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Of 'socialism' and 'socialist' legal transformations in China and Vietnam

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One of the great tragedies of modern constitutionalism is that it has remained largely insulated from the concerns that socialism was developed to address. These concerns are real, and deserve more constitutional attention than they generally receive. The insights gleaned from Vietnam's experience with the process of legal transformation perhaps can go some way toward rectifying this tragedy. We cannot presume, however, that it is enough that Vietnam chooses to call itself, its laws and its constitution 'socialist'. In order for the 'socialist' experiences of Vietnam to contribute to a meaningfully 'socialist' vision of legal transformation, their self-described 'socialism' must be somehow amenable to the experiences of others.

In the search for a possibly socialist legal transformation of Vietnam, one needs to be clear about the parameters of the discussion. On the one hand, since Vietnam is identified as a 'socialist' country, any legal change experienced by that country could credibly be termed a 'socialist legal transformation'. Such tautologies have little analytic utility, however. In order to constitute a meaningful topic of discussion and enquiry, the idea of socialism that informs our search for a socialist legal transformation has to function as an independent, rather than dependent, variable.

Of course, the Vietnamese are free to define 'socialism' and 'socialist law' as they see fit, just as if I decided to define 'cat' as a colour midway between red and fuchsia, I am perfectly within my rights to do so as a fully autonomous member of humanity. I would, however, find it well nigh impossible to participate in any meaningful discussion with others about the nature of cats. Similarly, to the extent that the idea of a 'socialist legal transformation' seeks to refer to something more than Vietnam's *sui generis* experiences, it must reference something beyond Vietnam's own, and possibly self-styled, 'socialist' interpretations of those experiences.

This is not to suggest that Vietnam's 'socialist' interpretation or actual experience of 'law' and 'legal transformation' must conform to outside expectations or even be intelligible to others. Nevertheless, as a cognitive matter, we need a minimal set of common points for reference. A lack of common points will not delegitimize the truths—relative or otherwise—that reside within the Vietnamese experience. It would, however, effectively prevent this experience from contributing to our larger appreciation of the human condition.

Even if we agree that the idea of a socialist legal transformation in Vietnam is something beyond whatever the Vietnamese say it is, we still leave room for divergence about what socialist legal transformation in Vietnam is, or could be. What follows is an exploration of how one particular variant of this phenomenon, what we will call a 'socialist constitutional transformation', could be conceptualised so as to allow the Vietnamese experience to contribute to a more global appreciation for the potential of that idea.

I have selected this 'constitutional' variant of socialist legal transformation because I believe that it offers a better opportunity for meaningful Vietnamese contribution than does the 'rule of law' metric that more commonly informs comparative legal analyses. Underlying the idea of a socialist legal transformation has to be some non-tautological conception of what constitutes a 'legal system'. The traditional rule of law conceptualisation, what Peerenboom (2002) and others have referred to as a 'thin' rule of law conception, sees 'law' simply in terms of certain mechanistic attributes. Examples of these attributes include the presence of a robust set of transparent and predictable rule-based definitions of both private and public competencies and powers, an independent judiciary capable of enforcing these rules free from the pressures of politics or expediency, and so on. Such a definition, however, would reduce the quest for a 'socialist' legal transformation to one of mere bookkeeping—a routine recording of whether or not a particular society does or does not have these requisite 'legal' structures. It would allow us to determine whether or not Vietnam has a legal system, but its ultimately deductive character would prevent Vietnam's particular 'socialist' experiences from contributing anything meaningful to our understanding of the phenomenon of law.¹

In order to allow Vietnam's 'socialist' experiences to contribute meaningfully to our own ongoing learning about the nature of the rule of law and legal development, we need to adopt a 'thicker'—or what Rawls (following Kant) would have called a more 'comprehensive'—vision of rule of law, one that perceives the possibility of normative linkages between the phenomenon of 'law' and whatever human values might be implicated by Vietnam's particularly 'socialist' transformation (see Pogge 2002). The idea of constitutionalism fills this bill quite nicely. Our common understanding of 'constitutionalism' embodies some reference to the idea of law, and in this way it can inform our understandings of legal transformation. But as we shall see further below, it also refers to something that is more than law, and in this way embeds that reference to 'law' within a larger web of ideas about the nature of human society.

The remainder of this chapter explores what a Vietnamese socialist 'constitutionalism' would look like in a way that could contribute to our knowledge about the nature and function of law within human society. It does not make any claims, however, about whether or not such phenomena as Vietnamese socialist constitutionalism or socialist legal transformation actually exist, or whether they should exist as a moral or practical matter. It could be the case, for example, that the particular aspects of human society that concern, or should concern, Vietnamese socialism are not coterminous with the particular aspects of human society that effect notions of constitutionalism. Such a condition would not delegitimize Vietnamese socialist understandings of society or government, but I am not interested in the legitimacy or lack thereof of Vietnam's 'socialist' experiences. I am simply interested in exploring how we might determine whether these experiences do indeed have something to contribute to our own understanding of the larger human phenomena of 'constitutionalism' and its role in 'legal transformation'.

To do this, I will adopt an unabashedly functionalist approach to understanding and defining constitutionalism. This is because the concept of constitutionalism emerges in response to assumptions and concerns that were originally distinctly 'Western' and distinctly capitalist (or more precisely 'mercantilist'). A rigorous focus on functionalism would tend to objectify these particular assumptions by expressing them in terms of explicit cause-effect relationships. This makes it easier to account for this phenomenon in the translation to different cultures and political-economic systems. Of course, functionalism has also come under attack for its cultural presumptuousness. Functionalist arguments too often presume that the particular functional needs of societies are universal, or that correspondence in structural form evinces correspondence in functional need. I will attempt to avoid such an analytic pratfall by allowing cultures to speak for themselves as to the particular functionality of their self-styled 'constitutional' systems.

