

THE DUTIES THAT BIND US: AN ANALYSIS OF DUTY-BASED CONSTITUTIONALISM IN CONFUCIAN AND CALVINIAN THOUGHT

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This article aims to draw out some of the key continuities between Confucian and Reformed natural law traditions, the latter represented by John Calvin (1509–64). It seeks to undermine contemporary academic definitions of Confucianism and constitutionalism, which are premised on misinterpretations. The first misinterpretation occurs where Confucian moral theory is viewed overly prescriptively, as being synonymous with legalist orthodoxy. The second misinterpretation occurs where constitutionalism is defined exclusively in terms of its dominant liberal conception. These problematic definitions of the two core concepts reduce the space of convergence between Eastern and Western constitutional frameworks, giving rise to the misleading narrative that they are fundamentally incompatible. With these issues in mind, the article adopts a dialectic interpretive method to read both traditions in light of their historical context and authorial purpose, to see whether such a reading can support some form of duty-based constitutionalism. Ultimately, the article examines Eastern and Western natural law ideas to reveal deeper themes common to both and highlight the normative continuities of two prominent, albeit culturally disparate, constitutional foundations.

I INTRODUCTION

Constitutional duties are legally binding, but they also bind us to each other.¹ The duties that bind the state are sourced in, and bounded by, the duties that we owe each other. All constitutions, regardless of their context and development,

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¹ Here, the term ‘duty’ is derived from the Latin ‘*ligare*’ (‘to bind or tie together’). From the mid-15th century onwards, *ligare* evolved to mean ‘obliged by law’ from Old French — ‘*lier*’, ‘*liier*’ (‘to bind up, fasten, tether; bind by obligation’) — and is also, interestingly, the root for the term, religion — ‘*religare*’ (‘that which ties believers to God’) — as first used by early Christian writers. See entry for ‘oblige’ in Hensleigh Wedgwood, *A Dictionary of English Etymology* (Trübner and Company, 2nd ed, 1872) 451.

commonly concern the notion of obligations.² That is, constitutional law is required, by its very purpose, to consider the justifications of political power and, in that scheme, what priority should be placed on normative pursuits like collective human flourishing.³ However, doctrinal constitutional law often shies away from discussions about its normative reasons.⁴ In this context, natural law theory has the real potential to fill this discursive vacuum. Natural law can consider the ontological purpose of constitutions by addressing the strong institutional link between descriptive power and the normative reasons for law. This article contends that, by introducing natural law themes into debates about Eastern and Western constitutional cultures, we shift the focus away from our differences to the commonalities that bind us together. We are all bound by the fundamental respect we owe one another in community.⁵ This respect characterises every legal relationship — between rulers and their subjects, subjects and those who rule them, rulers and their peers, and each subject and their neighbour. A duty-based framework,⁶ therefore, allows us to capture some of the normative continuities that exist between Eastern and Western constitutional foundations.

There is a popular view today that Confucianism necessitates an authoritarian form of government.⁷ Proponents of this view argue that Confucianism is fundamentally incompatible with constitutionalism. In so doing, they potentially commit at least one of two generalisations about the objects for comparison. The first is the assumption that constitutionalism is essentially synonymous with liberal democracy. This position presupposes that the core of Western constitutionalism is the idea that humans as ‘rights bearing individuals’ — subsisting on the ‘autonomous self’⁸ — gives rise to a political system which

² Jonathan Crowe and Constance Youngwon Lee, ‘The Natural Law Outlook’ in Jonathan Crowe and Constance Youngwon Lee (eds), *Research Handbook on Natural Law Theory* (Edward Elgar, 2019) 11. On this point, the authors note that both strong and weak natural law theories view natural rights as predicates of moral duties.

³ Aristotle, *Politics*, tr Ernest Barker (Oxford University Press, 1995) 1278b15.

⁴ Christopher Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press, 2013) 13.

⁵ Hwa Yol Jung has argued, for example, that the fundamental premises of the Western liberal constitutional democracies characterised by ‘rights talk’ and ‘individualism’ are not logically derived from broadly ‘Sinic’ relational ontology with its emphasis on the ethics of responsibility. She argues for the undeniable parallels between Emmanuel Levinas’ ‘ethics of responsibility’ and the transcendence of the other. See Hwa Yol Jung, ‘On Confucian Constitutionalism in Korea: A Metacommentary’ in Sungmoon Kim (ed), *Confucianism, Law and Democracy in Contemporary Korea* (Rowman & Littlefield Publishers, 2015).

⁶ Like that borne out of a strong natural law theory. See Constance Youngwon Lee, ‘Calvinist Natural Law and Constitutionalism’ [2014] (39) *Australian Journal of Legal Philosophy* 1, 22 (‘Calvinist Natural Law’).

⁷ A few prominent Confucian scholars who have noted this popular view include Xinzhong Yao and Shaohua Hu, to name just a few. See also James Dominic Rooney, ‘The Promise of Confucian Liberty’, *Law & Liberty* (Web Page, 17 May 2022) <<https://lawliberty.org/>>.

⁸ Ibid.

plausibly translates to an adherence to fundamental constitutional doctrines. In fact, the reverse may be closer to the truth: humans, as fundamentally constituted, are simultaneously fallible yet rational and, therefore, beholden to higher normative standards. The second assumption concerns the nature of Confucianism being reducible to one of its classical principles of *filial piety*. That principle holds that the basis for obligations of filial duty is that individuals' bodies belong to their parents and ancestors. This has been interpreted to mean that 'self-negation' — the setting aside of individual rights in service of collective interests — forms the basis of Confucian moral theory. Confucian philosophy may be more nuanced if viewed as an essentially relation-based framework.

This article seeks to explore a space of convergence between two ostensibly different constitutional cultures, and to systematically draw out some normative continuities shared by the constitutional theories of both. It will not attempt to argue that Confucianism is fundamentally compatible with constitutionalism, nor to advance a historical study of Confucian philosophy to show how it comports with the modern liberalist position. In this way, the article does not wade into practical manifestations of Confucianism but limits its scope of study to the normative space. The article does, however, examine the moral traditions illustrative of two distinct constitutional approaches in the East and the West, with a view to illuminating core normative continuities: (1) Confucian philosophy extant in many contemporary East-Asian countries, particularly those characterised by *Sinism*;⁹ and (2) the reformed natural law tradition in the West.¹⁰

This article will contend that both constitutional cultures are broadly defined by a common normative framework, strongly resembling (albeit not necessarily identical to) a *strong* natural law theory,¹¹ which I refer to as the 'spheres-of-influence' scheme.¹² This normative framework imposes a duty on all political actors to exercise their rights in a manner that is consistent with respect for the rights of others within the intricate network of relationships characteristic of any community *polis*.¹³ This duty, in turn, originates from each individual's primary allegiance to a transcendent point of value. It follows then that both normative

⁹ *Sinism* possesses a relational ontology based upon the idea that everything is related to everything else in the cosmos and nothing exists in isolation. See Herrlee Glessner Creel, 'Sinism: A Study of the Evolution of the Chinese World-View' (PhD Thesis, The University of Chicago, 1929).

¹⁰ Here represented in the theology of John Calvin, a second-generation reformer recognised for his systematisation of Reformation doctrine. See John Calvin, *On the Christian Faith*, ed John T McNeill, (Liberal Arts Press, 1957).

¹¹ Jonathan Crowe, 'Natural Law, Weak and Strong' (Seminar Paper, Maastricht Law and Philosophy Platform Seminar Series, 9 November 2020) <<https://ssrn.com/abstract=3726757>>.

¹² This concept was first introduced at the 'Post-Liberal Christian Legal Theory Workshop' at the University of Sydney Law School on 22 April 2022 in a paper titled 'Conscience and the Continuum of Constitutionalism.'

¹³ Aristotle (n 3) I278b15. For example, Aristotle uses the condition of living in *polis* as definitive of what makes humans, human.

frameworks lend themselves to a treatment of duties before any enunciation of rights takes place. To this end, the article proceeds as follows:

Part II addresses the prevailing view among Confucian scholars that constitutionalism in Sino-Confucian countries is essentially a foreign transplant and, therefore, incompatible with existing normative structures. This ‘incompatibility thesis’ stems from a preoccupation with the modern focus on rights and/or a conflation of constitutional moral and civic philosophy with constitutional orthodoxy. These assumptions have had the effect of facilitating superficial, if not paternalistic, views of constitutionalism in countries with a Confucian legacy.

Part III identifies the core tenets of ‘Confucian constitutionalism’. This section briefly introduces Confucianism as a moral philosophy originating from the teachings of Confucius ‘孔夫子’ (551–479 BC), which has had a significant impact on Northeast Asian countries. It examines Confucianism’s central moral and civic norms, including: the two forms of the *li*¹ (‘禮’) (as ‘rules of propriety or sacred ritual’) and *li*² (‘義’) (as ‘natural law’), *ren* (‘benevolence’), *yi* (‘righteousness’), *xiao* (‘filial piety’) as well as later outgrowths of political theory.

Part IV considers some core normative assumptions of Western constitutional thought attributable to John Calvin (1509–64) and his theory of government, as it derives from his theology.¹⁴ Here, the section specifically examines the fundamental tenets of Calvin’s natural law theory, namely, the principles of the sovereignty of God, conscience, and the *Imago Dei* in the context of human fallibility, and the law of love.

Part V offers an exposition of the ‘spheres of influence’ scheme and draws out the substantive continuities between the two normative paradigms. The idea of the common good is not absent from either normative tradition. Rather, the interests of the collective are part and parcel of the rights of individuals within a relational ontology.

II THE INCOMPATIBILITY THESIS AND DUTY-BASED CONSTITUTIONALISM

The popular view held by Confucian scholars today is that the spread of constitutionalism in the East was essentially the result of foreign

¹⁴ Here the adjective ‘Calvinian’ is used instead of ‘Calvinism’ to intentionally distinguish between ideas that can properly be attributed to Calvin directly from his writings, as opposed to the historical movement that was developed by his followers from his theology. This is thus an attempt to interpret Calvin’s texts on their own terms. See also, Brian G Armstrong, *Calvinism and the Amyraut Heresy: Protestant Scholasticism and Humanism in Seventeenth-Century France* (University of Wisconsin Press, 1969) xvii.

transplantation.¹⁵ According to this view, the institutional structures introduced to non-Western polities, as mere by-products of the foreign imposition of norms, remained fundamentally incompatible with pre-existing normative frameworks.¹⁶ This conclusion allowed its proponents to argue for an alternative political philosophy to that of constitutionalism on the basis that the two philosophies remain inherently incompatible.¹⁷ However, the truth may be far more nuanced.¹⁸ As aforementioned, the proponents of the ‘incompatibility thesis’ potentially make assumptions on one or both fronts:

- (1) The first assumption relates to a failure to differentiate core tenets of Confucian philosophy from its legalistic manifestation at certain points in Chinese history.¹⁹ This conflation of Confucian philosophy with Confucian statism — a political orthodoxy that was instrumentally employed by certain imperialist Chinese dynasties — greatly impoverishes the discourse.²⁰ This is because proponents of this view dismiss Confucianism as part and parcel of the ideological underpinnings of ‘Oriental despotism.’²¹
- (2) The second assumption relates to the failure to distinguish between different forms of constitutionalism. In modern constitutional law, ‘fundamental rights’ talk’ has reached near saturation point.²² It seems to imbue every facet of political and social life. However, accepting this dominant offshoot as the whole case for constitutionalism is misleading as it denies the inherently diachronic character of constitutional theory’s development. The conflation of classical (non-liberal) Constitutionalism with its modern democratic-liberalist expression results in a false equivalence,²³ which adversely skews any ensuing

¹⁵ The ‘iconoclasts’ of the May Four Movement held that Confucianism was diametrically opposed to liberal ideas like human rights and democracy. Chen Duxiu and his supporters most famously connected Confucianism with despotism. See Bui Ngoc Son, ‘Confucian Constitutionalism: Classical Foundations’ (2012) 37 *Australian Journal of Legal Philosophy* 61, 61–2.

¹⁶ See, eg, Habi Zhang, ‘What the West Got Wrong about China’, *Law & Liberty* (Web Page, 11 May 2022) <<https://lawliberty.org/>>. Here, the author argues that Confucianism and liberalism are mutually exclusive, basing her notion of freedom on Hannah Arendt’s individualistic account.

