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Rule of Law in China: Chinese Law and Business

China's Transition and the Limits of the American Constitutional Perspective

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Executive Summary

- The standard frameworks used to evaluate constitutional systems are not well suited to exposing transitional capacity. The constitutional problems that Minxin Pei's *Trapped in Transition* focuses on do not reveal the system's eventual capacity to transcend them.

- A similar list of constitutional problems appeared in the United States during the last quarter of the nineteenth century, a period of immense and successful constitutional transition in America. For this reason, such problems are not necessarily obstacles to the transition process.

- An evaluation of transitional capacity requires consideration of how the constitutional system is linked to and interdependent with other elements of political society, and identification of constitutional innovations within and between the constitutional system and other political entities.

- From this perspective, there is significant potential for constitutional development in China. The constitutional system is rapidly inter-penetrating other political and social systems within China's civil and political environment. There has been a recent explosion in constitutional discourse across all sectors of Chinese society, giving rise to experimentation and diffusion of constitutional innovations.

- We might therefore conclude that China, while deficient in many respects, also enjoys a significant capacity to find solutions for its constitutional problems.

China's Transition and the Limits of the American Constitutional Perspective

The anti-transitional biases of American constitutionalism

American constitutionalists have difficulty conceptualizing constitutional transition. This is because their vision of constitutionalism is founded on a series of assumptions that, collectively, render contiguous constitutional development conceptually impossible. Key among these assumptions are that political dynamics are driven wholly by something called 'power'; that such 'power' allows its holders to force those with less power to serve the holder's will; and that political actors are driven, first and foremost, by a self-interested desire for more power. The frequently cited genius of the American constitutional system is that it establishes a balance of power under which no one actor or clique of actors can compel the subservience of the whole political system. The resulting need to secure cooperation in the pursuit of a political agenda ensures that the agenda is public-minded.

By definition, non-constitutional systems are political systems in which power is not so balanced. They are systems in which particular actors or cliques possess sufficient power to dominate and control the entire political system. In such an environment, constitutional development would therefore involve dispersion of power from the more powerful to the less powerful. How could this happen? The natural tendency of political actors is to maintain and increase power. Political leaders in a pre-constitutional system would therefore never *voluntarily* submit to a constitutionalizing process. At the same time, their dominant grip on power means that the political system as a whole lacks the means necessary to compel them to relinquish power. In sum, in a non-constitutional political environment, constitutionalization is conceptually impossible.

The American constitutionalist's inability to conceptualize processes of constitutional transition is amplified by the way that these constitutionalists identify the presence of a 'constitution'. American constitutionalists define constitutionalism primarily in terms of a structural design whose defining elements include a national legislature and a national executive whose members are directly and fairly elected by the general population (or alternatively in the case of the executive by members of a directly elected legislature); a judiciary that is independent of other politics actors; and the routine and autonomous judicial enforcement of legalized rights and other legal norms that are superior to ordinary legislation that work to constrain the reach of political power (what Americans generally refer to as 'judicial review', though somewhat different from what the English understand as judicial review).

Nor do American constitutionalists admit to other, more rudimentary, variants of these structures. Indeed, they generally dismiss constitutional structures that resemble in some measure, but otherwise fall short of their structural ideals, as the products of a degenerate constitutionalism. When looking for structures in other countries, American constitutionalists thus tend to make the perfect the enemy of the good. But developing or emerging constitutional systems are by definition imperfect. For this reason, American constitutionalism is thus often unable to distinguish a state of true constitutional transition from one of constitutional stagnancy, or 'real' transitions from 'trapped' transitions.

A good example of this is how many American constitutionalists have tended to dismiss the constitutional import of direct national elections when these elections are not accompanied by judicial protections that restrict the reach of state or

majoritarian power – what are often referred to as 'illiberal democracies'. In fact, they often regard the appearance of these rudimentary elements to be affirmatively destructive of constitutional transition. But a brief survey of constitutional histories confirms that rudimentary forms of constitutional structures are frequently found in the early stages of constitutional development. Liberal electoral democracy, backed by robust and routine juridical protections against the state, generally only appears relatively late in the standard constitutional growth cycle. American democracy, for example, could be classified as having been rudimentary for most of the nineteenth century, with democracy being achieved in the late-nineteenth century. Strong judicial protection for civil and political rights did not become a meaningful part of the American constitutional order until the First World War. We nevertheless regard the American nineteenth century as a period of constitutional development.