The functionality of constitutionalism lies in its political epistemic character. More specifically, it lies in its recognition that valid political understandings are not monopolised by discrete and insular elements of society. To make such a demonstration, I will begin in the second section to explore what a political epistemology is and why it is important. As I will explain, 'political epistemology' refers to the normative criteria that political institutions use to determine whether a particular claim deserves to be taken into account in political decision-making. We shall also see that, despite their ethereal, metaphysical character, political epistemologies can significantly affect the patterns of decision-making made by the polity.

I will then explore why the idea of 'constitutionalism' gained purchase in the United States and Europe. We will see that what constitutionalism did was describe a new opening-up of political epistemology. Previously, European political epistemology had assumed that valid political insight could only come from a particular, insular segment of society. To the extent this assumption was ever valid, it was rendered obsolete with the onset of mercantilism. The appeal of US

constitutionalism lay in the fact that it recognised this new political–epistemic situation. I will then engage in a comparative exploration of constitutional functionality in the People’s Republic of China to show how despite its socialist and generally non-Western predicates, China’s use of constitutionalism evinces this same particular functionality.

Finally, I examine some of the implications of all this for an exploration into a distinctly ‘socialist’ legal transformation in Vietnam. I begin by taking particular notice of the fact that, despite being a strongly self-identified socialist country, China’s idea of constitutionalism operates largely outside of its idea of socialism. As we shall see, this is because the Chinese idea of socialism exists within a largely closed epistemic framework, which effectively renders it irrelevant to the particular, epistemically-opening functionality of constitutionalism. Analogous to this phenomenon is the failure of the early Anglo-American constitutionalism to associate itself with Christianity, despite the defining role that Christianity played in the self-identity of both England and the United States during the time of their respective constitutional formations. In both countries, the early constitutionalists recognised that Christianity’s ultimately closed epistemic character rendered it incompatible with constitutionalism as they saw it.

Of course, none of this is to suggest that Vietnam’s own idea of socialism is similarly epistemically closed or otherwise similarly constitutionally irrelevant. What it does suggest, however, is that to the extent our interest in Vietnam’s ‘socialist’ legal transformation is motivated by a desire to see how that experience might rectify oversights in Western visions of law and constitutionalism, the epistemology that informs the phenomenon of Vietnamese socialism will have to be, perhaps for that purpose only, epistemically open.

OF INSTITUTIONS AND INSTITUTIONAL EPISTEMOLOGIES

The particular functionality of constitutionalism lies in its ability to encapsulate institutionally a particular kind of political epistemology. In this section I will examine what a political epistemology is and why it is important.

Political society is itself a kind of institution. In order to function effectively, institutions must have agreed-upon criteria for determining which of the myriad of competing factual claims confronting the institution will be taken into account in intra-institutional decision-making. We will call such a collection of criteria an ‘institutional epistemology’. In other words, an institutional epistemology refers to the normative collection of rules and methods a particular institution uses to determine whether particular claims are to be afforded institutional respect, that is, whether they are to be treated as ‘true’.

Of course, many will often question the degree to which actual institutional decision-making comports with that institution’s purported normative epistemology. Kuhn (1962) famously demonstrated, for example, that scientific ‘truths’ were frequently informed by factors such as reputation, professional opinion and

intellectual fad that science itself claimed should be irrelevant to truth determinations. Similarly, both critics of the common law and even some common law judges claim that judicial decision-making in common law courts is frequently informed by factors that are not recognised as valid by the formal epistemology of that institution (see Posner 1990; and Singer 1984).

But institutional epistemologies can have important institutional effects even where they are not perfectly adhered to. For example, they significantly affect the capacity of an idea to propagate through the system. Studies have found that epistemically consistent information propagates more readily through an institution than does epistemically inconsistent information, even where the technologies and ideas operating outside of received normative understandings of the institution prove useful in addressing institutional problems (see Roger 1995; Elster 1995; Barenberg 1994).

In this way, institutional epistemologies significantly shape institutional evolution. This is true even where decision-makers do not personally take the institution's own epistemology particularly seriously. Studies of institutional behaviour and dynamics have also found that institutional leaders and opinion makers who successfully introduce new ideas and norms for strategic, instrumental purposes often lose control of these ideas and norms after they become accepted by the institution (Elster 1995; Barenberg 1994). For example, authoritarian governments in Eastern Europe and Latin America frequently sought to assuage pluralist, interest-based opposition by setting up state-corporatist interest organisations operating ostensibly on behalf of these classes. The strategic design behind this move was, on the one hand, to secure the political support of these interests by symbolically recognising and legitimating their particular concerns, while on the other hand preventing these concerns from interfering with governance by ensuring that these organisations would operate as an agent of the state rather than as an agent of the target interests. In numerous instances, however, the state-corporatist organisation originally set up simply to provide the appearance of interest-based empowerment actually began working on behalf of its constituency in direct contradiction of the original strategic intent of their founders. The simple symbolic act of recognising the legitimacy of these interests, incorporating them into the state's formal political epistemology as it were, ultimately opened the door to these interests' more effective participation in political decision-making (see Baohui Zhang 1994; Elster 1996).

Institutional epistemology can also shape actual institutional decision-making by dictating particular organisational structures to the institution. To see how this is so, let us compare two legal institutions with two different formal institutional epistemologies: juries and forensic laboratories. The institutional epistemology employed by a jury is essentially conventionalist, in the sense that it holds simple consensus as the defining feature of institutional truth (see Reichenbach 1938). Insofar as a jury is concerned, a claim becomes 'true' simply by virtue of the fact that a certain portion of that jury accepts it as true. The reasoning behind the decision is largely irrelevant, as is the possibility that that truth might lie in direct contradiction of other truths found by that same jury (Abraham 2001). The institutional

epistemology employed by a forensic laboratory, on the other hand, is primarily positivist. A forensic laboratory will ostensibly recognise the truth of a claim of culpability only when that claim can be rationally, consistently extrapolated from other truths recognised by forensic institutions (see Gadamer 1996). The mere presence of some sort of consensus among a selected group of individuals is epistemically² irrelevant.