¹⁷ Jiang Qing, *A Confucian Constitutional Order: How China’s Ancient Past Can Shape its Political Future*, Daniel A Bell and Ruiping Fan (eds), tr Edmund Ryden (Princeton University Press, 2012) 239.

¹⁸ The face of hybridisation means that Confucianism itself was a foreign transplant in many Northeast Asian countries from China. See Andrew M Law, ‘Situating Strategic or Hybrid Confucianism(s): Issues and Problematics’ (2021) 11(2) *Dialogues in Human Geography* 257.

¹⁹ For example, the most turbulent period in Chinese history known as the period of the Warring State (475–221 BCE). See Xinzhong Yao, *An Introduction to Confucianism* (Cambridge University Press, 2000) 18.

²⁰ *Ibid* 271.

²¹ Shaohua Hu, *Explaining Chinese Democratization* (Praeger, 2000) 24.

²² Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press, 1991) 76.

²³ Sor-hoon Tan, *Confucian Democracy: A Deweyan Reconstruction* (State University of New York Press, 2003) 7.

comparative analysis between constitutionalism and Confucianism.²⁴ To avoid this fallacy, we can distinguish constitutionalism from constitutions in terms of the former's etymological genealogy.²⁵ In this article, I refer to constitutionalism as a political framework whereby the sovereign's power is self-constrained.

Lately, there have been incremental shifts away from this incompatibility thesis by prominent comparative constitutional law scholars.²⁶ The new approach holds that the normative foundations of the constitutional systems in the East and West are not so fundamentally incompatible as first thought — that, in fact, they possess key normative continuities.

A *Duty-Based Constitutionalism*

In recent decades, there has been growing support for the claim that natural-law theory can supply a solid ontological foundation for constitutionalism, minimally conceived.²⁷ That is, when constitutionalism is viewed *conservatively* in terms of a government's legitimacy being directly dependent on its observation of limitations to its own powers,²⁸ the core concepts of natural law can explain the normative necessity for upholding constitutional frameworks of political governance.²⁹

In other words, when we conceive of constitutionalism in terms of limitations on government powers characterised by fundamental constitutional doctrines — such as the 'rule of law' and 'the separation of powers'³⁰ — we can reduce the theoretical divide that exists between the ontological foundations of Confucian and Calvinian constitutional theories. Thus, by limiting the scope of our inquiry to a conservative definition of constitutionalism, we are able to sidestep the thorny question of 'rights talk',³¹ and thus, importantly, shift our

²⁴ Zhang (n 16).

²⁵ Graham Walker, 'The Idea of Nonliberal Constitutionalism' [1997] 39 (Ethnicity and Group Rights) *Nomos* 154, 165 ('Nonliberal Constitutionalism').

²⁶ For example, Professors Sungmoon Kim, Chaihark Hahm and Sor-hoon Tan.

²⁷ More debatable is whether natural law theory supports all aspects of modern constitutionalism and, in particular, the connection between an 'arid scheme of government powers' and 'abstract rights.' See Gerard V Bradley, 'Natural Law Theory and Constitutionalism' in George Duke and Robert P George (eds), *The Cambridge Companion to Natural Law Jurisprudence* (Cambridge University Press, 2017) 397. See also Jonathan Crowe, 'Philosophical Challenges and Prospects for Natural Law Foundations of Human Rights' in Tom Angier, Iain T Benson and Mark D Retter (eds), *The Cambridge Handbook of Natural Law and Human Rights* (Cambridge University Press, 2022) 485.

²⁸ Charles H McIlwain, *Constitutionalism: Ancient and Modern* (Cornell University Press, 1940) 24; Carl Joachim Frederich, *Man and His Government: An Empirical Theory of Politics* (McGraw-Hill, 1963) 271.

²⁹ Graham Walker, *Moral Foundations of Constitutional Thought: Current Problems, Augustinian Prospects* (Princeton University Press, 2014) 3–8.

³⁰ Suri Ratnapala, 'The Idea of a Constitution and Why Constitutions Matter' (1999) 15(4) *Policy* 3.

³¹ Thomas C Grey, 'Constitutionalism: An Analytic Framework' [1979] 20 (Constitutionalism) *Nomos*, 189, 190. See also Jung (n 5).

focus to the space of convergence that exists between Eastern and Western moral traditions.

That constitutionalism is conceptualised as functionally and prescriptively concerned with the legal limitation of government powers, does not mean that the idea of what is ‘legal’ pertains exclusively to positive law.³² In other words, the existence of formal restraints is not necessarily indicative of constitutional order.³³ The ‘self-limiting character’³⁴ of a constitution may be highly regularised without being embodied in any formal sense.³⁵ As such, a ‘constitution’ — properly understood — must capture certain fundamental normative commitments. These constitutional commitments can, in turn, be viewed in terms of a constitution’s ‘telos’, which it shares with natural law, namely the advancement of the common good and collective human flourishing.³⁶

Against this theoretical backdrop, natural-law theory explores the motivations of political agents. By addressing the ontological question of the moral good, that tradition examines the fundamental normative reasons for constitutional law. Systematic attempts to identify the normative motivations of legal actors have been advanced by the natural law tradition for centuries. The most influential attempt in the 20th century can be found in the revival of natural law theory in the work of Germain Grisez³⁷ and John Finnis³⁸ in the early 1980s (widely known as the ‘new natural law theory’).³⁹

The normative foundation that constitutionalism shares with Calvinian natural law theory logically translates to a duty-based framework.⁴⁰ The natural law outlook is broadly characterised by two fundamental ideas: first, that natural law captures the basic (and timeless) regularities of life that are intrinsically good for humans given our basic natures (‘the basic goods’);⁴¹ and, second, that these

³² Charles H McIlwain, *Constitutionalism and the Changing World* (Cambridge University Press, 1939) 244.

³³ Carl Joachim Frederich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (Ginn and Company, rev ed, 1950) 123 (‘Constitutional Government’).

³⁴ Walker, ‘Nonliberal Constitutionalism’ (n 25) 165.

³⁵ Frederich, *Constitutional Government* (n 33) 123.

³⁶ Nicholas Tsagourias, ‘Constitutionalism’ in Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Models* (Cambridge University Press, 2007) 3.

³⁷ Germain G Grisez, ‘The First Principle of Practical Reason: A Commentary on the “Summa Theologiae”’, 1–2, Question 94, Article 2’ (1965) 10(1) *American Journal of Jurisprudence* 168, 192–3.

³⁸ John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011).

³⁹ Contemporary natural law has been associated with the Roman Catholic tradition. Prominent natural law scholars in the last few decades have been Thomistic. See *ibid*; Robert P George, *In Defense of Natural Law* (Clarendon Press, 1999); Russell Hittinger, *The First Grace: Rediscovering the Natural Law in a Post-Christian World* (ISI Books, 2003). See also Lee, ‘Calvinist Natural Law’ (n 6). Here, I identify the differences between Thomistic and Reformed approaches to natural law theory. The first is based on a sanguine account of human nature which makes it more facilitative of a rights-based constitutional theory. In contrast, reformed approaches are premised on an anthropology that views human nature as extensively distorted, thus, fallible, resulting in a duty-based view of constitutionalism.

⁴⁰ Bradley (n 27).

⁴¹ Finnis (n 38) 34.

basic forms of life translate to a set of normative principles or requirements that distinguish sound from unsound thinking and, also, provide the criteria for distinguishing reasonable from unreasonable acts.⁴² It follows that these basic goods not only explain the morality of individual actions, but also play a fundamental role in explaining the nature and purpose of social, political and legal institutions.⁴³ In this context, for Calvin, these basic goods are identified in terms of the sovereignty of God, and moral agency is defined in terms of the universal facility of conscience, which, albeit fundamentally fallible, requires everyone to pursue higher moral standards (by virtue of the doctrine of *Imago*).⁴⁴ This produces a strong gravitational pull towards higher substantive norms as premised on every individual's moral duty.

Moreover, natural law grounds the quality of our moral thoughts and actions in objective norms, whose content depends on our fundamental human nature. Classical natural-law traditions in the West posit a direct connection between human nature and the teleological order of the universe ('the cosmos') or (in Christian accounts) God (as the divine and eternal Being).⁴⁵ Thus, it is arguable that, whether thinly or thickly conceived, natural law theories are commonly duty-based.⁴⁶ This is because, in their conceptualisation and methodology, natural law theories place priority on the duties of individual actors whose thoughts or actions are normatively judged by the extent of their adherence to objective values.⁴⁷

To come full circle, there are strong continuities between the normative purpose of constitutionalism and the fundamental tenets of natural law theory. Indeed, one could *even* go so far as to suggest that the latter offers an ontological basis for the former. Thus, insofar as a comprehensive understanding of the motivations of political actors is concerned, the anthropological and teleological focus of natural law allows it to supply a normative foundation for constitutional law. This inquiry, however, is beyond the scope of the present discussion. Suffice it to say, there are clear conceptual continuities between the key principles of these two schools of thought, and, furthermore, their synergetic engagement may potentially be observed in other cultural and historical contexts.

⁴² Ibid 23.

⁴³ Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge University Press, 2019) 1–12.

⁴⁴ Constance Youngwon Lee, 'The Spark That Still Shines: John Calvin on Conscience and Natural Law' (2019) 8(3) *Oxford Journal of Law and Religion* 615 ('The Spark That Still Shines').

⁴⁵ Russell Hittinger, *A Critique of the New Natural Law Theory* (University of Notre Dame, 1987) ('*Critique*'). Here, the author distinguishes classical natural law theories from new natural law at this conceptual point.

⁴⁶ Both duty-based but with a teleological metaphysical account of Kantian deontology. See, eg, Immanuel Kant, *Critique of Pure Reason* ed Paul Guyer and Allen W Woods, tr J M D Meiklejohn (Cambridge University Press, 1998).

⁴⁷ The implications for 'weak natural law theory' may be a scheme of natural rights. See, eg, Finnis (n 38).

III CORE TENETS OF CONFUCIAN ‘CONSTITUTIONALISM’

This Part begins by elucidating the natural law ideas in Confucianism as a basis for constitutionalism. At the outset, it is important to clarify the nature and scope of inquiry as well as the methodology being used, especially the approach to interpreting primary sources. First, the specific Western term for ‘natural law’ (*lex naturae*) can be translated into modern Chinese as ‘自然’ ‘*zírán fā*’.⁴⁸ Having said that, it is also important to acknowledge that the modern Chinese term did not exist in classical Chinese jurisprudence.⁴⁹ Notwithstanding the ‘absence of the term,’ Ho aptly notes that this does not mean that ‘we cannot ask whether natural law ideas or natural law thinking existed in Chinese tradition.’⁵⁰ Indeed, prominent Chinese legal historian, Geoffrey MacCormack, observes the clear lines of symmetry that exist between natural law theories and Confucian ‘ways of thinking about law’ insofar as they both appeal to an ultimate standard or objective norms grounded either in the cosmos or man’s own nature.⁵¹ A constitutional offshoot of this principle would be that the ‘ultimate standard ought to form the basis for the laws enacted by the ruler for the regulation of the state.’⁵²

It is also important to clarify the scope and nature of the term ‘Confucianism’ as used in this article. Confucianism can be broadly defined as representing a diverse tradition,⁵³ which can be traced back to the teachings of Confucius, but which also encompasses the works of his disciples. It has also been the subject of hybridisation with many customary and religious norms, such as those derived from Taoism, Buddhism, Shamanism, Sinism in classical times and, more recently, Feminism and Marxism.⁵⁴ In the face of this hybridisation and diversity, it is difficult to distil the fundamental tenets of Confucianism.⁵⁵ Therefore, for the purposes of present inquiry, we will focus on the traditional corpus of Confucianism (the ‘Classics’) as propounded by Confucius himself (551–479 BCE), and developed further by Mencius (372–289 BCE) and (to a lesser extent)

⁴⁸ Etymologically, the term ‘自然’ ‘*zírán*’ originates from classical Chinese, a key concept in Taoism that means ‘of its own, by itself, spontaneously, natural or occurring naturally.’ See Guorong Yang, ‘Metaphysical Principle and Principle of Value: The Way (*Dao* ‘道’) and Natural Spontaneity (*Ziran* ‘自然’) in the Philosophy of the *Laozi*’ in Paul J D’Ambrosio et al (eds), *Philosophical Horizons: Metaphysical Investigation in Chinese Philosophy* (Brill, 2019) 238.

