning to this puzzling question.

CONCLUSION: INDIRECT CONSTITUTIONALISM?

The fact that Ginsburg focused only on the Korean Constitutional Court's structural relation with the president (and to a less degree, the legislature) or its distinctive style of judicial review, but not on the nature of the fundamental values that it was committed to guarding, suggests that he did not understand Confucian constitutionalism as a normative alternative to liberal constitutionalism. However, the findings that the Korean Constitutional Court is committed to Confucian values as much as to liberal values and that liberal values that formally inform the constitution are protected by means of Confucian-inspired moral reasoning and intellectualism (or optimistic epistemology) raise an important theoretical question as to how we should understand Confucian constitutionalism in the context of formal liberal democratic constitutionalism. Should it be understood as an element, a regrettable relic of Confucianism of the past, that only interferes in the coherent operation of liberal constitutionalism in Korea? Or, since Confucian constitutionalism is the factor that significantly contributes to judicial activism in Korea via its reliance on the few super-citizens' optimistic epistemology, should it be discouraged or eliminated so that the Korean polity can be more robustly democratic?

Indeed, throughout this Article I attributed several ambiguities that the Korean Constitutional Court revealed—its oscillations between its purely neutral task and its overtly political judgment and suggestions, between its purely legal task and its moral(istic) reasoning and conclusions, between its commitment to a liberal democratic basic order and its anti-liberal and non-democratic epistemic stance, among other things—to its tacit commitment to Confucianism. In this regard, it can be said that Korean constitutionalism is marked by a curious juxtaposition between liberal

45. KCCR1, 2001Hun-Ga9·10·11·12·13·14·15 and 2004 Hun-Ga5 (consolidated) (February 3, 2005).

https://doi.org/10.1017/lsi.2018.24 Published online by Cambridge University Press

constitutionalism on a formal level and Confucian constitutionalism as an informal practice. Instead of finding this incongruence between two incommensurable modes of constitutionalism troublesome, I propose that we understand Confucian constitutionalism operative in tandem with liberal constitutionalism, to which the Korean polity is formally and directly committed, as what can be called *indirect constitutionalism*, a mode of constitutionalism that aims to shape the polity's constitutional identity in a way that achieves a meaningful, if not full, congruence between liberal constitutional principles and the underlying moral tradition and public culture that mark the polity as a distinctive moral community (Kim 2016, 122–24).

The idea of indirect constitutionalism helps us to translate what may be deemed to be a case of legal incoherence or a clash of two constitutional aims and practices into a curious cultural communication between the polity's formal constitutional values and principles and the background culture of civil society that is not embedded in such principles and values. Indirect constitutionalism makes sense especially in societies like Korea and Taiwan that have recently undergone liberal democratic transitions and their highest courts were produced or significantly reinstitutionalized as a result. In such societies, there is a notable gap between the polity's formal liberal constitutional identity and the Confucian public culture that still importantly influences the citizenry's moral sentiments, values, reasoning, and practices. Indirect constitutionalism encourages a constitutional practice that bridges the cultural and normative gap between liberal values and principles on the one side and local values and practices on the other, thereby giving rise to a constitutional practice that is neither Western-liberal nor traditionally local but one that is robustly democratic, sufficiently liberal, and moderately cultural. If we understand local cultural values, to which the constitutional court is implicitly committed to promoting, as "quasi-constitutional values," indirect constitutionalism can be redefined simply as *a mode (or dimension) of constitutionalism aimed to promote or engage in quasi-constitutional values within the formal liberal constitutional framework*.

When understood in terms of indirect constitutionalism, therefore, Confucian constitutionalism does not aim to replace or directly compete with liberal constitutionalism. And this is the most important feature of Confucian constitutionalism that I am discussing and proposing in this Article in comparison with its various suggestions currently explored by many Chinese scholars including Jiang Qing (2013) who understands "Confucianism" in a comprehensive religious sense and thus presents Confucian constitutionalism, underpinned on distinctively Confucian institutions, as a stark alternative to liberal constitutionalism.[46]

Of course, it is not an easy task to achieve a constitutional balance among democratic, liberal, and cultural components that undergird a single constitutional practice and it cannot be predetermined by a philosophical fiat exactly what sort of balance should be pursued or prescribed for a given society, which can only be determined in consideration of the society's specific cultural, social, and political circumstances. In this regard, it is open to debate whether the version of Confucian constitutionalism that implicitly informed the Korean Constitutional Court's jurisprudence and decision was the most optimal or desirable one. And it is equally debatable whether the justices'

46. For a critique of Jiang's (fundamentalist) Confucian constitutionalism, see Kim (2015).

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self-imposed role of super-citizenship would continue to contribute to democratic consolidation that the Korean polity has been painstakingly pursuing in the past three decades. What is certain, however, is that Confucian constitutionalism as indirect constitutionalism has successfully helped to protect Korea's otherwise liberal-democratic constitutional order and largely lived up to the moral and political aspirations of Korean civil society that is itself "ethical" by character (Cho 1997; Kim 2018). At any rate, it would be premature or even reckless to attempt to get rid of Confucian constitutionalism in Korea in order to achieve a pure, more internally coherent, form of liberal constitutionalism.

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