Of course, Kuhn (1962) has famously demonstrated that, despite their formal objection to conventionalism, scientific communities—like forensic laboratories—are, in fact, governed by conventionalist epistemic forces. Assuming this to be the case, does it mean that the decision-making patterns of juries and laboratories are really indistinguishable?

This is clearly not the case. The different institutional epistemologies of laboratories and of juries have caused each to assume a distinct organisational structure and these structures give very different shapes to their respective decision-making patterns. In order to activate its democratic, conventionalist function, service on a jury is determined largely by lottery (Abramson 1994). At the same time, however, the conventionalist nature of a jury decision renders the process by which that decision is made inherently opaque—a jury does not articulate the reasoning that underlies its determination—which, in turn, gives rise to the possibility that some jury decisions could be founded on unfair or unjust biases (*Harvard Law Review* 1997). For this reason, the information on which a jury may base its decision is strictly filtered.³ Service in a forensic laboratory, by contrast, is not democratic, but limited (at least insofar as the forensic decision-makers in that laboratory are concerned) to persons who possess specialised knowledge and training (see Schroeder 1992). Since the validity of a scientific truth–claim derives from the transparency of the relationship between that claim and other established scientific truths (Kahn 2001), there is thought to be no need for institutional filtering of the knowledge that these specialists are allowed to view.⁴

Obviously, the decision-making pattern of a largely random collection of citizens viewing carefully filtered evidence in an opaque decision-making environment will differ significantly from that of a homogeneous selection of trained specialists with unfiltered access to evidence but whose decision-making processes must be transparent in order to be credible. Thus, even accepting Kuhn's claim that scientific determinations are ultimately as conventionalist as jury determinations, the differing normative character of the forensic laboratory's decision-making epistemology, *vis-à-vis* that of the jury, nevertheless produces very different patterns of decision-making.⁵

HISTORICAL DIMENSIONS: CONSTITUTIONAL DEVELOPMENT IN EARLY MODERN AMERICA AND WESTERN EUROPE

The emergence of constitutionalism in early modern America and later in Western Europe is directly associated with the appearance of a new, institutional epistemology for political decision-making. Under feudalism, statecraft skills were

effectively cultivated only within a small, distinct and insular class of the population. As a result, the knowledge, understandings and skills associated with statecraft were effectively limited to members of that particular population, a condition we will refer to as being 'epistemically closed'. With the rise of mercantilism, however, many of these skills became increasingly deployed within and comprehensible to persons outside this aristocratic élite and political knowledge became progressively open.

However, Europe's standard state-level forms of political organisations, which had developed in and reflected the presumption of the feudal era, were slow to adapt to this new epistemic condition. US constitutionalism, by contrast, developed initially and primarily in the context of a mercantile society, and thus both recognised and encapsulated political dynamics associated with this new open political epistemology. As the political capacities and ambitions of epistemically-excluded populations increasingly clashed with the political monopolies of the old European order during the nineteenth century, European polities began turning to US constitutionalism as a means for opening political epistemology in a nevertheless controlled, regulated manner. Herein resides the real functionality of modern constitutionalism—its capacity to conceptualise political systems founded on a largely open political epistemology.

On the reproduction of political knowledge

Institutions are complex phenomena. On the one hand, they frequently endure and are intended to endure for generations, but they are ultimately comprised primarily of individuals that endure for much shorter spans. Moreover, these individuals must possess particular skills and knowledge necessary for the effectiveness of the institution. In order to survive and be effective, institutions must therefore be able to ensure that the individuated knowledge necessary for its survival and effectiveness is continually being 'reproduced' in new individuals who can take over from older individuals when they leave the institution.

Institutions can reproduce institutional knowledge in a number of ways. For example, an institution might seek to instil relevant skills and knowledge itself via internal training processes. An example of this would be the apprenticeship arrangements found in many craft and artisan communities. Where other institutions within the society are producing the relevant skills and knowledge, however, the reproducing institution can save time and money by simply 'raiding' these other institutions for its personnel. When a large US public corporation needs a new CEO, it often simply hires someone with significant prior experience as an executive officer from another US corporation because the particular knowledge demanded of a CEO is now produced in a myriad of institutional sites throughout the corporate world.

Obviously, how a particular institution goes about reproducing itself depends to a large extent on factors within the larger society from which that institution draws its members. Where the relevant skill is highly fungible within the larger society of which that institution is a part (for example, literacy in industrialised

economies), the institution will find it cheaper to rely on other institutions for reproduction (for example, public schools). The less fungible the skill (for example, violin-making), the more incentive there is to develop and reproduce that knowledge in-house (for example, apprenticeship systems) (see Becker 1975).

Government is itself an (intergenerational) institution. Its long-term success clearly depends in part on its ability to ensure that the particular skills and understandings that underlie effective governance—what we will refer to somewhat misleadingly as ‘political knowledge’—are being continually and effectively reproduced in new generations of personnel. As per our discussion above regarding the different strategies for reproducing institutional knowledge, different governments adopt different approaches to this problem, depending in part on particulars in the larger society of which that government is a part.

The reproduction of political knowledge in feudal Europe: closed versus open epistemic systems

During the early formation of the European state system, the skills and techniques associated with political leadership in Europe were not produced by society at large. They had to be produced by political institutions ‘in-house’. This was the ultimate functional basis for feudalism. Feudalism effectively created a specialised sub-community—the nobility—that sought to ensure the (re)production of persons with the skills and understanding necessary for governmental effectiveness. This reproductive aspect of feudalism was most clearly reflected in the original English–Norman system of feudal tenures, a system in which the King (and other higher-level nobility) would grant perpetual land-rights to another in exchange for a pledge to provide particular forms of service. Under this system, the principal source of knights for the King’s armies was those families vested with military tenure, who were obligated to provide ‘knight’s service’ in exchange for their dominium over a parcel of the King’s land. Similarly, public administrators often came from families vested with civil tenure. Such a system made perfect sense in a society in which both effective military talents (such as wielding a lance while on horseback and wearing heavy armour) and effective literacy required years of specialised training that society at large did not, and could not, provide.⁶

One by-product of creating distinct and insular institutional environments for the reproduction of particular institution-specific skills and understandings is that these environments would generally enjoy a kind of monopoly in the production and reproduction of that kind of knowledge. Where a particular kind of knowledge is monopolised by a particular, discrete and insular community, I will refer to it as ‘epistemically closed’. There are at least two kinds of epistemic closure. One is a kind of closure, which I will call ‘functional’, that occurs when the institution is the only one that is able produce the particular knowledge relevant to that institution. During the tenth and eleventh centuries, the University of Bologna functionally monopolised the reproduction of what would later become known as the Civil Law

in Western Europe, because it was the only institution in Western Europe with access to the historical materials from which principles of civil law derived, Justinian's *Corpus Juris Civilis* (of which it had the only copies) (Vinogradoff 1968; Haskins 1957).