A related problem with the way that American constitutionalism identifies the presence of constitutionalism in other systems is what David Scuilli has described as 'the presumption of exhausted possibilities'.[1] Defining constitutionalism simply as the presence of a particular form and manner of electing governmental officials, a particular form of articulation and enforcement of norms, and a particular institutional geography, amounts to saying that there can be no possible functional or structural alternatives. It follows that only a constitution constructed in formal and rational law can ever meaningfully constrain government; that only an independent judiciary can meaningfully provide protection against political illiberalism; and that only direct mass elections meaningfully ensure governmental responsiveness. According to American constitutionalism, there is no other way by which such outcomes can be secured.

But the presumption that the American constitutional imagination encompasses the limits of what is constitutionally possible is not only misfounded, it can be quite dysfunctional when used as a framework for evaluating the dynamics of other constitutional systems.

Consider France's principal administrative 'court'—the *Conseil d'Etat*. The *Conseil* does not resemble the independent judiciary that American constitutionalism regards as absolutely essential to effective administrative restraint. In fact, it is just the opposite. The *Conseil* is a part of the administrative branch. Its *conseillers* (i.e., its ersatz judges) are selected and appointed by the administrative government; and can be removed at its behest. They are periodically assigned to other governmental ministries, ostensibly to make them more empathetic to the administration's distinctive needs and concerns. Nevertheless, the *Conseil* may actually be more effective at checking administrative abuses then either the American or the English administrative legal frameworks.

This brings us to another problematic aspect of American constitutionalism's effort to comprehend the phenomenon of legal transition. The French *Conseil d'Etat's* experience of political embeddedness *promoting* rather than detracting from institutional autonomy is not unique. It is a phenomenon common to human constitutional experience. As John Haley famously demonstrated in the case of post-War Japan, political embeddedness can be an effective way to get more powerful political actors to respect and pay due deference to newly authoritative but still relatively weak constitutional entities in an emergent constitutional system.[2] By focusing on separation of powers and political 'independence', the American constitutionalist thus actually inverts the developmental dynamic.

1. Sciulli, D. (1992) *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory*. New York: Cambridge University Press.

2. Haley, J. O. (1994) *Authority without Power: Law and the Japanese Paradox*. Cambridge: Cambridge University Press.
O'Brien, K. J. (1994) 'Chinese People's Congresses and Legislative Embeddedness: Understanding Early Organizational Development', *Comparative Political Studies*, Vol. 27: 81–4.

We need to remember, in this regard, the particular purposes for which American constitutionalism was originally founded. American constitutionalism was intended to impart stability and authority to an existing regulatory environment that appeared to be degenerating into French-style radicalism. It did this by restraining and regulating the more radical aspects of democracy: by subordinating that democracy to structural devices that would work to buttress the existing political and social order. The American constitution was not transitional but preservative. It was dedicated to the pursuit of a 'more perfect union', rather than to the creation of a radically new one.

Transitional constitutional orders, by contrast, are orders that are far from being acceptably perfect. An analytic framework that was developed in order to solidify and preserve an existing constitution is thus ill-suited for evaluating a constitutional system's capacity to transform itself.

Does Pei demonstrate a constitutional system that is 'trapped in transition'?

The conceptual problems inherent in American conceptualizations of constitutionalism and used to evaluate the developmental potential of a dynamic and emergent constitutional system are evident in Minxin Pei's efforts to demonstrate that China's evolving constitutional system has become 'trapped in transition'. Pei principally supports his claim by citing the following problems: increasing corruption, decreasing capacity to monitor local officials, an increasingly dysfunctional system for punishing corrupt officials, the growing size of the Chinese state, the increased decentralization of the Chinese state, the appearance of local political monopolies, increasing collusion between local political monopolies and criminal organizations ('Mafia states'), and declining ideological norms.

These problems give rise to what Pei terms a 'governance deficit'. It is this governance deficit, he suggests, that prevents China from pursuing solutions to its constitutional, political, and social problems. Principal among these problems include increasing problems with regards to public and workplace safety, transport accidents, public health and education, rural decay, and unemployment.

There is no question that China's constitutional system is confronted by a wide range of developmental problems. But do these problems represent insurmountable impediments to further constitutional development? How do we know that these factors are not merely secondary effects of the transition process itself?