⁴⁹ Norman P Ho, ‘Natural Law in Confucianism’ in Jonathan Crowe and Constance Youngwon Lee (eds), *Research Handbook on Natural Law Theory* (Edward Elgar, 2019) 164.

⁵⁰ Ibid.

⁵¹ Geoffrey MacCormack, ‘Natural Law in Traditional China’ (2013) 8(2) *Journal of Comparative Law* 104, 104–5.

⁵² Ibid.

⁵³ Kenneth Scott Latourette, *The Chinese: Their History and Culture* (The Macmillan Company, 1934) 55.

⁵⁴ Daniel A Bell, *China’s New Confucianism: Politics and Everyday Life in a Changing Society* (Princeton University Press, 2010) xxvii.

⁵⁵ Ibid.

Xunzi (312–230 BCE).⁵⁶ The Classics is comprised of the following works: the *Four Books* ('Sishū') — that is, the *Analects* of Confucius, the *Book of Mencius*, the *Doctrine of Mean* and the *Great Learning*, as well as the 'Five Classics': the *Book of Changes* ('I Ching'), the *Classic of Poetry* ('Shu Ching'), the *Book of Rites* ('Yi Li') and the *Spring and Autumn Annals* ('Chunqiu').⁵⁷ This collection of works has been associated with the Chinese concept of the supreme authority of the Canon ('ching'),⁵⁸ which establishes this corpus as the sacred scripture of Confucianism.⁵⁹

Relatedly, though this Confucian corpus was consolidated in the pre-Qin period of Chinese history (prior to 221 BC), it continued to be revitalised and revised in other Sino-Confucian states like Korea and Japan.⁶⁰ At this point, we may briefly comment on Confucianism as a diachronic movement. There are marked discrepancies in the way the thoughts have manifested in the context of *realpolitik* (as opposed to *moralpolitik*).⁶¹ For example, if we consider its evolution in the Korean context, particularly the Chosun dynasty (1392–1910), this site is characterised by narrow geographical boundaries, cultural, ethnic and linguistic homogeneity. All these characteristics lend Korea to a clearer (and perhaps, more fruitful) picture of the *actual* synergetic developments that occurred between contemporaneous indigenous mores and the development of Confucian norms.⁶²

In contrast, the Chinese context is complicated by the tyrannies of distance due its vast territory and its geographical location, which makes it culturally and linguistically diverse. These jurisdictional idiosyncrasies mean that the primary motivation for government, historically, was to bring about peace and harmony through the centralisation of power via philosophical orthodoxies like Confucian 'legalism' or '法家'.⁶³ It follows that such contextual factors invariably have the effect of muddying later synergies, which emerged through the hybridisation of customary norms with state-sanctioned Confucian ideology.⁶⁴ As such, this

⁵⁶ Ibid. Authorship remains uncertain. Though most of the core texts are attributed to Confucius and his disciples, it was perhaps subject to repeated editing and re-collection by Confucian scholars, if not Confucius himself.

⁵⁷ Ibid. Later referred to as the Thirteen Classics and Four Books after the period of Song Dynasty (960–2379) in order to recognise its expansion from the Four books and Five Classics (later Six after the discovery of the *Book of Music*) to include, *inter alia*, the *Canon of Filial Duty* ('Xiaojing') (frequently attributed to Xunzi).

⁵⁸ Ibid. Roughly analogous to the Bible in the West. See Michael Nylan, *The Five 'Confucian' Classics* (Yale University Press, 2001) 2.

⁵⁹ Xinzhong Yao, *An Introduction to Confucianism* (Cambridge University Press, 2000) 52–4.

⁶⁰ Ibid.

⁶¹ Sungmoon Kim, 'Confucian Constitutionalism: Mencius and Xunzi on Virtue, Ritual and Royal Transmission' (2011) 73(3) *The Review of Politics* 375, 375. See also SangJun Kim, 'The Genealogy of Confucian Moralpolitik and the Implications for Modern Civil Society' in Charles K Armstrong (ed), *Korean Society: Civil Society, Democracy, and the State* (Routledge, 2002) 57–58.

⁶² This article serves as preliminary groundwork for future projects along these lines.

⁶³ Rooney (n 7).

⁶⁴ This legalistic offshoot of Confucian philosophy is intentionally referred to here as 'ideology' given the government's clear agenda for its sanction and proliferation.

article will consider only the *moralpolitik* or substance of the accepted classical Canon of Confucianism.

Moreover, the interpretive approach adopted in this article will be a dialectical interpretive method that oscillates between at least two perspectives: the contextual historical meaning and the textual meaning represented by the linguistic signifiers.⁶⁵ This narrow oscillation occurs with a view to ultimately discerning the meaning that best reflects (insofar as that is possible) what the author intended for the text.⁶⁶ This hermeneutic approach differs from those preferred by some scholars of Chinese Confucian philosophy⁶⁷ in two main ways.

The first difference is the way in which the hermeneutic approach selects the core commitments of Confucianism. It avoids cherry-picking those concepts most conducive to the argument by undertaking a historicised assessment of the subject in the light of the structural integrity of the philosophy as a whole. This means that key tenets will be identified and interpreted with an intentional regard for the underlying religious or normative influences, or both, that feature most prominently in Confucian thought. The second way in which the hermeneutic approach differs is that it approaches Confucianism, not as contained in a single text, but constitutive of a larger collection of works bound by this common outlook. This presupposes, to some extent, a structural and conceptual integrity of thought.⁶⁸ As such, this holistic approach allows us to better capture the normative assumptions that underpin each contributor's understanding so as to arrive at a more coherent account of Confucian natural law.

In terms of relevant contextual factors, the historical period in which Confucius found himself was a tumultuous time in Chinese history, marked by frequent warfare and general cultural turmoil. Born in the Eastern Zhou dynasty, Confucius was motivated by a strong desire to address the challenges of his day by revitalising a robust moral framework within his society. Importantly, Confucius believed that the only way of re-establishing justice and order in Chinese society was through the integration of ritual practices in the culture.⁶⁹ At this time, the average Chinese individual's belief system was an eclectic mix of animism, polytheism, Buddhism, Confucianism and Taoism, without any sense of consistency.⁷⁰

⁶⁵ Harold J Berman, *Law and Language: Effective Symbols of Community*, John Witte Jr (ed) (Cambridge University Press, rev ed, 2013) 70–7. Berman stresses the importance of considering language in terms of its cultural and historic foundations. This begins by acknowledging the ongoing synergy between linguistic signifiers and their normative referents.

⁶⁶ I will be using a similar interpretive method to examine John Calvin's theology with a few variations to account for his particular legal and philosophical education. See below Part IV.

⁶⁷ Ho (n 49) 164.

⁶⁸ Like the one adopted by Edward Slingerland, 'Virtue Ethics, The Analects, and the Problem of Commensurability' (2001) 29(1) *Journal of Religious Ethics* 97, 97.

⁶⁹ Latourette (n 53) 55.

⁷⁰ Ibid.

In this context, to restore civility to human social interactions, Confucius viewed as essential the inculcation of sound moral understanding in the common people, based on the customary rules of propriety.⁷¹ Latourette notes that ‘the maintenance of the proper ceremonies including those of a religious nature, and the exhibition by the ruling classes of a good moral example’, was at the fore of Confucius’ mind and his efforts were directed in pursuit of an ideal society. This ideal society was to be led by a group of model citizens, who represented paragons of self-cultivation. These paragons of virtue were referred to as ‘junzi gentlemen.’⁷²

This marked the emergence of classical Confucian doctrine, and a collection of canons were seen as the basis for a state-sanctioned religion.⁷³ Indeed, the term for the classical Canon of Confucianism — ‘*Ching*’ — translates to mean ‘the constant,’ ‘invariable standard,’ and ‘immutable law.’⁷⁴ A point of difference with Western religion, and Christianity in particular, is that Chinese religious life was marked by *this-worldliness* (unlike Christianity’s *other-worldly* focus on the heavenly kingdom). The purpose of religion in the East was flourishing in the present life. However, this by no means translated to a consequentialist way of thinking. Confucius may not have believed in a heavenward bound trajectory, but he extolled reverence for the ordinances of heaven (‘*Tiān*’).⁷⁵

A Confucian Moral Norms

As aforementioned, there are two fundamental tenets of natural law theory (as broadly defined): the first relates to our nature as humans – what norms are intrinsically valuable given the nature that we have (basic goods).⁷⁶ The second tenet relates to our obligation, motivation and capacity as moral agents to pursue these basic goods. Regarding the first aspect of natural law, then, we can ask: is there a core aspect of Confucian thought that reveals a way of thinking about law

⁷¹ Ibid.

⁷² Ibid 55.

⁷³ Phillip Ho Hwang, ‘What is Mencius’ Theory of Human Nature?’ (1979) 29(2) *Philosophy East and West* 201, 201.

⁷⁴ Hu Shih, ‘The Natural Law in the Chinese Tradition’ [1953] 5 *Natural Law Institute Proceedings* 119, 134 (‘Natural Law in the Chinese Tradition’).

⁷⁵ Eirik Lang Harris ‘The Nature of the Virtues in Light of the Early Confucian Tradition’ in Kam-por Yu, Julia Tao and Philip J Ivanhoe (eds), *Taking Confucian Ethics Seriously: Contemporary Theories and Applications* (State University of New York Press, 2010) 163, 165.

⁷⁶ Alasdair MacIntyre adds that our deontological responsibilities cannot be understood except in the context of socially constituted, cooperative practices that contain their own internal goods and standards of excellence. Written in Aristotle’s nomenclatures of causality, these virtues can then be acquired through habitual training and practice which enable individuals to perceive and then act in a manner toward their realisation in the world: Alasdair MacIntyre *After Virtue: A Study in Moral Theory* (Duckworth, 1981) 178.

that tests its validity by reference to an ultimate normative system, grounded in human nature or some other transcendent or cosmic standard?⁷⁷

To answer this question, we cannot deny that classical Confucian thought was heavily influenced by the pre-Qing influences of *Taoism* as most famously enunciated by Lao Tze.⁷⁸ The core principle of *Taoism* is the *Tao*, which translates to ‘the Way of Heaven,’ ‘the Path’ or ‘Nature.’ The basic notion of *Tao* entailed the attributes of self-evidence and intrinsic value as expressed by *wu wei*, which translates to ‘does nothing.’⁷⁹ The basic conception of the ‘Way of Heaven’ can therefore be understood as representing an intrinsic and abiding truth: ‘an example of the highest virtue is the water [because] it benefits all things and resists none.’⁸⁰ Here, the ‘Way of Heaven’ substantively resembles the notion of ‘the good’ in natural law thought.⁸¹ In other words, the *Tao* represents a virtue that is both intuitively accessible, inherently authoritative and timeless. This is a re-occurring concept (whether explicit or implied) within Confucian writings and one that furnish the ideas with a teleological trajectory.⁸²

Confucius articulates the importance of moral law as a foundation for formal justice. He writes:

If the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame. If they be led by virtue, and uniformity sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good.⁸³

Confucius’ reference to the people’s proclivity for ‘a sense of shame’ resonates with natural law tenets relating to a moral agent’s intuitive discernment of first principles.⁸⁴ It follows that an agent that has not acted in accordance with that

⁷⁷ Authors like Joseph Needham answer this question in the affirmative. See Joseph Needham, *Science and Civilisation in China: History of Scientific Thought* (Cambridge University Press, 1956) vol 2, 544 (‘*Science and Civilisation in China*’).

⁷⁸ Shih, ‘Natural Law in the Chinese Tradition’ (n 74) 123.

⁷⁹ Ibid 124.

⁸⁰ Ibid.

⁸¹ CS Lewis, *The Abolition of Man* (Harper Collins Publishers, 1944) ch 2.

⁸² Ibid.

⁸³ Confucius, *The Analects*, tr James Legge (Neeland Media, 2017) [2.3] (‘*The Analects*, tr Legge’). Also cited in Wejen Chang, *In Search of the Way: Legal Philosophy of the Classic Chinese Thinkers* (Edinburgh University Press, 2017) 34.