Monopolising institutions can also develop what we might call deontological closure. Deontological closure results when the institution's epistemology refuses simply as a formal matter to accept or consider potential knowledge that originates from outside the institution, without regard as to whether or not that knowledge could actually contribute to institutional effectiveness. When the Catholic Church determined in the sixteenth century, via the Council of Trent, that theological truths could henceforth only be issued from properly recognised Catholic theologians (Pelikan 1984), it produced a particular institutional epistemology that would be called 'deontologically' closed.

To be clear, few, if any, actually functioning institutional epistemologies are completely closed or completely open. In general, most, if not all, institutional epistemologies are simply more closed or more open, depending on the degree to which they limit *pro forma* possible sources of knowledge. Similarly, with regards to those institutions that do evince some degree of epistemic closure, that closure is most frequently due to a combination of mutually reinforcing natural and deontological conditions. Nevertheless, as we shall see, these admittedly very unclear and ambiguous distinctions can still be useful in explaining constitutional functionality.

Mercantilism⁷ and the 'opening up' of political knowledge

It was noted that under feudalism the reproduction of political knowledge basically was monopolised by a particular sub-community of the feudal system, the nobility. The resulting epistemic closure may well have originally been functional, as would be the case where literacy and chivalry were not being effectively reproduced by society at large (Keen 1990). Over the centuries, however, economic and technological development conspired to destroy whatever functional advantages these epistemic monopolies enjoyed. The military discovery first of the longbow and, later, of the firearm, freed military effectiveness from its previous dependence on years of specialised knights-service training. Effective armies could now be produced from the general populace in a matter of months. Similarly, mercantilisation and the printing press meant that a widening diversity of non-enseffed communities were producing literacy and other administrative skills used to administer, or at least understand, government (see Keen 1990; Zaret 2000).⁸

As these other populations gained force in society, the insular and distinct political sub-communities that had descended from those used to reproduce feudal government sought to maintain their epistemic monopolies by buttressing their deteriorating functional monopolisation of political knowledge with a more deontological monopolisation. As noted above, the Catholic Church, for example,

justified its continued monopoly over the promulgation of canonical law by claiming that only the Catholic Church could comprehend divine truths. Secular aristocracies adapted a similar tactic, creating an ‘artificial aristocracy’—in the words of Thomas Jefferson—in which the mere formality of being born into the feudal nobility supposedly evinced unique access to divinely bestowed political knowledge (Jefferson 1984 [1813]). Both the concept of a ‘natural law’, which linked traditional political practices to divine inspiration, and the ‘divine right of kings’, which linked the formality of Kingship with divinely-ordained truths, would be examples of this phenomenon.⁹ Another example of this tactic is found in how many political thinkers, such as Edmund Burke, associated the reproduction of effective political knowledge with something akin to animal husbandry (see, for example, O’Neill 2004).

The advent of US constitutionalism

As national political systems increasingly relied on deontological rather than functional means for maintaining control over the generation of political knowledge, their political epistemologies became increasingly ineffective in generating and maintaining social coherence. In England, increased tensions between the state’s formal epistemology that ‘the King can do no wrong’ and the growing belief of a new mercantile class that it could in fact see the King actually doing wrong ultimately produced a series of crises in the seventeenth century: the Long Parliament, a Civil War, Oliver Cromwell’s Interregnum and finally, the Restoration (North and Weingast 1989). The overall result of this century-long tension was to kludge the underlying epistemic disagreement via the well-established common law device of the legal fiction (Dicey 1967). On the one hand, the English system maintained the appearance of a closed political epistemology, for example by formally continuing to recognise the classical doctrine that ‘the Queen could do no wrong’. On the other hand, it also established that the Queen’s omnipotence could be effectively manifested only where the action in question was the responsibility of someone else in government.

Unfortunately, this particular kludge did not work insofar as American (and other English) colonialists were concerned, since they were not represented in the English parliament (Bailyn 1967). Therefore, when the American colonists sought to justify their independence from their English overseers, they did so in part by disputing the closed character of England’s official political epistemology.¹⁰

Of course, the American colonists did not invent the idea that political epistemology was inherently open. Such an idea was a defining product of the Enlightenment, and even before then was very much present in the mercantilist city-state ‘republics’ of fourteenth-century Italy (Skinner 1989). American revolutionaries expressly drew from both sources in developing their advocacy for a particularly ‘open’ political epistemology. The real American contribution was not to invent this kind of epistemology, but to embed it within a particular, institutionalised framework of government, what they and I refer to as a ‘constitution’.

The marriage between the idea of a constitution and the notion that political knowledge was open was particularly apparent in the Federalist–Anti-Federalist exchange that accompanied the founders' campaign to ratify the constitution. The Federalist–Anti-Federalist exchange was remarkable if for no other reason than for being the first extended deliberation on the future shape and path of government to take place in public newspapers. Moreover, although by-and-large penned by political élites, the newspaper articles that constituted this exchange were frequently written under *noms de plume* that suggested a more common origin (for example, 'Publius', 'The Federal Farmer').