One test would be to identify constitutional polities with a similar constellation of constitutional difficulties, and see if they were nevertheless able to develop their way out of such conditions.

Pei himself gives no comparative reference point in supporting his claim about China. But similar polities are not difficult to find. One particularly striking example is that of the United States during the last quarter of the nineteenth century, which faced a set of constitutional problems very similar to those described by Pei in the context of contemporary China.

One of the defining elements of late-nineteenth century America was rampant and increasing corruption. The machine and patronage politics of the day meant that corrupt local public officials were virtually immune from punishment or discipline. Moreover, not only was the American state growing exponentially, but its growth was overwhelmingly in the area of positions of patronage, precisely the positions thought to be the principal source of the epidemic corruption. This corruption was further compounded by a belief that the founding generation's ideology of republican, public-minded virtue had long-since given way to an ideology of 'me-first' factionalism; and that the 'natural aristocracy', which had unified the country and constitutional apparatus in the first 100 years of the nation, had dissolved in the face of machine and party politics, catering primarily to local or private economic interests.

This form of politics, like that of present-day China, often operated in collusion with criminal elements. During this period of US history, we even find the same evidence of a 'governance deficit' that Pei finds in China. Industrial and workplace accidents were endemic, far in excess of Western Europe. There was no public health system, and urban areas confronted severe problems with regard to sanitation and pollution. There was no public education. Literacy rates were significantly lower than in Western Europe. The rapid growth in industrialized agriculture severely upset the communal stability of rural communities. With the great depression of the 1890s, unemployment rose to crisis levels.

Indeed, so severe were the problems of the late-nineteenth century, and the corresponding 'governance deficit', that many late-nineteenth century Americans feared their constitutional system had become fatally corrupt and obsolete. They were as convinced as Pei is with regard to present-day China that the American constitutional system was 'trapped in transition', and, for virtually the same set of reasons.[3]

But the constitutional system of late-nineteenth century America was not trapped. In fact, just the opposite. That period was one of pronounced and dramatic constitutional transition in which the pre-modern and paternalist constitutionalism of a pre-industrialized, gentrified polity was rapidly being eclipsed by that of a modern, pluralist constitutional system, catalyzed by the new social and economic dynamics and technologies of industrialization. The constitutional problems and disruptions were actually the products of a society that had suddenly become severely destabilized by rapid urbanization, by radical shifts in patterns of work and the distribution of wealth, and by the sudden obsolescence of formerly effective governance technologies.

Crucially, constitutionalism was transformed, not in spite of these disruptions, but because of them. It was precisely these disruptions that gave birth to the modern constitutional state. Electoral problems eventually produced modern electoral systems; corruption triggered the development of more effective monitoring systems; new norms of public-mindedness arose; and health, safety, and education problems were addressed.

These developments emerged out of trial-and-error responses to the transitional crises mentioned above. Some of these responses worked, others did not. As the legacy of effective responses accumulated, theory gradually emerged that configured them into a seemingly coherent conceptual framework born of an often-dire necessity. The theory, the legitimacy, and the ideology only emerged after the facts – as the products, not the cause, of a somehow successful regulatory and constitutional transformation.

It is worth noting that China, too, is presently undergoing a period of rapid industrialization and corresponding social modernization. The problems and deficits described by Pei could thus similarly be the products primarily of this larger transition rather than of some fatal pathology in the constitutional system. This is not to suggest that China's constitutional system will be similarly capable of responding to and developing out of these problems. But at the very least, the constitutional history of late-nineteenth century America illustrates that the social and political problems that Pei focuses upon are not always the constitutional transitional death knell Pei assumes them to be. China's constitutional system may be 'trapped in transition', but if so, it is not for the reasons argued by Pei.

Correcting the biases of American constitutionalism

So, is China's constitutional system really 'trapped in transition'? In order to evaluate a constitution's transitional capacities, we must first correct the particular presumptions that make applying the approach of American constitutionalism to this

3. Sciulli, D. (1992), op. cit.

question so dysfunctional. At the heart of Pei's argument is the claim that what prevents China's constitutional system from developing is an implicit pact between a single party-state desperate to stay in power and a political-economic elite that benefits from the current political structure. This claim is founded upon a number of presumptions about the nature of human society and developmental dynamics that, while common to the American constitutionalist, are very simplistic, and in their simplicity obscure rather than highlight the true dynamics of constitutional transition.