⁸⁴ John Calvin, *Institutes of the Christian Religion*, ed John T McNeill, tr Ford Lewis Battles and John T McNeill (Westminster Press, 1960) II.vii.10. Note here, Calvin published the first edition of the *Institutes* in 1539, and then went on to produce subsequent editions in 1544, 1545, 1550, 1553, and finally 1559. References to *the Institutes* throughout this article will appear in the following form: book.chapter.section number (eg I.i.1). Unless otherwise stated, citations in this article are taken from Battles’s 1960 translation, based on the 1559 edition: John Calvin, *Institutes of the Christian Religion*, tr Battles and McNeill. However, some citations will be drawn from other translations, depending on the meaning being highlighted.

intuitive knowledge would be affected by the ‘discomfort’ of a guilty conscience.⁸⁵ Another important point (which we shall revisit) relates to the tacit deference Confucius reserves for the separation of natural ‘*ziran fa*’ and positive law ‘*fa*’ (‘法’). In the above passage, this is clearly evinced by the distinction between ‘guided by orders’ and ‘guided by virtue.’⁸⁶

A core tenet of Classical Confucianism is the principle of *li*. This term has two written forms (though the modern pronunciation is the same). The erroneous conflation between these two terms by treating the word *li* as protean as opposed to one that engenders multiple referents detracts from a proper analysis of Confucian thought as an integrated system of ideals. To some degree, these two distinct forms of *li* (*li*¹ (‘禮’) and *li*² (‘義’)) serves to reinforce its continuity with a natural law paradigm.⁸⁷

The first form of *li* or *li*¹ refers to rules of propriety that have been elevated as sacred rituals in Confucianism. This is written in Chinese as ‘禮’ and holds that all individuals, social and political institutions must observe certain rules of proper conduct in line with the moral virtues. Thus, Confucius upheld reverence for enduring moral norms as best expressed through acts of observing the sacred customary rituals. He believed that this would, in turn, bring the society closer to its ideal form.

The second form of *li* or *li*² (‘義’ or ‘*the rule of li*’) may refer to an embodiment of the *Tao* as natural law that is binding on all humankind.⁸⁸ In this sense, *li*² represents, in the words of Mencius,

the highest expression of order and discrimination, the root of strength in the state, the Way by which the majestic sway of authority is created, and the focus of merit and fame ... If they [kings and dukes] proceed in accordance with the Way of ritual principles [*li*], then they will succeed; if they do not, then they will fail.

The idea here is that, unless the rule of *li* (*li*²) is observed in society as an objective norm, law as *fa* cannot be properly applied. At this juncture, there is a divergent view that rule of *li* represents a kind of Confucian traditionalism, representing human-made institutions and norms. Particularly for Xunzi, *li* has been understood to mean the Ways of ancient kings as recorded in the classics, which indicate the ‘rightness’ (*yi*) or ‘what is right.’⁸⁹ Xunzi further asserts that *li* is the

⁸⁵ Tom Ginsburg recently concluded that there exists in Confucianism ‘a king of higher law, constraining positive human law’: See Tom Ginsburg, ‘Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan’ 27(4) *Law & Social Inquiry* (2002) 763, 794.

⁸⁶ *The Analects* (n 83).

⁸⁷ Needham, *Science and Civilisation in China* (n 77) 544.

⁸⁸ Latourette (n 53).

⁸⁹ Masayuki Sato, *The Confucian Quest for Order: The Origin and Formation of the Political Thought of Xun Zi* (Brill, 2003) 345–7. Here, Sato observes that in the works of Xunzi, *li* and *yi* are used interchangeably to some degree and sometimes used as compound words (*liyi*).

invention of sage kings to bind the perverse will of men.⁹⁰ Both Confucius and Mencius' were captivated by the *fa* of the ancient kings (of Zhou), viewing them as synonymous with the rules of *li*, which, they held, ought to be admired.⁹¹ Indeed, so captivated was Confucius that he declared himself 'not a maker' but a 'transmitter' of this ancient wisdom.⁹²

Whether Confucianism departs from natural law fundamentals then turns on the question of whether the rule of *li* is descriptive, rather than normative in nature. The separation between *li* and *fa* in Confucian thought is not directly analogous to the dichotomy between natural and positive law in Western natural law. However, to the extent that normativity is concerned, the *fa* of the ancient Kings as embodied in the rule of *li* offers a teleological trajectory for law as social fact. Moreover, when we view *fa* and *li* within a broader framework of *Tao*, the way the canonical Confucian scholars are referring to *li* is not as a past social fact but as a present social norm.⁹³

Moreover, the categorisation of law — the distinction between the two derivatives of *li* in addition to *fa* — raises the possibility of a continuum in Confucian legal thought. If *li*¹ is the practical embodiment through ritualisation of fundamental ethical precepts, and *li*² is the ideal form that supplies the motivation for moral action, then unless the content of *fa* comports with the rule of *li* it could potentially be deemed invalid. *Li*², by being representational of 'broad moral principles' that give the *li* validity, is predicated on the belief that these 'principles are rooted in innate human feeling' as they embody what humans intuitively discern to be right.⁹⁴ Bodde goes so far as to argue that, in this context, the notion of *li* is itself grounded in human nature. In this way, both forms of *li* present an integrated framework for natural-law-type thinking that holds that the content of positive laws ('*fa*') must pass the test of moral validity (as set by two forms of '*li*') to attain some degree of legitimacy (if only in terms of functionality).

In slight contrast to the legitimating language used in Western natural law, it is more accurate to conceive of the *li*² as pivotal to the formation of *fa*. This is partly because the Confucian scholars did not endorse the promulgation of positive law but, rather, channelled their energies in the long-term project of cultivating people's morality through ritual. Various Confucian principles upheld as fundamental attest to this endeavour. As such, these principles ('moral virtues') play a role in moderating the content of *fa*. One of the most prominent moral virtues underpinning the sacred rituals was the principle of filial piety or

⁹⁰ John Knoblock, *Xunzi: A Translation and Study of the Complete Works* (Stanford University Press, 1994) vol 3, 151–2.

⁹¹ Yu-Lan Fung, *A Short History of Chinese Philosophy* (Macmillan, 1948) 108–11.

⁹² *The Analects*, tr Legge (n 83) [7.1].

⁹³ Herbert Fingarette, 'The Music of Humanity in the Conversations of Confucius' (1983) 10(4) *Journal of Chinese Philosophy* 298, 335.

⁹⁴ Derk Bodde, 'Basic Concepts of Chinese Law: The Genesis and the Evolution of Legal Thought in Traditional China' (1963) 107(5) *Proceedings of the American Philosophical Society* 375, 383.

the 'xiao.' Filial piety, as represented by the *xiao*, was more than respect between members of a family (ie between a son and his father, or children and their parents). Thus, filial piety is a representational normative attitude, best summed up by Yonglin in the following terms:

For any individual, parents constitute an all-important link in their cosmic existence and community. They are one's ancestors: deceased ancestors after their physical death, and 'living ancestors' while alive. To recompense parents for such cosmic grace, one must practice filial piety.⁹⁵

As such, filial piety is a moral norm that can be translated to a civic one, in the sense that it is epitomic of the way a subject ought to interact with their sovereign. The inherently reciprocal (relational) nature of filial piety means that the normative framework casts all relationships (including the one between sovereign and subject) in terms of moral obligations as opposed to rights. This core principle of classical Confucian thought reveals the groundwork for its relational ontology.

The articulation and formulation of other core moral goods are also indicative of this fundamental relational ontology upon which Confucianism is predicated.⁹⁶ What Mencius calls 'The Four Cardinal Virtues', which include: '*ren*' '仁' (meaning 'perfect virtue,' 'benevolence,' 'humaneness,' 'love'⁹⁷), the *li* '禮' (*li* as 'propriety'), the *yi* '義' ('righteousness,' 'rightness' (cf 'shame'), the *zhi* '智' ('wisdom' or 'the ability to discern between right and wrong') appear to constitute the normative foundations of Confucian thought.⁹⁸ The first moral norm, *ren*, features frequently in the *Analects*. However, Confucius does not offer a definitive meaning of the term.⁹⁹ The creation of the *junzi* (or the ideal gentleman) in Confucian theory points to an inbuilt *telos* in Confucian thought. Confucius himself did not ground the rule of *li* (*li*²) in either the cosmos or human nature explicitly,¹⁰⁰ He did, however, see the reference to a paragon of virtuous human being based on the pursuit and mastery of *ren*. The value of any practice, whether it is 'archery' or 'charioteering',¹⁰¹ only becomes meaningful to the extent that it is informed by the good of *ren*. As Confucius notes: 'A man who is not *ren* – what has he to do with music?'¹⁰²

⁹⁵ Jiang Yonglin, *The Mandate of Heaven and the Great Ming Code* (University of Washington Press, 2011) 156 (citations omitted).

⁹⁶ See MacIntyre (n 76) 178. Alasdair MacIntyre, an Aristotelean scholar, defines 'virtue' as 'an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods.' Though he argues against the commensurability of Aristotelian and Confucian ethics, there are structural similarities present here that go beyond the substance of the virtues themselves.

⁹⁷ Here, it seems to indicate *agape* love (unconditional love for humanity) and not the other forms.

⁹⁸ Knoblock (n 90) 150.

⁹⁹ Herbert Fingarette, *Confucius: The Secular as Sacred* (Harper & Row, 1972) 37–56.

¹⁰⁰ See, eg, Confucius, *The Analects*, tr Legge (n 83) [17.19].

¹⁰¹ Ibid 9.6, 9.7 and 13.4.

¹⁰² Ibid 3.3.

The *ren*, thus conceived, was seen as the overarching Confucian norm, and defined in terms of the perfection and harmony of lesser values.¹⁰³ On a holistic view, the *ren* person (*junzi*) is one who is an integrated or ‘complete person’ (‘*cheng-ren*’).¹⁰⁴ As such, *ren* acts as a unifying force for the other values by offering a teleological end on the one hand, and by introducing a sense of incremental progression towards this end on the other.¹⁰⁵

The etymology of the Chinese character *ren* attests to the fundamental connection between the self and others in Confucian theory. As Yuen points out,

[R]en ‘仁’ is written in two parts, one a figure of the human being, meaning oneself, and the other with two horizontal strokes, literally meaning two, and therefore implying relationships with other persons. Thus, a person is always ... situated in a social context, a self-in-relation.¹⁰⁶

This means that the *telos* towards most ‘perfect and complete’¹⁰⁷ is inherently contingent upon how harmoniously one lives in relationships with other persons. When probed by one of his disciples as to the ambit of *ren*, Confucius is recorded as having responded: it is ‘to love all men [‘爱人’, *ai-ren*].’¹⁰⁸ This understanding of the self and an individual’s moral potential within a relational framework also serves to explain the seamless transition that Confucian thought makes from the ‘moral values’ to the norms one ought to pursue in the public space.

In terms of fundamental human nature, Confucian scholars posited that the individual was endowed with an inner moral faculty from Heaven which is capable of self-perfection.¹⁰⁹ Mencius propounded a clearer and more comprehensive account of human nature than Confucius, in which he advanced an optimistic view of human capabilities.¹¹⁰ He believed that all humans are born of heaven’s decree (‘*ming*’) and that they are naturally endowed with the virtues of ‘humanity, dutifulness, conscientiousness, truthfulness to one’s word, and unending delight in what is good.’¹¹¹

¹⁰³ Ibid 13.19, 13.27, 14.4 and 17.6.

¹⁰⁴ Ibid 14.12.

¹⁰⁵ Ibid 4.2: ‘Merely set your heart sincerely upon *ren*, and you can do no wrong.’

¹⁰⁶ Mary Mee-Yin Yuen, *Solidarity and Reciprocity with Migrants in Asia: Catholic and Confucian Ethics in Dialogue* (Palgrave Macmillan, 1st ed, 2020) 160.

¹⁰⁷ Fingarette (n 93). For Confucius, humans are inherently social creatures: see Zhongjiang Wang, ‘The “Ren” of the Unity of the “Mind and Body” and Confucian Virtue Ethics — The Structure of Confucian Benevolence and the Guodian Manuscript’s Character of “Ren”’, in Zhongjiang Wang (ed), *Excavated Texts and a New Portrait of the Early Confucians*, tr Kevin Turner (Peter Lang Publishing, 2021) 30.