In this exchange, both sides commented with pride on the presumptiveness of the ordinary American citizen's willingness to proffer political insight. In opening this exchange in October of 1787, Publius (Alexander Hamilton) remarked: 'It has been frequently remarked that it seems to have been reserved to the people of this country... to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice' (Hamilton 1961 [1787]:89). The Anti-Federalist 'Brutus' began his first essay by noting

When the public is called to investigate and decide upon a [such a great] question...the benevolent mind cannot help feeling itself peculiarly interested in the result. In this situation, I trust the feeble efforts of an individual, to lead the minds of the people to a wise and prudent determination, cannot fail of being acceptable to the candid and dispassionate part of the community. Encouraged by the consideration, I have been induced to offer my thoughts upon the present important crisis of our public affairs (Brutus 1981 [1787]:363).

Diffusion to England and beyond

To the rest of the world, this new open political epistemology was the defining feature of this American 'constitutionalism.' In an appendix to his 1803 edition of Blackstone's *Commentaries on the Law's of England*, the English legal scholar St. George Tucker noted

The American Revolution has formed a new epoch in the history of civil institutions, by reducing to practice, what, before, had been supposed to exist only in the visionary speculations of theoretical writers...The powers of the several branches of government are defined, and the excess of them, as well in the legislature, as in the other branches, finds limits, which cannot be transgressed without offending against that greater power from whom all authority, among us, is derived; to wit, the people (St. George Tucker 1999 [1803]:19).

Perhaps nowhere is the defining linkage between 'constitutionalism' and an open political epistemology made more obvious than in the way this concept of 'constitutionalism' began affecting nineteenth-century English politics. Up until the middle nineteenth century, English political thinkers had regarded the structure of English government as—in Dicey's words—a kind of 'sacred mystery of statesmanship' (Dicey 1967:2; see also Harrison 1996), one whose wisdom and logic ultimately lay beyond rational critique by ordinary mortals (see Epstein 1994). The mere existence of a cabinet, for example, was not formally acknowledged in English constitutional scholarship until the early nineteenth century (Harrison 1996).

Beginning in the early nineteenth century, working-class radicals began introducing a new notion of 'constitutionalism' into British political debate, one derived expressly from the American experience that linked political legitimacy with widespread capacity to participate in the development of political knowledge. An example of this development can be seen in the radical publisher T.J. Wooler's use of constitutional argument in his courtroom defence against charges of seditious libel in 1817. Inspired to a considerable extent by Thomas Paine's articulation and defence of American theories of governance, Wooler used the term 'constitutionalism' to refer, not to a closed creed, but to a much more inclusive way of interpreting English political history. Over the objection of both the prosecutor and the presiding judge, he argued that interpretations and understandings of constitutional principle should be open to anyone. Wooler used this idea effectively to undermine efforts by the court and by government prosecutors to constrain courtroom discussion to technical points of law, and dramatically transformed the trial into a debate about the properly public character of England's 'constitutional' rights (Epstein 1994).

Within a generation, the popularisation of Wooler's alternative, the American-derived vision of 'popular constitutionalism', engendered a cultural split within England over the meaning of English 'constitutionalism' (Dicey 1967; Kammen 1986; Epstein 1994). The split had two related dimensions. On the one hand was the epistemic disagreement, outlined above, over the source of constitutional authority. On the other hand, there was a related political justice disagreement over the fairness of the particular distribution of political privilege within English society. England's modern vision of constitutionalism, as famously introduced by Walter Bagehot and Albert Venn Dicey, compromised the two dimensions of this dispute: accepting the radical's constitutionalist epistemic claims while rejecting their political justice arguments (see Schneiderman 1998; Tulloch 1977; Kammen 1986). In Dicey's words, the wisdom of the English political system lay in its ability 'to give to constitutions resting on the will of the people the stability and permanence which has hitherto been found only in monarchical or aristocratic states' (Dicey 1886c).

The epistemic experiences that caused first the Americans and later English reformers to reject England's closed vision of political epistemology were not unique to them. Beginning in the late eighteenth century, the idea of an inherently open political epistemology spread across first to Europe, and then beyond. And with it spread the new, American idea of constitutionalism. The French Revolution, which rejected *in extremis* any aristocratic claim to innate privilege or superiority, also ushered in the enactment of France's first self-described 'constitution' (the Constitution of 1791), an enactment that was expressly inspired by the American interpretation of its own experience (Billias 1990; Bourne 1903). Reformers in the post-Napoleonic German states then used both French and American visions of constitutionalism to begin urging the constitutionalisation of their own governments, a development that culminated in its initial stages in 1849 with the aborted Paulskirche Constitution of 1849 (Nipperdey 1996; Hartmann 2002). Towards the end of the nineteenth century, Japan and China began using the clearly-imported

concept to refer to new forms of government that soften their respective monarch's formal monopolisation of political knowledge—both inventing entirely new words (*kenpo* and *xianfa* respectively) to capture this new notion.

COMPARATIVE DIMENSIONS: CONSTITUTIONAL DEVELOPMENT IN SOCIALIST CHINA

The comparative strength of this concept, and its reference to the epistemic opening of political knowledge, is well demonstrated by recent events in the People's Republic of China. China has recently experienced a constitutional emergence. As we shall see below, behind the emergence of this self-styled constitutionalism is an ongoing re-evaluation of the nature of political knowledge in China.

Constitutionalism, socialism and political epistemology in China

We noted above that the notion of 'constitutionalism' (*xianfa*) originally entered Chinese political discourse in the late nineteenth century, imported from Japan by scholars interested in replacing China's absolutist monarchy with a more open political system. The monarchical system was formally dismantled in 1911. By the 1920s, the idea that the political environment was to be governed by a constitution resembling that of Western countries was well-accepted within China. In the 1930s, when civil war broke out between the factions in power, the Republicans and the Communists, both sides adopted self-styled 'constitutions' to govern their respective territorial holdings (Fitzgerald 2002).