One of these oversimplification lies in Pei's presumption that any significant constitutional change must be the product of intentional elite design. In fact, however, even the most rudimentary of constitutions is comprised of an exceedingly complex system of political interrelationships. Because of this complexity, the evolutions of such systems are often spontaneous, operating outside the capacities of even the most powerful and authoritarian political entities to harness and control the evolutionary trajectory. In order to evaluate the dynamics and possibilities of constitutional transition, we must recognize the complexity and spontaneity of such development, and not reduce the process of transition to the conscious intentionality of an overarching, anthropomorphized political elite.

Pei further oversimplifies the power dynamics by conflating power with omnipotence. He assumes that because the Chinese Communist Party (CCP) enjoys a hegemonic position within China's constitutional and political systems, it therefore can be presumed to control, either affirmatively or through passive acquiescence, the actions and inactions of every other actor within the systems. According to Pei, the Communist Party is an entity so powerful that it is able to consume utterly its members' capacity for individual, autonomous, moral and political judgment and action.

But human will is actually far more resilient than this. And in fact, many who join the ranks of the CCP retain their independent desires, hopes, and moral convictions. They seek to improve and correct the flaws in the Party rather than embrace them for their own personal aggrandizement. It is not uncommon to find Party cells and Party leaders within public and private organizations more interested in protecting their organization from Party meddling than in subjugating the organization's own values to the Party's will.

The CCP is neither monolithic nor omnipotent. It is a complex mélange of different attitudes, philosophies, and values, a not insignificant portion of which are public-minded. Since some level of consensus is a prerequisite for collective, institutional action, this mélange of values and goals represents real limitations on the Party's actual power. More importantly from the perspective of constitutional transition, the complexity of the interactions between these personal, institutional, and Party identities provides a space within the CCP in which, according to institutional theory, new and even transformative constitutional norms and visions are most likely to emerge and grow outside the conscious intentions or awareness of anything approximating a discrete elite political interest-class.

For these reasons, evaluating transitional potential requires recognition of the range and diversity of thought and values that operate within even the most hegemonic of political entities, such as the CCP. We cannot presume the Party to be a monolithic and omnipotent entity simply because it is the most powerful actor in the political system. There must be consideration for how evolutions in the identities and values of the Party's members and of those outside the Party with whom it interacts, might be causing it to evolve.

For these reasons, the developmental potential of an emergent constitutional system is more likely to be found in its interdependence than in its independence. These include both interdependence among diverse constitutional institutions, and interdependence between these institutions and the larger political and social environment. Interdependence creates the spaces in which new

and transformative institutional norms and practices are likely to arise. It is also through such interdependence that new practices and norms that emerge in one institutional locale are transmitted to the larger constitutional system, and to the state's larger political and social environment beyond that.

China's constitutional transition re-evaluated

Viewed in the light of a more developmentally sensitive understanding of constitutionalism, there is little reason to conclude that China's constitutional system is responding dysfunctionally to the transition in which it finds itself. The constitutional system, the CCP, and China's nascent civil society do, indeed, appear to be increasingly interdependent. This, in turn, is creating identifiable spaces within the political and constitutional environments in which new constitutional norms are developing, and which provide leverage for ongoing constitutional development.

Perhaps the most significant recent example of this is found in the popular discourse that suddenly appeared in response to the death of university design student Sun Zhigang while in the custody of the Guangdong public security apparatus. This discourse was heavily laden with constitutional discussion, and it led to the repeal of China's custody and repatriation system.

The CCP's propaganda organs subsequently sought to stifle such critical constitutional discourse. But it has nevertheless been kept alive by Chinese lawyers and legal activists. Three years after the Sun Zhigang incident, this popular constitutional discourse re-emerged over the drafting of the Real Property Law, forcing reconsideration on the part of political authorities. This discourse, too, was subsequently suppressed by the Party's propaganda apparatus. But the channels through which it took place nevertheless remain open, ready to catalyze new constitutional discourse when the appropriate issue arises. These include the legal profession and a reasonably sympathetic and professionalizing press. These channels are just emerging, and so far are only marginally effective. Nevertheless, the fact that constitutional norms are now beginning to penetrate the emerging identities of the press and the Bar in China suggests that the reach of constitutional consciousness has extended beyond the controlling hand of the party-state. It is no longer dependent on the consent of the Party for its propagation.