¹⁰⁸ Confucius, *The Analects*, tr Legge (n 83) 22. Here, he describes the lifelong process of becoming a sage: ‘At fifteen I set my heart on learning; at thirty I took my stand; at forty I came to be free from doubts; at fifty I understood the Decree of Heaven; at sixty my ear was attuned [sic]; at seventy I followed my heart’s desire without overstepping the line.’

¹⁰⁹ Ibid [7.22]: ‘Heaven produced the virtue that is in me’.

¹¹⁰ Cf Xunzi with a more pessimistic view: Knoblock (n 90) 151–2.

¹¹¹ Lee Dian Rainey, *Confucius and Confucianism: The Essentials* (Wiley, 2010) 95.

Going further than Confucius, Mencius also connected the *li* to human nature, as sanguinely conceived, and the cosmos or Heaven ('*Tiān*') as the proper ends for all human action.¹¹² From this anthropological position, Mencius derives the concept of '*ji zhi weiyi*' '己之威儀' ('universal human dignity').¹¹³ It follows that, according to Mencius, every person possesses the heavenly principle that assigns to them an 'awesome' human dignity,¹¹⁴ but this dignity bears the potential for further cultivation in pursuit of the complete realisation of an individual's moral character — the capacity for 'sagehood' (the embodiment of *zhi* wisdom).¹¹⁵ Here, the purview of Mencius' discussion about *yi*-righteousness is limited to the individual, '[whose] intellectual capacities are bestowed from without and possessed solely within.'¹¹⁶

Xunzi later revised and expounded Mencius' anthropology.¹¹⁷ And in spite of the variances in focus, neither account views the self in isolation.¹¹⁸ The self is not capable of being divorced from its relationship with others. Xunzi emphasised the intrinsically relational aspect of human nature by developing Mencius' internalisation of *yi* as moral rightness to *yi*^x, a form of moral duty that must be cultivated through forms of internal moral rituals: 'Cultivating one's will and intention, then one will take kings and dukes lightly.'¹¹⁹ The political implications of *yi* as the moral conscience¹²⁰ within every person is particularly pronounced when Xunzi places the emphasis on the agent's actions and influence in society in the light of the values of rightness, fairness, justice and influence, as well as making clear attempts to bridge the dual categories of *yi*-duty and *yi*-rightness in the promotion of an ideal form of government, which continually pursues a more harmonious socio-political order.¹²¹

¹¹² Hwang (n 73).

¹¹³ Hu Shih, *English Writings of Hu Shih: Chinese Philosophy and Intellectual History*, Chih-P'ing Chou (ed) (China Academic Library, 2013) vol 2, 211 ('*English Writings of Hu Shih*'). Mencius, *Book of Mencius*, tr James Legge (CreateSpace, 2016) 4B26.

¹¹⁴ Confucius, *The Analects*, tr Legge (n 83) [20.22]. See also An'xian Luo, 'Human Dignity in Traditional Chinese Confucianism' in Marcus Düwell et al (eds), *The Cambridge Handbook of Human Dignity* (Cambridge University Press, 2015) 177.

¹¹⁵ Shih *English Writings of Hu Shih* (n 113) 211. Mencius, *Book of Mencius*, tr James Legge (CreateSpace, 2016) 4B26.

¹¹⁶ Yuen (n 106) 160.

¹¹⁷ Xunzi wrote, 'In antiquity the sage kings took man's nature to be evil, to be inclined to prejudice and prone to error, to be perverse and rebellious, and not be upright or orderly. For this reason, they invented ritual principles and precepts of moral duty': See Knoblock (n 90) 151–2.

¹¹⁸ The outcome of Mencius' more sanguine views of nature may translate to a weaker version of a theory of moral law as it reduces the gap between social practice and the normative ends.

¹¹⁹ Xianqian Wang, *Collected Exegeses on the Xunzi* (Zhonghua Shuju, 1988) [1.27]–[1.28] ('*Collected Exegeses on the Xunzi*').

¹²⁰ Ibid [2.56].

¹²¹ Ibid [11.295].

B *Confucian Civic Norms*

I now turn to consider what is referred to as the ‘civic norms’ in classical Confucian thought, when viewed as conceptual political derivatives of its moral account. The civic norms are distinguishable from moral norms in that they are a set of attributes, primarily concerned with the creation and sustenance of a political community, and therefore have a connection once removed from the cultivation of human ‘excellence.’¹²² As such, though civic norms are seen as instrumental to social harmony and ritual order, their cultivation does not lead to ‘sage[hood].’¹²³ Xunzi, in particular, noted that governance began with the ruler’s moral self-cultivation.¹²⁴ He noted that sage-kingship (not unlike Plato’s account of the philosopher king)¹²⁵ represents the ideal ends for governance or the Kingly Way.¹²⁶ Confucius’ endorsement of the use of the rule of *li* to ‘correct’ the ruler can be seen in his redefining of the term government from *zheng* ‘政’ to *zheng* ‘正’.¹²⁷

Thus, though *zheng* ‘正’ does not easily translate to a single English word, it nevertheless encapsulates a sense of ‘correcting in goodness’ or, as it is more popularly translated, ‘[moral] rectification’ of the ruler and the people.¹²⁸ In the light of its moral connotations, we can consider the Confucian method of government that Confucius derives from *zheng* and coins as ‘*zheng-ming*.’ The *Analects* state that ‘social order often stems from a failure to call things by their proper names.’¹²⁹ Viewed in terms of the political and moral implications of this concept, *zheng-ming* does not literally refer to the need for nomenclatural accuracy but, rather, the importance of ensuring that the ‘names’ (connoting the social roles and corresponding formal titles) correctly comport with the values proper to these roles.

In other words, far from requiring definitional accuracy, ‘the rectification of names’ is a method for recognising that the standards for action (based on the formal definition of duties) ought to correspond to the real actions of the persons discharging those political functions.¹³⁰ As such, the *zheng-ming* method of government requires that each person act in a manner that is consistent with the

¹²² Tan (n 23) 52.

¹²³ Confucius, *The Analects*, tr Legge (n 83) [6.28].

¹²⁴ Wang, *Collected Exegeses on the Xunzi* (n 119) [14:5]; [9:18] and [12:4].

¹²⁵ Plato, *Republic*, tr Robin Waterfield (Oxford University Press, 2008) bk v.

¹²⁶ See Xunzi [10:15] in Kurtis Hagen, *The Philosophy of Xunzi: A Reconstruction* (Open Court, 2007) 32–35.

¹²⁷ Confucius, *The Analects*, tr Legge (n 83) [13.3].

¹²⁸ *Ibid.*

¹²⁹ Loubna El Amine, *Classical Confucian Political Thought: A New Interpretation* (Princeton University Press, 2015) 31.

¹³⁰ Zhongying Cheng, *New Dimensions of Confucian and Neo-Confucian Philosophy* (State University of New York Press, 1991) 222.

standards their roles require: the ruler as ruler, the subject as subject, the father as father, and the son as son.¹³¹

Another fundamental civic norm that follows from the Confucian idea that there is a proper relationship between rulers and their subjects is *minben* ('民本'), which translates to mean 'the people as the root or basis.' This civic principle is found in the *Shu Jing* [or *Shu King*], which states:

The people should be cherished and should not be debased. For the people are the country's foundation, and when the foundation is firm set the country is peacefully disposed.¹³²

The propriety of every relationship based on the rule of *li* presupposes several things. The first is that the government's implementation of power is teleologically limited to what is proper according to the content of *li*.¹³³ The second is that the legitimacy of power through the 'mandate of heaven' is based on the common good.¹³⁴ On this basis, Mencius concludes that the root of legitimate government lies not in repression but in education towards virtue. Sage Kings Yao and Shun were admired by the Confucian sages because their rule led their subjects to 'become possessors of themselves' ('使自得之').¹³⁵ As such, the 'mandate of heaven' ('*tian-ming*') is embodied in the people and the monarch is obliged to govern his kingdom in accordance with the principle of love for the people.¹³⁶ Interestingly, the entire political framework is cast in terms of natural duties. For instance, neither the principle of *minben* nor *zheng-ming* invoke rights either for the ruler or the ruled. Rather, the *telos* of governance (and being governed) is cast in terms of one's requirement to uphold the standards that are proper to their defined roles within the broader framework of moral norms.

IV CALVINIAN CONSTITUTIONAL THEOLOGY

This Part now turns to examine our second site for normative analysis, namely John Calvin's theology, with the aim of appreciating the natural law assumptions underpinning his account of constitutionalism.¹³⁷ While Calvin's theory of

¹³¹ Warren E Steinkraus, 'Socrates, Confucius, and the Rectification of Names' (1980) 30(2) *Philosophy East and West* (1980) 261.

¹³² James Legge, *The Shu King: Or the Chinese Historical Classic*, (Clarendon Press, 2016) 65 ('*The Shu King*').

¹³³ Liyi '禮義' represents ritual duty, featuring in the *Spring and Autumn Annals*. See Jinhua Jia, 'From Ritual Culture to the Classical Confucian Conception of Yi' (2021) 20(4) *Dao: A Journal of Comparative Philosophy* 531.

¹³⁴ Mencius, *Book of Mencius*, tr Robert Eno (Indiana University, 2016) 2A2.6 ('*Book of Mencius*, tr Eno').

¹³⁵ Legge, *The Shu King* (n 132).

¹³⁶ Shih, 'Natural Law in the Chinese Tradition' (n 74) 123.

¹³⁷ Karl Holl, *The Cultural Significance of the Reformation*, tr Karl Hertz, Barbara Hertz and John H Lichtblau (Meridian Books, 1959) 65–6.

government is well known,¹³⁸ particularly for its role in the Reformation's fight for personal freedoms,¹³⁹ what receives less attention is his duty-based paradigm for civic life. Indeed, at the time of writing, the systemisation of theological doctrine was of critical concern to the Reformers. This urgency culminated in Calvin's seminal work, *The Institutes of the Christian Religion*, of which the most prominent exposition 'on Civil Government' is found in Book IV, Chapter xx.¹⁴⁰ In contrast with his political theory, Calvin's account of natural law is noticeably less systemised. I previously noted that this reticence may *not* be due to a lack of importance but owing to its foundational nature.¹⁴¹

At the outset, it serves to reiterate the historical preponderance of contradictory and uncompromising interpretations of Calvin's theology.¹⁴² Considering this, it is particularly important to (briefly) outline the method of interpretation utilised in comprehending his works. Calvin lived during a time of major social upheaval and the forthright nature of some of his statements is best understood in terms of this climate. Calvin also uses a distinct polemical method of oscillating between a binary set of perspectives in his discussions on natural law — no doubt influenced by his extensive legal and philosophical education.¹⁴³ This oscillation between two points of view enables Calvin to draw a more nuanced meaning of the object for study, often holding in tension apparently contradictory positions. Importantly, Calvin's political and philosophical perspectives cannot be divorced from his theological framework or exegetical purpose. Therefore, a proper understanding of Calvin's meaning ultimately requires an appreciation of the dialectical, relational, and soteriological aspects of the overall purpose of the author.

This Part will first examine the core tenets of Calvin's natural law propositions by applying the dialectical method of interpretation. The second half of the Part will consider the implications of his natural law for his duty-based paradigm of political theory.

¹³⁸ Philip Benedict, *Christ's Churches Purely Reformed: A Social History of Calvinism* (Yale University Press, 2002); Richard Muller, *Calvin and the Reformed Tradition: On the Work of Christ and the Order of Salvation* (Baker Academic, 2012) 288; John Witte Jr, *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge University Press 2008); John Witte Jr, Joel A Nichols and Richard W Garnett, *Religion and the American Constitutional Experiment* (Oxford University Press, 5th ed, 2022).

¹³⁹ John Witte Jr, *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge University Press, 2008) 77.

¹⁴⁰ Calvin, *Institutes of the Christian Religion* (n 84) IV.xx.3.

¹⁴¹ I cover John Calvin's Natural Law Theory oriented on his account of 'conscience' at lengths in Lee, 'The Spark That Still Shines' (n 44).

¹⁴² Robinson chooses to refer to 'John Calvin' as '*Jean Cauvin*', so extensive was the impact of the caricatures. See Marilynne Robinson, *The Death of Adam: Essays on Modern Thought* (Houghton Mifflin 1998) 174–5.