During this same timespan, however, an alternative political epistemology—called socialism—was also shaping notions of governance within the communist faction. Socialism began in China as an epistemically open concept, finding its conceptual shape in debates among public intellectuals during the early part of the twentieth century (Li Yu-ning 1971). It was also one of the principal ideological bases for the Communist Party of China (CPC), but the CPC was an inherently closed epistemic community (van de Ven 1995). Modelling itself after the Communist Party of the new Soviet Union, it embraced what James C. Scott termed a 'high modernist' vision of social organisation, that is, one that saw effective social development purely in terms of top-down planning and organisation (led by the Party) (Schwartz 1968; cf. Scott 1998). Inherent in the act of placing yourself and your own designs uniquely at the pinnacle of social development is an assumption that no-one from the outside could possibly possess independent knowledge relevant to that endeavour.

During the civil war period, the epistemic tension between the CPC's closed, Leninist vision of socialism, on the one hand, and its use of a constitutional-style government on the other, was buffered somewhat by an institutional pragmatism brought about by the need to respond creatively to a number of serious threats to the Party's survival (Fitzgerald 2002). Once the CPC succeeded in gaining control of the mainland from the Republicans, however, its internal epistemic contradiction became

more manifest. In 1954, the new People's Republic of China enacted its first constitution, one which tried to establish a particular power balance between the constitutional and party systems (Jiang Jinsong 2003). Nevertheless, when the constitutional system—namely the national parliament, the National People's Congress (NPC)—and the Party began to disagree on the Party's role in the new Chinese state (specifically, over the viability of a multiparty political system), the CPC effectively dismantled the constitutional apparatus (Jiang Jinsong 2003). With the onset of the Cultural Revolution in the mid 1960s, a very epistemically-closed vision of socialism became the only institutionally recognised source of political knowledge in China (Schwartz 1968).

The re-advent of Chinese constitutionalism

By the mid 1970s, the Cultural Revolution was widely regarded within China, even among CPC political élite, as a social and political disaster. A new leader, Deng Xiaoping, sought to begin extracting China from the utter chaos caused by the CPC's long string of failed policies. Political authority in China, however, continued to rest overwhelmingly on CPC affiliation. By famously characterising his reforms as 'socialism with Chinese characteristics,' Deng therefore legitimated himself and his ideas by linking them with the CPC's unique competence to understand the truths of socialism (Kluver 1996; Chan 2003).

At the same time, however, Deng also found it useful to resurrect the constitutional system, albeit more out of strategic, rather than epistemic, concerns. On the one hand, a resurrected constitutional system allowed him, symbolically, to distinguish his newer high-modern reformism from the disastrous high-modern reformism of the earlier CPC. Additionally, Deng's support for economic transformation was not without opponents, some of whom enjoyed considerable prestige and respect within élite political circles. In order to promote his reforms, Deng sought ways to marginalise his more prestigious oppositions' capacity to affect political decision-making without denying the CPC's wisdom in affording such people respect. Placing such opponents in the resurrected, but still moribund, constitutional apparatus allowed him to recognise their political prestige while at the same time isolating them from political decision-making.

One such opponent was Peng Zhen. Peng had been part of the CPC's inner circle since at least the 1930s. He had participated in the Long March, a distinct badge of honour in the CPC, and served as mayor of Beijing during the 1950s. He was a protégé of Zhou Enlai, one of China's most respected and admired political figures. However, he opposed significant aspects of Deng's reforms, and Deng therefore had him assigned to the leadership of the newly reconstituted NPC. Technically the supreme constitutional body, the NPC was expected to, and for the most part did, operate largely as a 'rubber stamp' legitimator of important Party directives. The conventional wisdom is that Deng expected that Peng's assignment to the rubber-stamp NPC would effectively remove his voice from high-level political decision-making (Tanner 1999).

This was not to be the case, however. Having been removed from an élite position in the CPC decision-making hierarchy, Peng sought to develop potential alternative sources of political authority, sources that existed outside the CPC's direct bureaucratic control (Tanner 1999). Obviously, Peng could not appeal to truths of socialism in such efforts, since doing so would have required him either to work through decision-making pathways of the very institution from which he was effectively isolated, or alternatively to contest the closed character of socialism from outside of the CPC and thus alienate the very institution he was seeking to influence. Indeed, throughout the 1980s, moves to expand discussions about the nature of Chinese 'socialism' beyond the scope of the CPC were quickly quashed by the CPC (Sun Yan 1995).

In seeking to promote the NPC's role in political decision-making in China, Peng thus had to appeal to legitimate epistemologies that had purchase within the CPC but whose reproduction was not monopolised by the CPC. He solved this problem in part by reviving the CPC's earlier articulated support for constitutionalism (Tanner 1999; Potter 2003). This strategy benefited him in a number of ways. First, the demise of the CPC's interest in constitutionalism corresponded with the onset of the now discredited Cultural Revolution and this gave significant historical weight to his arguments (see, for example, Peng Zhen 1990a, 1990b; Jiang Jinsong 2003). Second, Peng was head of the NPC after 1983, which in turn was formally China's paramount constitutional body. An appeal to constitutionalism thus gave some comparative advantage to the NPC, and through it, to Peng (O'Brien 1999).

The epistemic nature of China's new constitutionalism

Peng's epistemic machinations evinced the same appeal to an epistemically open political knowledge as we earlier saw in the emergence of constitutionalism in England and the United States. As noted above, at the core of Peng's argument for a re-invigorated constitutionalism was a conceptual linkage between the collapse of the constitutional order and the onset of the Cultural Revolution. Of course, Peng was not the only member of the Chinese political élite to criticise the Cultural Revolution. In fact, the CPC had effectively delegitimated the Cultural Revolution when it tried and convicted the 'Gang of Four'.¹¹ The prosecution and conviction of the Gang of Four both signalled official acknowledgment that the Cultural Revolution had been a mistake and laid responsibility for that mistake wholly at the feet of particular individuals.