Studies show constitutional consciousnesses to be blooming among diverse elements of the Chinese population, including the rural peasantry, the migrant and urban industrial workforces, and urban apartment owners. It is a disillusioned consciousness, to be sure, one that is well aware of the systemic problems described by Pei. Nevertheless, it remains an optimistic one, generally regarding Chinese constitutionalism as a possible force for positive change, rather than a dead letter. Such optimism in the face of disillusionment may seem hard to sustain. However, exactly the same form of disillusioned constitutional consciousness emerged during constitutional transitions of early industrial America and drove the constitutional reform movements — the Mugwumps, the populists, and the progressives — who ultimately brought the American constitution into it modern guise.

A similar kind of consciousness appears to be affecting constitutional responses in China, albeit slowly and fitfully, as we saw above in the discussion of the Sun Zhigang case. The political system is indeed developing policy initiatives that address articulated concerns of abused and endangered workers, rural landholders, the unemployed, and those deprived of fair access to adequate educational opportunities.

Such responses are often not those that the American constitutionalist predicts they should be. For example, China's response to worker safety and abuse has been to promote corporate social responsibility rather than independent unionization. And many of these responses may fail to produce the desired results. But we must avoid the fallacy of the American constitutionalism that presumes that every possible solution for constitutional and social problems has already been catalogued. In a world in

which the future of constitutional possibilities remains open, and in which constitutional transition and development are often the spontaneous aggregate products of thousands of individualized and localized experiments, the developmental relevance of such responses should not be dismissed simply because they embody regulatory strategies that differ from those that comport with our own experiences, or because their actual impact is less than we would wish. In a world in which constitutional development is complex, and in which constitutional possibilities are inexhaustible, experimentation is probably the only effective evaluative criterion in analyzing developmental and transitional capacities.

On the need to assume responsibility

The American constitutionalist is likely to raise three principal objections to this analysis. The first objection claims the emergent constitutional optimism is a form of political co-option. A willingness to engage with or challenge an unjust state on the state's own terms represents a self-interested betrayal of the true public good. But in making this claim, the American constitutionalism must be prepared also to label Mahatmas Gandhi, Desmond Tutu, and Martin Luther King, Jr. as traitors to their causes, or deny the public-mindedness of the authors of the velvet revolutions of Poland, Hungry and Czechoslovakia. These people, too, sought to transform systems every bit as unjust as that of China by working with and through the system rather than through abrupt and violent overthrow. To claim that they were morally and intellectually 'co-opted' is to speak a language that few would understand.

Another objection to the gradualist approach is that it is taking too long. But gradualism cannot be dismissed simply because it is too gradual for our tastes. The real world does not operate in accordance with our moral sensitivities. Constitutional transitions can take generations, during which time people will continue to suffer injustices. The constitutional modernization that began in the United States in the nineteenth century was not effectively achieved until the Second World War. Its dislocations and continued injustices plagued American society for generations, with new problems and injustices arising out of attempted solutions. In this perspective, the fact that after only thirty years, China still faces constitutionally significant dislocation and injustices, with regards to its ongoing and immense social and economic transformation, is simply not an adequate reason to pronounce the system failed.

The final objection is that my advocated perspective would encourage us to do nothing about China's real and significant political and constitutional problems, because it would suggest that everything is going to be alright in the end. But I am not suggesting that a successful transition in China has become a *fait accompli*. Clearly, this transition, if it is to be effective, is requiring of considerably more effort and struggle to make it work.

In fact, it is precisely the perspective that China is 'trapped in transition' that offers an easy way out, by discarding the difficult moral compromises and prioritization of values that real 'transition' inevitably entails. Real transition is hard. It involves inevitable mistakes and hard compromises. It involves having to bargain with the devil — and sometimes losing. It involves assuming moral responsibility for the limits of our own knowledge, limits that are both inevitable and can cost others dearly. It involves the ever-present and inescapable possibility of being shown, after the fact, to be wrong. In short, it involves the disconcerting awareness that wanting to do good and actually doing good are very different, and that the latter may not only exceed the limits of our powers but also our moral awareness. Consoling ourselves that China is indeed 'trapped' in transition allows us to avoid this reality; to avoid assuming the hard responsibility for the work that most needs to be done in the context of China's immense and frighteningly dynamic constitutional, political, and social transition.

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