¹⁴³ Susan E Schreiner, *The Theater of His Glory: Nature and the Natural Order in the Thought of John Calvin* (Baker Books, 1991) ch 3.

A Calvinian Moral Norms

Although never the focal point of his theology, Calvin's texts, especially his references to conscience, strongly intimate a basis for natural law theory.¹⁴⁴ To elucidate core normative assumptions, we can first examine the formulation of 'the good' according to Calvin, which is comprised of two components: the ultimate sovereignty of God and the unwavering contemplation of His divine attributes. Calvin, in an intellectual lineage that can be traced all the way back to Augustine, premises his account of natural law on the self-evident goodness of God's character, which brings cohesion to all forms of wisdom.¹⁴⁵ Calvin views God as the 'transcendent good,' the first principle from which every other value is derived.¹⁴⁶ This conceptualisation supports the basic natural law proposition that all other positive laws *ought* to necessarily derive from this moral source.

Positing God as the starting point for natural law means that every objective norm derives from God and asserts the sovereignty of God's will. Calvin writes, '[God's] will is, and rightly ought to be, the cause of all things that are. For if it has any cause, something must precede it [and] this is unlawful to imagine.'¹⁴⁷ Here, like Aquinas, Calvin elevates the eternal character of God. A sovereign force that transcends the limits of time and space and has no beginning or end — the 'I Am.'¹⁴⁸ The significance of this for an account of natural law is that it posits an external standard by which all humans are held accountable to norms of objective goodness.

This goodness, in turn, finds unity in God's divine attributes. This unity comprises the second component of Calvin's first principles. On this point, Thomas Aquinas had borrowed Aristotle's scheme of causality to assert that everything was created by God with an in-built *telos*.¹⁴⁹ That is, what is good for the thing determines what it *ought* to pursue. The assumption inherent in this idea is that the subject should act in ways that are proper to God's will for it. How is this revealed to us? Calvin argues that God's attributes of *logos* is implanted in us through our being created in the divine image, a doctrine referred to as the *Imago Dei*.¹⁵⁰ It follows that reason is God-given and divinely inspired. As such, 'the proper good' is consistently determined by reference to God's divine will and divine character.¹⁵¹

¹⁴⁴ Calvin, *Institutes of the Christian Religion* (n 84) IV.x.3, I.xv.8.

¹⁴⁵ William F Keesecker, 'The Law in John Calvin's Ethics and Christian Ethics' in Peter De Klerk (ed), *Calvin and Christian Ethics: Papers and Responses Presented at the Fifth Colloquium on Calvin and Calvin Studies* (Calvin Study Society, 1987) 19–20.

¹⁴⁶ Calvin, *Institutes of the Christian Religion* (n 84) I.xvii.2.

¹⁴⁷ Ibid III.xiv.21.

¹⁴⁸ John Calvin, *Commentary on Exodus 3:14*, tr William Pringle (Calvin Translation Society 2005).

¹⁴⁹ Hittinger, *Critique* (n 45) 4.

¹⁵⁰ Calvin, *Institutes of the Christian Religion* (n 84) I.xv.4.

¹⁵¹ In a previous work, I refer to this as the 'unity principle': Lee, 'Calvinist Natural Law' (n 6) 22.

Like two sides of the same coin, Calvin's emphasis on the supremacy of God in the conceptualising of first principles also comes with a realistic understanding of the limitations of human nature. For Calvin, nature does not possess ontological independence but is contingent upon God's sovereign power and benevolence. The reason natural law cannot be derived from human standards, but necessarily measured according to God's divine nature, stems from Calvin's anthropology that humans are 'totally depraved.'¹⁵² A note of caution here: traditionally, numerous misinterpretations of Calvin's texts has meant that his doctrine of 'total depravity' has been (mis)understood as removing all human potential for discerning and pursuing the good, leaving no basis for a viable natural law theory.¹⁵³

A realistic assessment of the flawed (but not hopeless) state of human nature was essential to Calvin's natural law account. According to the doctrine of the Fall of Humanity, God originally created humans to be good, orderly and capable of perfect reasoning. However, after the Fall, nature was extensively distorted and human capacities for reason were infected with fallibility. To paraphrase the words of Calvin, even creation could not escape the disordering effects of sin, and while reason remains common to all people, it is corrupted in all respects so that even correct judgements are vitiated by a polluted will.¹⁵⁴ In the context of extensive human fallibility, Calvin sees the function of natural law as being God's bridle for humankind to curb its descent into bestiality.¹⁵⁵ Calvin's pessimistic but not fatalistic view of human nature holds particular significance for the explanatory power of his natural law theory.

So far, we see that Calvin conceives of the objective good and human fallibility in a way that preserves the relational dynamic between the moral agent and the good. This interconnectedness between human reason and knowledge of God is foundational to his anthropology.¹⁵⁶ The 'vertical' connection extant between human nature and God's transcendent character is evinced by the opening statement of the 1559 edition of the *Institutes*, where Calvin states that 'the entire sum of our wisdom, of that which deserves to be called true and certain ... consists of ... the knowledge of God, and of ourselves.'¹⁵⁷

It is worth emphasising that in this relational dynamic, far from holding these two types of knowledge (of God and of ourselves) in equal favour, Calvin

¹⁵² For more on this point, see Stephen J Grabill, *Rediscovering the Natural Law within Reformed Theological Ethics* (William B Eerdmans Publishing, 2006) 20–3.

¹⁵³ *Ibid* 21.

¹⁵⁴ Calvin, *Institutes of the Christian Religion* (n 84) II.xv.4.

¹⁵⁵ Calvin, *Institutes of the Christian Religion* (n 84) II.iii.3.

¹⁵⁶ As Torrance notes, true knowledge of human nature is reflexive of divine revelation through God's Word 'about the creative action of His love'. TF Torrance, *Calvin's Doctrine of Man* (Lutterworth Press, 1949) 14.

¹⁵⁷ John Calvin, *Institutes of the Christian Religion*, tr Henry Beveridge (Hendrickson Publishers 2008) I.i.1.

places the pre-eminence and priority on the knowledge of God.¹⁵⁸ Such a fundamental hierarchy between God and humans makes clear Calvin's intention to conceptualise human moral capacity as a divine endowment.¹⁵⁹ Moreover, this relational dynamic is not only evinced by the substance but also reinforced by the structure of the *Institutes*.¹⁶⁰ This intentional structure therefore offers a clearer picture of the teleology present in Calvin's account of natural law, and the distance between descriptive and normative accounts wherein human agents ought to pursue the good. Thus, the asymmetry between the sovereign good and flawed human nature casts Calvin's entire moral theory in terms of the duties we owe. In this context, the only appropriate response for any moral agent would be humility, in an attitude of reverence toward the good.

The key locus between human nature and the good lies in the doctrine of *Imago Dei*. This doctrine is significant as it presupposes the relationship between God and His human creation. As Gerrish aptly points out, 'Calvin does not seek to define the image solely by what man possesses in his nature, but also by the manner in which he orients himself [sic] to God.' In the original condition, humans, in their innocence, were able to see God's perfections and to enjoy a filial communion with the Eternal while on earth. Calvin identifies the *Imago* in terms of a continuum with an ultimately eternal and heavenward-bound trajectory. In other words, his doctrine of *Imago* necessarily encapsulates a teleology (or eschatology).

It follows that, in relation to civil life, Calvin maintains that apprehension of moral knowledge is ineradicable after the Fall. To Calvin, the limits of humans' truth-discerning capacity vary significantly with the object for examination. In respect of the heavenly things, the symptom of degenerate human reason is erroneous reasoning but the main basis for reason's futility is impiety. Impiety is distinguishable from isolated cases of human error. Its immanence in human nature invariably 'diverts reason's power of judgement from its divinely appointed end.'¹⁶¹ In contrast, the shift in attitude is notably stark when Calvin speaks about human nature in respect of earthly matters.¹⁶² He writes, the 'human mind, however much fallen and perverted from its original integrity, is still adorned and invested with admirable gifts from its Creator.'¹⁶³

Therefore, in respect of civic affairs on earth, Calvin's account of human reason posits a total perversion of the *Imago Dei* but not its total destruction. Indeed, Calvin openly acclaims human reason's ability to operate in the earthly sphere.

¹⁵⁸ Ibid I.xii.21.

¹⁵⁹ Lee, 'The Spark That Still Shines' (n 44) 622.

¹⁶⁰ Ibid.

¹⁶¹ Calvin, *Institutes of the Christian Religion*, tr Battles and McNeill (n 84) II.ii.25.

¹⁶² Ibid II.ii.13, II.ii.17

¹⁶³ Ibid II.ii.15

The dialectic between the heavenly and earthly perspectives is what permits Calvin to argue both for the total inability of human reason to attain piety in the heavenly kingdom but also maintain humankind's inexcusability before God. The fact that 'some sparks still shine' leaves no excuse for 'men [sic] engaging in 'ignorance' in earthly affairs.'¹⁶⁴ Calvin states:

[I]f we think that any pretext for thoughtlessness, error or ignorance will serve as an excuse, we are greatly deceived; for no excuse can be admitted, since experience teaches us that there is naturally implanted in man some knowledge of God, and that these truths are engraved (*insculptum*): that God governs our life, that he alone can remove us by death, that it is his proper duty to aid and help.¹⁶⁵

Such a dialectical account in the context of the spiritual and earthly kingdoms, not only establishes natural human awareness of their moral duties, but also generates the gravitational pull which motivates them towards as Calvin puts it, 'rule for the right conduct of life' in respect of civic matters.¹⁶⁶

B *Calvinian Civic Norms*

In terms of an overarching framework, Calvin's discussion of civil government hinges on a deeper presuppositional question: what is the relationship between ideal and actual power? This query consistently underscores Calvin's discussions on government. Throughout Book IV, chapter xx, Calvin clearly means to distinguish between two notions: namely, *potestas* and *auctoritas*.¹⁶⁷ The first term, *potestas* refers to a raw, descriptive power or what we can refer to as *de facto authority*. Power in this sense describes the actual dynamics characterising the operation of political institutions or the influence parties have over the affairs or personhood of another. The thing that is absent from this first conception of authority is the lack of an appeal to an external standard of legitimacy.

In contrast to *potestas*, the term *auctoritas* not only alludes to descriptive influence of one entity over another, but also whether that influence has been legitimated. Calvin wished to fill the vacant 'secular' concept of power with a legitimate authority based on its conformity to his normative framework.¹⁶⁸ Accordingly, Calvin commences his discussion on civil government with the assertion that it is a manifestation of God's divine providence. By attributing civil

¹⁶⁴ Ibid II.ii.12

¹⁶⁵ Ibid I.iii.1.

¹⁶⁶ Ibid II.ii.22.

¹⁶⁷ Calvin, *Institutes of the Christian Religion*, tr Battles and McNeill (n 84) IV.xx.4.

¹⁶⁸ For example, as Carl Schmitt observes, a predicate to political sovereignty is the transcendence of God. Schmitt was especially fond of invoking Hobbes' famous maxim '*auctoritas non veritas facit legem*' ('authority, not truth, makes the law'): Carl Schmitt, *The Leviathan in the State Theory of Hobbes: Meaning and Failure of a Political Symbol* (University of Chicago Press, 1938) 44. See also Benjamin A Schupmann, *Carl Schmitt's State and Constitutional Theory: A Critical Analysis* (Oxford University Press, 2018) 31.

government to God's providence in this way, Calvin holds the idea of God's sovereign rule over the universe at the core of his political theory.¹⁶⁹

Calvin calls his account of law 'the perpetual rule of love.' This rule is the final measure and destination of all laws.¹⁷⁰ Applied to politics, the rule of love is associated with one (minimal) 'purpose' – as 'the limit of all laws.'¹⁷¹ Calvin identifies the rule of love with 'divine law,' 'moral law,' and 'that conscience which God has engraved upon the minds of men.'¹⁷² These concepts are viewed as related and overlapping (though, as aforementioned, not synonymous). He derives the substance of the rule of love from what has come to be known as the 'Greatest Commandment', '[t]he first part of the law simply commands us to worship God with pure faith and piety; the other to embrace [fellow humans] with sincere affection.'¹⁷³ Thus, the twofold requirement is the standard by which all other positive laws are to be judged.