By contrast, Peng argued that the Cultural Revolution was due to the CPC's systemic failings, rather than merely to the personal failings of particular individuals. He attributed the Cultural Revolution to a lack of information and understanding within the party-system itself. This lack of information, he argued, had been caused by the dismantling of the constitutional system. He claimed that, because of the uniquely representational nature of the NPC, constitutionalism provided special access to knowledge that was vital to preventing the kinds of Party mistakes the Cultural Revolution represented (Peng Zhen 1990b). In this way, Peng's argument

clearly linked the benefits of constitutionalism with what we are calling the opening-up of political epistemology. What he was saying, in effect, was that by itself the CPC hierarchy inherently lacks access to particular sources of knowledge that can be crucial to political decision-making, and that such knowledge can only come from representational institutions—institutions like the NPC that are able to directly perceive and reflect the diversity of experiences found in larger society.

Of course, many have suggested that Peng's appeal to constitutionalism was strategic—that in fact he was not actually interested in establishing 'constitutionalism' as a normative matter. But since we are looking at constitutionalism from a functionalist perspective, what we are really interested in here is institutional effect, not personal intent. And regardless of Peng's actual motivations, his arguments did seem to trigger a growing institutionalisation of constitutionalism in China, and institutionalisation that is indeed characterised by what we are claiming to be constitutionalism's ultimate purpose, namely, to open political epistemology to input from sources outside the CPC or any other discrete and insular segment of society (see Dowdle 2002).

For example, beginning in the late 1980s, the NPC began consulting with an increasingly diverse collection of societal interests when drawing up or reviewing draft laws and regulations. In some cases, it rejected draft legislation because it felt that the drafters had failed to take sufficient account of particular societal perspectives. It encouraged greater autonomy in NPC representatives and promoted the need for private capacity to challenge political decision-making. These 'constitutional innovations' have since diffused to other areas of China's constitutional apparatus. All this can be directly traced to Peng Zhen's initial promotion of constitutionalism and to the need he articulated to free political epistemology in China from monopolisation by a discrete and insular collection of decision-makers (Dowdle 2002, 1997).

WHITHER 'SOCIALIST' CONSTITUTIONAL DEVELOPMENT?

One of the things curiously absent from China's evolving constitutional evolution is any distinctly 'socialist' aspect. Socialism and self-styled 'socialist' political doctrine have been the defining focus of Chinese political thought during the last half of the twentieth century (Schwartz 1968; Sun Yan 1995; Chan 2003). Nevertheless, Chinese constitutional discourse has yet to identify a distinctive correspondence between any of the key socialist doctrines to emerge in China and any of the particular structures, doctrines or procedures that constitute China's constitutional system.¹²

Our discussions above offer an explanation for this curiosity. If constitutionalism involves an opening-up of political epistemology, and if the epistemology of 'socialism' as it has evolved in China is monopolised by the CPC as I suggested, then the two discourses would be epistemically incompatible. The reason why China's socialist discourse remains in the main so irrelevant to China's constitutional

development (at least insofar as its comparative relevance is concerned) is because the 'truths' of Chinese socialism would have very little purchase in the epistemic environment that governs Chinese constitutionalism.

A similar phenomenon can be seen in the absence of any association between Anglo-American constitutional structures or practices and Christianity. Arguably, Christianity was as much a defining element of Anglo-American political communities during their respective periods of constitutional formation as socialism has been with regards to that of China. At the time of their respective constitutional formations, American and English constitutionalists readily identified themselves as members of distinctly 'Christian' nations, and were not shy about drawing parallels between Anglo-American political and constitutional acumen and their Christian piety (Bradford 1993)—just as Chinese constitutionalists today readily draw parallels between China's political and constitutional acumen and their socialist piety. Nevertheless, Anglo-Americans, including Anglo-American Christian theologians, have largely rejected the idea that our respective constitutions have anything distinctly 'Christian' about them (Dreisbach 1999).

This phenomenon can not simply be due to some misplaced strain of constitutional imperialism. Our respective constitutionalist founders were well aware that they were engaging in a very particularist venture, one that to them was by-and-large distinctly Anglo-Saxon (Kammen 1986). Today, we continue to acknowledge our constitutional particularism when we uncontroversially see in our constitutionalism distinctly 'capitalist' or distinctly 'liberal' elements. Nor is Anglo-American conceptual blindness in this regard unique to us. Even self-professed non-Christians in self-professed non-Christian countries (such as those in China, or in the Middle East, or in the former Soviet bloc) who have sought to resist universal application of Anglo-American constitutional models by-and-large have not founded their resistance on any distinctly 'Christian' aspect to Anglo-American constitutionalism.

We find a particularly clear demonstration of Anglo-American constitutionalism's intellectual resistance to Christian-theological doctrine in the intellectual history of the privilege against self-incrimination, a privilege that is prominent in both the US and English constitutional systems (1 Blackstone 1783 [1765]:*68). Until recently, contemporary jurisprudence has held that the privilege emerged in the common law in opposition to competing ecclesiastical law doctrine (Levy 1986). In fact, that privilege actually emerged initially in ecclesiastical law itself. Its initial justifications were founded in significant part in Christian theological doctrine. From there, it migrated into English and later into American constitutional law. It was there that it shed its religious underpinnings (Langbein 1994; Helmholtz 1990).

What could have caused the constitutional law of two strongly self-identified Christian polities to repudiate the Christian origins of one of its fundamental maxims? The answer would seem to lie in precisely the kind of epistemic incompatibility that we saw above in the context of the conceptual disconnect that separates constitutionalism from socialism in socialist China. Particularly during

the Enlightenment, and perhaps so even today, many saw the fundamental epistemology of Christianity as being incompatible with the demands of the post-feudal European constitutionalism. The foundational epistemic building block of Christianity is faith. As described by John Locke, '[f]aith [in contrast with reason] is the assent to any proposition...upon the credit of the proposer as coming from GOD, in some extraordinary way of communication' (Locke 1979). As per Locke, the very nature of faith prevents persons other than the believer from being competent to assess the truths inherent in the belief. Capacity to contribute to the truths of the belief thus is monopolised by the believer. Thus, under Locke's description, faith comports with what we are calling a closed epistemology.