Pursuant to this scheme, the spoken (positive) law only bears authority insofar as the magistrate's utterance remains consistent with the spirit of the law (natural law).¹⁷⁴ Calvin identifies the true content of law with the divine mind, but then makes a connection between the divine mind and the 'reason inherent in nature.'¹⁷⁵ Calvin therefore appears to introduce a continuum to the laws themselves. This continuum between divine, moral, and natural laws allows Calvin to emphasise God's superintendence of civil government in the context of human fallibility. The two realms do not occupy a disparate space for Calvin but remain part of an integral whole — within the overall realm of providence.

In terms of political theory, a government that is established on the perpetual rule of love 'provides that a public manifestation of religion may exist among Christians, and that humanity may be maintained among men [sic].'¹⁷⁶ The conceptualisation of moral law in terms of a nexus between us, an eternal God, and our neighbours on earth, allows Calvin's account to encapsulate laws governing both Christians and non-Christians alike. By viewing the law as unitary within a continuum and not in disparate parts, Calvin extracts evidence of a universal, collective humanity.

The orderly will of God is identifiable through natural law (via the conscience), finds expression in the Decalogue, and attains fullness in the gospel. Calvin's view of natural law as a necessary but inferior aspect of law is made evident in the way he writes about the relationship between the divine law and the magistrate, made possible through conscience. Not only is the magistrate a

¹⁶⁹ Calvin, *Institutes of the Christian Religion*, tr Battles and McNeill (n 84) I.xvi.2.

¹⁷⁰ Ibid IV.x.15.

¹⁷¹ Ibid IV.x.3.

¹⁷² Ibid IV.x.3.

¹⁷³ Ibid IV.x.15.

¹⁷⁴ Ibid IV.xx.14.

¹⁷⁵ Ibid II.vii.

¹⁷⁶ Ibid IV.x.3.

guardian of peace and justice according to God's providence, but they are also bound by mutual servitude to the individuals governed. Pursuant to the perpetual rule of love, individuals and governors alike are bound by mutual servitude and are accountable to a transcendent point of reference.

V SPHERES-OF-INFLUENCE SCHEME

In this final Part, I examine the constitutional implications that flow from the core tenets of Confucian and Calvinian normative positions. As discussed earlier, common criticisms of both Calvin's theology and Confucianism (mistaken for its orthodox offshoot) are that they align with an authoritarian form of government. Calvin's theory of government has often been charged with either attempting to unite the church with the state in a theocratic political scheme, or completely separating the two in support of a libertarian state.¹⁷⁷ Confucianism, on the other hand, is viewed as a derivative of legalist orthodoxy.¹⁷⁸ A product of its time (some of the most turbulent in Chinese history), the legalist strategy was constructed on a need's basis by placing the primacy on political stability through ideological homogeny and robust hegemony.¹⁷⁹

These common positions frequently fail to appreciate the incredible sophistication of these normative traditions and their nuanced approach to fundamental questions, which include, *inter alia*: what are the basic moral values and their connection to human nature? How does the metaphysical attributes of human nature affect the development and maintenance of social and political relationships? Is there an ongoing synergetic engagement between the self and the others within a broader teleological framework? And, ultimately, how would answers to such fundamental questions inform a model of government? I will briefly consider the scheme that emerges from the normative assumptions of both before turning to draw out some key continuities and differences.

A *The Confucian Duty-Based Framework*

Given its historic diversity and complexity (through hybridisation with many indigenous customary laws), I concluded that the classical Canons of Confucianism can supply us with defined parameters for exploration of some of the key normative principles of Confucianism. When assessed on these writings, Confucian moral philosophy points strongly to a relational ontology founded upon the core values like filial piety (*xiao*) as tempered by love and empathy for the other *ren*. In the next section, I examine whether this relational ontology, far

¹⁷⁷ Rooney (n 7).

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

from aligning Confucianism with hegemonic social hierarchies or a shallow liberal contract theory, most plausibly lends support to a duty-based constitutional framework. A core Confucian maxim — ‘修身齊家 治國平天下’ — translates to mean: ‘Cultivate oneself, put one’s family in order, govern the state, and harmonise the world.’ This shows that Confucian moral theory’s emphasis on self-cultivation (to become a sage (‘*聖*’) whether citizen or ruler) lends support to the claim that the normative basis for so-called Confucian constitutional theory is premised on a primacy of one’s duty to others.

1 *Vertical Relationships*

The ‘spheres of influence’ scheme is evident in Confucian philosophy’s emphasis on self-cultivation. The first principles of Confucianism relate to the importance of self-cultivation in accordance with the rules of ritual propriety (*li*, in both senses of the term). The rule of *li* places emphasis on the other moral norms, particularly ritual-duty premised on rightness (*yi*). In every formulation of basic goods, perhaps best exemplified in the distinction between *li*¹ and *li*², the dichotomy between the actual and the normative is pronounced. Though of less prominence in formal texts, but latent in the normative background, is the concept of the Way of Heaven (*Tao*) paving the possibility of an overarching framework of normative teleology. This assumed teleology thus gives an overarching sense of moral duty to agents in the pursuit of basic values.

Importantly informing this overarching duty-based framework is the norm of filial piety (*xiao*), which holds respectful relationships as a matter of primacy. Unlike Calvin’s continuum of norms, which realises it’s full breadth by spanning both earthly and heavenly dimensions, Confucianism is grounded in the sublunary world. However, this does not necessarily detract from the possibility of an aspirational trajectory for moral action. Indeed, further to the emphasis on *xiao*, moral norms substantively derive from what is considered by the classical Confucian scholars as classical traditions. In this context, the kings of old are not emulated because they held positions of extensive political authority; rather, they are held up as paragons of virtue because their conducts align with the ‘Kingly Way.’¹⁸⁰ In this way, tradition forms the metaphysical foundation for the normative principles everyone *ought to* follow. For example, in the words of Confucius: ‘Ever think of your ancestor, [c]ultivating your virtue.’¹⁸¹

The vertical trajectory stems from an abstract concept of ‘ancestor.’ It is pertinent to note that, on an overly simplistic meaning, this elevates *filial piety* as the overarching ideal in Confucian moral philosophy. However, if viewed as an abstract principle, the idea of ancestor does not literally translate to ancestor worship, but rather a reference point for ultimate moral value.

¹⁸⁰ See Xunzi [10:15] in Hagen, *The Philosophy of Xunzi* (n 126) 32–35.

¹⁸¹ Xiaojing, *The Classic of Filial Piety*, tr James Legge (FV editions, 2020) 5.

Thus, the polarity and intimate connection between self-cultivation and the ordering of society characterises the Confucian account of human nature. Confucian anthropology holds that each person possesses the ‘Heavenly Principle’ that constituted the structure of the universe (‘太极’) and the associated capacity to become a sage (‘圣’).¹⁸² Human nature is thus endowed with universal dignity that must continue to be cultivated to become a sage or ‘superior man [sic]’¹⁸³ (one who embodies the fundamental ideals). Here, we see some normative seeds for finding universal human equality (reminiscent of the *Imago Dei* doctrine that all humans are created in the divine image and therefore have intrinsic worth).

However, here there is an importance placed on the concept of role-duties that derive from such a staunch commitment to filial piety. The role-duties¹⁸⁴ hold that actions must accord with the ethical norms, which vary with a person’s role and station within a society: kinship groups, lord or subject, father or son, elder or younger and so forth. A failure to uphold these role-duties risks disrupting social harmony.¹⁸⁵ Part and parcel with one’s private endeavours for moral self-cultivation was an awareness of the normative requirements of their position and role in society.

In the cultivation of one’s moral character — characterised both by traditional and social demands — the norm of *ren*, or ‘humaneness’ or ‘love,’ is both defining and unifying. Humans are distinguishable from beasts due to their ability to have empathy for others through *ren*. This Confucian ideal emphasises the importance of reciprocity and places the priority on obligations rather than individual rights. Contemporary rights’ rhetoric in Western polities is likely to be far less compelling in a state that normatively insists on the fulfilment of moral obligations both in substance and structural framework.¹⁸⁶ It follows that *ren* cannot be divorced from the *airen*.¹⁸⁷ This offers a unified principle of duty that extends outwards. The reciprocal nature of filial piety and *ren* therefore has the effect of casting all human relationships in terms of obligations as opposed to rights.¹⁸⁸

¹⁸² Mencius, *Book of Mencius*, tr James Legge (CreateSpace, 2016) 3A4 (‘Book of Mencius, tr Legge’).

¹⁸³ Benjamin Schwartz, ‘Some Polarities in Confucian Thought,’ in Arthur F Wright (ed), *Confucianism and Chinese Civilisation* (Stanford University Press, 1964) 7.

¹⁸⁴ Mencius, *Book of Mencius*, tr Legge (n 182) 5B7.

¹⁸⁵ Confucius, *The Analects*, tr Legge (n 83) [16.10].

¹⁸⁶ Several other scholars have commended the plausibility of this conclusion: WC Durham Jr and Brett G Scharffs, *Law and Religion: National, International and Comparative Perspectives* (Aspen Publishing, 2nd ed, 2019) 83–4; Qianfan Zhang, *Human Dignity in Classical Chinese Philosophy: Confucianism, Mohism, and Daoism* (Palgrave Macmillan, 2016) 45–99.

¹⁸⁷ As aforementioned, ‘empathy for all.’

¹⁸⁸ Yongping Liu, *Origins of Chinese Law: Penal and Administrative Law in Its Early Development* (Oxford University Press, 1998) 96–7.

2 *Horizontal Relationships*

Confucianism holds that society is natural to human beings. The framework of *xiao* means that a more ‘complete’ person, or one who is known as *junzi* or gentleman, is one that recognises his social and political responsibilities in addition to the moral dictates of his conscience: ‘It commences with the service of parents; it proceeds to the service of the ruler; it is completed by the establishment of character’¹⁸⁹

Such statements lend support for claim that Confucianism facilitates a peaceful transition between the past and present, the private and public spheres. The respect one owes to parent or grandparent in their immediate spheres of horizontal influence extends horizontally outwards to benefit all society. The Confucian maxim, ‘修身齊家 治國平天下’ begets a framework whereby influence originates with cultivation of one’s own character and extend outward in concentric circles which also presumes that¹⁹⁰ familial ties and social relationships form the minimal foundation for human existence.¹⁹¹ Here, Confucianism recognises that, not only are relationships with other humans a pre-condition to our existence (born of our parents), but we are born with a desire for certain things that ensure our continued survival.

As such, the respect a person has for their parents and grandparents (immediate family) could extend horizontally outward to benefit all society.¹⁹² This love is grounded in *airen* or empathy for all and Confucius identifies this as the one quality that distinguishes humans from other animals. Confucius presupposes that all humans are born with the innate capacity for empathy.¹⁹³ The presence of *airen* gives rise to a moral command to act in ways that benefit the family, the community and the state.

What makes the good life? Conforming ones conduct to the rule of *li* is the Confucian standard of a good life. However, regarding the question of what constitutes the best life, Confucianism places emphasis on the collective. As the state is viewed as essential to human life, so our relations of piety must extend naturally to the government. (These positions of political office were viewed as often including a *yi*-duty to educate people on human relations.) A best life is thus defined as one which dedicates itself to the administration of government. This Confucius notes, for example:

¹⁸⁹ Confucius, *The Classic of Filial Piety*, tr, James Legge (FV editions, 2020) ‘The Scope and Meaning of the Treatise’ [12].

¹⁹⁰ Mencius, *Book of Mencius*, tr James Legge (n 182) 4A5.

¹⁹¹ Jean Bethke Elshtain, *Public Man, Private Woman: Women in Social and Political Thought* (Princeton University Press, 2nd ed, 1981) 326–7.

¹⁹² Mencius, *Book of Mencius*, tr Legge (n 182) 4A27.

¹⁹³ Confucius, *The Analects*, tr Legge (n 83) [15.23]: ‘is not [reciprocity] ... such a word? What you do not want done to yourself, do not do to others’.

To refuse office is to fail to carry out one's *yi*-duty. If the norms between the elder and younger cannot be abandoned, how could one think of abandoning *yi*-duties between ruler and subject? This is to throw the most important human relations into turmoil in one's efforts to remain personally untarnished.¹⁹⁴

Such a dichotomy, based on value principles, means that positive laws to some extent must be shaped by the moral law. By extension, institutions and law can potentially be criticised for falling short of the normative values. For example, Mencius argues that there is no difference between killing a man with a sword and doing it with government.¹⁹⁵ In fact, records show that Mencius went so far as to support the legitimate depositions of governments that failed to pursue the common good in advancement of selfish ends.¹⁹⁶

B John Calvin's Duty-Based Framework

I now turn to the constitutional framework that emerges from the core tenets of Calvin's natural law theory. The opening statement of the *Institutes* is indicative of the coherence of Calvin's thoughts wherein any emerging polity holds at its core a normative system with a transcendent anchor (the vertical relationship each human has with the divine) and extends horizontally outwards in incrementally larger spheres of influence. Such a political scheme is predicated on moral principles of natural law, the divine image and the sovereignty of God, which has the effect of rendering all persons, possessors of naturally occurring moral knowledge, to be held accountable to transcendent standards of normative value. It follows that when we overlay this 'continuum'¹⁹⁷ onto a constitutional framework, we place the priority, not on the individual rights of the citizen, but on the responsibilities of all political actors wherein duties to others precede individual rights and the common good prevails over self-interest.

1 Vertical Relationships

The first principle for Calvin's political theory is the doctrine of *Imago Dei*. Humans were born into kinship with God, and therefore we are created with the

¹⁹⁴ Ibid 18.7. For more on the 'golden rule' see Yu-Lan Fung, *A Short History of Chinese Philosophy*, Derk Bodde (ed) (Macmillan, 1948) 42–4.

¹⁹⁵ Government officials, according to classical Confucianism, must be chosen via a meritocratic system wherein all who are willing (regardless of background or class) can sit a national civil examination to test their knowledge of Confucian principles.

¹⁹⁶ *Book of Mencius*, tr Eno (n 134) 1A4. Confucius expresses a similar sentiment but just stops shy of deposing selfish governments: Confucius, *The Analects*, tr Legge (n 83) [16.1].

¹⁹⁷ A referent ascribed by this article to the design of constitutional theory emerging from Calvin's theology.

innate desire to form relationships.¹⁹⁸ This relational aspect is manifest in the conscience, which is part of every person. What are the implications of this relational design for civil government? Calvin's ontology for his political theory manifests from the *a priori* relationship individuals have with God, which renders both rulers and ruled alike beholden to a transcendent moral standard.

This mechanism for moral discernment (conscience) explains humans' proclivity toward forming relationships but also the dichotomy that exists between human political influence and the transcendent ideals we are inclined to pursue. The political implications stemming from the fact that individuals are born possessing this moral knowledge is that it displaces any excuse for political misconduct on the basis of ignorance. Conscience therefore becomes the basis for human freedom as well as the mechanism for political and moral accountability.

Calvin writes in II.ii.13 of the *Institutes* that 'certain seeds of justice abid[e] in their wit... conscience was to them a law, and by this they are abundantly convicted as guilty.'¹⁹⁹ He also declares in the same passage that 'there exist in all men's [sic] mind universal impressions of a certain civic fair dealing and order.'²⁰⁰ These natural 'human endowments' permit us to exercise our judgement in a manner consistent with the knowledge of 'what is just and unjust ... honest and dishonest' and ultimately ensure that we as political actors — whether ruler or ruled — remain first and foremost subject to God's sovereign rule in a duty-based framework.²⁰¹

This vertical limitation resembles the unity or whole as embodied in the notion of the 'All community.' According to this logic, even the 'sovereignty of the state as a special category is itself subject to a higher legitimating standard. Viewed in terms of the *Imago Dei*, the vertical relationship between human beings and the divine precedes the individual and supersedes the 'All community'.²⁰² Moreover, this vertical and dichotomous link renders duty the starting point for an inquiry into the significance of individual conscience to the civil order.

¹⁹⁸ In Calvin, *Institutes of the Christian Religion*, tr Battles and McNeill (n 84) III.vii.7, Calvin cites Seneca's dictum that we are 'born to help one another' ('*Homo in adiutorium mutuum genitus est*') from Seneca, *Moral Essays, Volume 1: De Providentia, De Constantia, De Ira, De Clementia*, tr John W Basore (Harvard University Press, 1928) 106 I.v.2. 118.

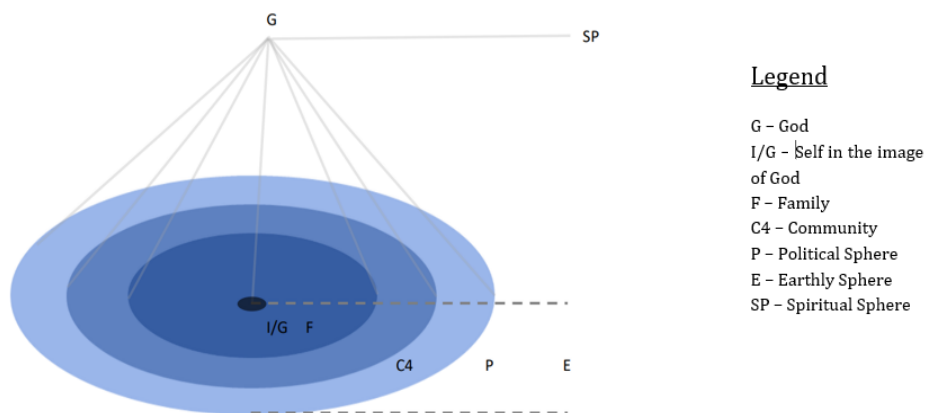
¹⁹⁹ John Calvin, *Commentaries on the Epistle of Paul the Apostle to the Romans*, tr John Owen (Kessinger Publishing, 2010) 96–98; Calvin, *Institutes of the Christian Religion*, tr Battles and McNeill (n 84), II.ii.22.

²⁰⁰ Calvin, *Institutes of the Christian Religion*, tr Battles and McNeill (n 84) II.ii.13.

²⁰¹ *Ibid* II.ii.22.

²⁰² Calvin, *Institutes of the Christian Religion*, tr Battles and McNeill (n 84) II.viii.40. Calvin states that we hold our neighbour sacred because of the divine 'image imprinted in' humans.

Figure 1: John Calvin's Spheres-of-Influence Scheme²⁰³



2 Horizontal Relationships

Calvin recognises that, in a political context, our natural drive for meaningful relationships as directly contributing to our self-preservation must be weighed up against the fulfilment of our communal interests.²⁰⁴ Our social inclination, or what I have referred to as ‘horizontal spheres-of-influence,’ represents those relationships with other humans (both intimate and at arms’ length) that diffuse the full reach of our social world. In this context, the more local relationships tend to be the ones to which we belong, with no or little choice, and are often determined by ties of kinships. These consanguine relationships extend to ties we form as a result of proximity or shared common interests or projects (such as, neighbours, friends, colleagues and so forth).²⁰⁵

Our sense of obligation in each of these spheres-of-influence also varies. As Aroney points out, our view of these relationships may vary from ‘socially

²⁰³ This graphic also appears in Constance Y Lee, ‘Conscience and the Continuum of Constitutionalism’ (2023) 12 (2) *Oxford Journal of Law and Religion* (advance).

²⁰⁴ Ibid II.viii.9. In discussing the ten commandments, Calvin states that ‘God forbids us to hurt or harm a brother unjustly, because he wills that the brother’s life be dear and precious to us.

²⁰⁵ Ibid III.xx.38. Here, in the context of prayer, Calvin compares the Heavenly Father with the ‘best of [earthly] fathers’ who embrace his family, his household and his people.

obligatory and necessary to voluntary and contingent.’²⁰⁶ However, these divisions are not cut and dried. There are some relationships that fall into the latter category that may still be seen as obligatory and necessary. These ‘exceptions’ to the common rule of thumb are those relationships that are deemed political.’²⁰⁷ These ‘political’ relationships are considered necessary to unite individual actions towards a negotiated, authoritative co-ordination in the most effective pursuit of the universally beneficial. These relationships are often characterised by the assertion of ‘sovereignty’ by the few who are legitimately recognised by the community in order to resolve co-ordination problems in the pursuit of the common good.²⁰⁸

Further to this constitutional scheme, Calvin concludes that there exists a mutuality of duties between civil rulers and their subjects. These reciprocal obligations are encased within a broader and overarching framework where there is a primacy of duty to God. Within this framework, God’s ordinances and covenant of grace mean that citizens owe their rulers a general duty of obedience and, in turn, rulers are appointed with ‘holy ministry’ to protect and channel their power and resources in service of the welfare of the community and in pursuit of the common good.

VI CONCLUSION

Confucian ideas continue to have a strong hold over many cultures throughout East Asia. Against this backdrop, there is much incentive to align Confucianism with either statism at one extreme or liberal democracy at the other. However, neither of these alliances facilitate productive dialogue. Indeed, narratives

²⁰⁶ Nicholas Aroney, ‘Natural Law and Federalism’ in Jonathan Crowe and Constance Youngwon Lee (eds), *Research Handbook on Natural Law Theory* (Edward Elgar Publishing, 2019) 371, 375.

²⁰⁷ As Calvin scholars such as Matthias Freudenberg and Jeannine E Olson observe, Calvin’s social-ethical deliberations are grounded in the idea that all human relations and actions are equally subject to the dominion of God by virtue of His sovereignty. See Matthias Freudenberg, ‘Economic and Social Ethics in the Work of John Calvin’ (2009) 65(1) *Hervormde Theologische Studies* 634; Jeannine E Olson, ‘Calvin and Social-Ethical Issues’ in Donald K McKim (ed), *The Cambridge Companion to John Calvin* (Cambridge University Press, 2004) 153.

²⁰⁸ Max Weber, ‘Politics as a Vocation’ in Hans Henrich Gerth and Charles Wright Mills (eds), *From Max Weber: Essays in Sociology* (Oxford University Press, 1946) 77. On the potentially conflicting claims of political-legal and religious authority, see Beverley McLachlin, ‘Freedom of Religion and the Rule of Law: A Canadian Perspective’ in Douglas Farrow (ed), *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (McGill-Queen’s University Press, 2004) 12; Jean Bethke Elshtain ‘A Response to Chief Justice McLachlin’ in Douglas Farrow (ed), *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (McGill-Queen’s University Press, 2004) 35. Relatedly, the understanding of the common good as collective human flourishing in classical legal tradition is bolstered and preserved by public authorities according to the ordinances of reason: See Thomas Aquinas, *Summa Theologiae*, tr Brian Davies (ed) (Oxford University Press, 2014) I-II, q. 90, art. 4.

relegating Confucianism to 'one or the other', or even as something completely singular, have been misleading and do not afford it proper appreciation on its own terms.

This article has contended that an overly prescriptive definition of Confucian philosophy detracts from an authentic study of the tradition's fundamental conceptions. Further skewing any genuine comparison is an exclusive focus on liberal conceptions of constitutionalism as representational of the whole of the Western position. This narrow conceptualisation of constitutionalism invariably leads to overlooking normative themes that may commonly underpin Eastern and Western constitutional structures.

By utilising an interpretive method with a dialectical focus, this article has sought to examine some of the foundational assumptions of classical Confucian thought. Confucian philosophy holds as its core tenets: an aspiration toward transcendent standards; the dichotomy of positive and normative law; and an emphasis on the moral cultivation of the self, within a broader relational framework which places the primacy on the duty of individuals to pursue the good of others.

We also see common themes once we turn to consider the Reformed natural law tradition (as derived from John Calvin's theology). Calvin posited that we are universally endowed with a certain measure of moral discernment (albeit limited) to pursue the transcendent good. This formulation begets a strong gravitational pull towards higher moral standards.

Both philosophies premise their normative scheme on every individual's moral duty. They hold that, by our natures, we are born with the innate drive to pursue and form relationships with others. We are also motivated by the natural desire to ensure that those relationships are meaningful. These meaningful relationships start from the individual and extend outward in a constitutional spheres-of-influence scheme bound together by the respect we have for common norms and for each other.

In this way, a study of the deeper conceptual themes in East and Western philosophical traditions reveals continuities in core normative assumptions. By highlighting the continuities between these two prominent moral traditions (Confucian and Calvinian), we start to see the traces of a common conceptual foundation for our constitutional obligations. This original viewpoint allows us to turn our minds to the normative space that we share, rather than the differences that set us apart. It thus serves as a reminder that we are united by the duties that we owe — to the good and to each other — by virtue of a shared humanity.