American constitutionalists were strongly influenced by Locke's views about the conflict between faith-based religion and reason-based constitutionalism (Walzer 1983). This epistemic incompatibility between faith-based Christianity and reason-based constitutionalism also caused many leading religious figures to similarly reject the idea of a Christian constitutionalism (or what they tended to call a 'Christian commonwealth'). John Witherspoon, a leading Presbyterian clergyman and President of the College of New Jersey (later to be known as Princeton), argued that

Another reason why the servants of God are represented as troublesome is, because they will not, and dare not comply with the sinful commandments of men. In matters merely civil, good men are the most regular citizens and the most obedient subjects. But, as they have a Master in heaven, no earthly power can constrain them to deny his name or desert his cause (1802:415).

Elder John Leland, leader of the Virginia Baptists, expressed the same sentiment more bluntly when he urged that '[t]he notion of a Christian commonwealth, should be exploded forever' (Green 1845:118).¹³

Of course, none of this is to deny that Christianity has often had decisive influence over various aspects of Anglo-American constitutional development. Nor is it to suggest that Christianity—or religion in general—should not have such influence (Greenawalt 1988). But just as Judaism's significant influence on Albert Einstein (Jammer 1999) did not result in a discernibly 'Jewish' theory of relativity, Christianity's epistemic incompatibilities with constitutionalism have caused its influence on Anglo-American constitutional development, like socialism's influence on China's constitutional development, to remain outside the cognition of 'constitutionalism' per se.

All this suggests another important point regarding our efforts to identify a 'socialist' legal-constitutional transformation in Vietnam. Our analysis of the way that Christianity did and did not affect Anglo-American legal-constitutional development 200 years ago argues that, insofar as Vietnam's 'socialist' legal or constitutional transformation is concerned, we need to be careful and not confuse a hypothesis that Vietnam's constitutional or legal transformation has not been particularly 'socialist' with a hypothesis that Vietnam's constitutional or legal transformation has not in fact been strongly and positively influenced by 'socialism'. If it were to be found that Vietnam's legal transformation was not distinctly 'socialist',

that would not denigrate at all socialism's contributions or potential contributions to that country. It would not imply that socialism in Vietnam is a meaningless sham. It would not mean that socialism does not contribute anything valuable or important to Vietnam's ongoing legal and constitutional transformation. It would simply mean that socialism's particular contributions to Vietnam's constitutional, political and social development remain, at least for the time being, outside the limits of constitutionalism's particular *Gestalt*.

CONCLUSION

As I noted at the outset, the fact that Western constitutionalism continues largely to ignore the particular economic and societal injustices that socialism seeks to address should be of significant concern to us. To date, our experience has been that the burdens of 'transformation' tend to fall disproportionately—and, many argue, unjustly—on those very populations that socialism seeks to protect. The idea(l) of a socialist legal transformation is thus very enticing (Stiglitz 1994), and one hopes that Vietnam's socialist heritage would allow it to contribute to our understanding of how such an ideal might be reified in humanity at large. But hope *per se* does not alleviate the need for hard and critical analysis. If Vietnam's 'socialist' experiences are to point us in the direction of a distinctly 'socialist' form of human legal transformation, then the 'socialism' that defines those experiences must itself be the product of human reflection—not simply that of some distinct if valuable subset.

NOTES

- ¹ For more on the problem of deductive legal models, see Dowdle (forthcoming).
- ² Such consensus does have important ramifications, insofar as the sociology of forensic truth is concerned.
- ³ See, for example, *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993).
- ⁴ See Hsu (1999), which shows broad constitutional recognition of social need to protect unfiltered scientific access to information.
- ⁵ One particularly visible example of this might have been the O.J. Simpson Trial. See Arenella (1996) and Thompson (1996).
- ⁶ See generally Keen (1990). The feudal tenures system is described in Baker (1990).
- ⁷ My use of the term 'mercantilism' in this context derives from the definition offered by Minchinton (1969:vii):
'Mercantilism' can therefore be described as the striving after political power through economic means, which, given the circumstances of the time [ca. 1400–1700], meant through encouragement of trade and manufactures rather than the improvement of the land.
- ⁸ See Keen (1990) and Zaret (2000). See also Dickson (1967) and Clapham (1958), who both describe the merchant class's increasing penetration of governmental decision-making.
- ⁹ With regards to the epistemic implications of the English doctrine natural law, see Jeremy Bentham (1996). With regards to the epistemic implications of the divine right of kings, see, for example, Jean Bodin (1992).
- ¹⁰ There is no questioning that this new, open 'American' political epistemology was very much developed in pursuit of very strategic and self-serving ends. See also Howard Zinn (1995). I described above, however, how one important feature of *institutional* epistemologies is that they can reproduce and strengthen themselves simply by affecting institutional structures and other processes of runaway legitimation.

- ¹¹ The 'Gang of Four' referred to four élite Party members (including Mao's wife) who allegedly convinced Mao to initiate and perpetuate the Cultural Revolution in order to further their own personal ends.
- ¹² Constitutional scholars and intellectuals in China readily associate their constitution in general with something called Chinese 'socialism.' But as noted above, simply saying that China's constitutional system is 'socialist', without linking distinctive aspects of its socialism with distinctive aspects of its constitutionalism, is comparatively meaningless (or more precisely, tautological): similar to one saying that Chinese food is 'socialist'. Of course, to reiterate, the fact that the Chinese have not yet drawn particular links between their socialist experiences and their constitutional experiences does not diminish at all the importance or legitimacy of either China's socialist system or its constitutionalist system. Nor does it diminish the legitimacy of their claims that their constitution is in fact a 'socialist' constitution. It simply means whatever 'socialist' aspects there may be to these experiences, they are aspects that—unlike many other aspects of Chinese constitutional experiences (see Dowdle 1997)—as yet remain inherently outside the realm of to meaningful *comparative* understanding.
- ¹³ For a similar argument as made by a more modern Christian theologian, see Powell (1993).

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