The Counter-Enlightenment Strikes Back

Lucas Brang 2020-07-29T11:31:22

> "For China, the May Fourth Movement eight decades ago was also an enlightenment, but the social and economic conditions were then not ready for liberal constitutionalism, and the movement ended with the triumph of Marxism-Leninism as a new dogmatism. Will this second 'enlightenment' fare better?"
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> *Albert Chen, Toward a Legal Enlightenment*

How does one make sense of the piece of legislation known as the "Constitution" in a political context where there are no effective mechanisms for its enforcement, and where constitutional text and political reality diverge dramatically? For the longest part of the post-1989 era, the majority of Chinese jurists approached this predicament with an avowedly reformist attitude. Using the familiar language of Enlightenment universalism, they called for the gradual overcoming, through an empowered judiciary, of the rift separating political reality from normative ideal: China, it was said, was "marching toward an age of rights".

Since around the mid-2000s, however, a growing number of Chinese constitutional theorists have set out to challenge this implicitly liberal *modus vivendi*. Acting upon a "new", decidedly non-Marxist set of ideas – "organic" anti-formalism,cultural particularism, and Schmittian political realism – they rejected the nascent efforts at "judicialising" China's constitution as a form of "Westernisation". Although the link between academics and the political leadership remains opaque, this theoretical assault on liberal constitutionalism has had enduring effects, and a good deal of the rhetoric which subsequently sunk into official discourse seems to originate here. Collectively, these ideas amount to what one might call, borrowing Isaiah Berlin's famous phrase, a "Counter-Enlightenment" in Chinese jurisprudence.

On an institutional level, the People's Republic of China (PRC) has undergone significant restructuring in recent years, culminating in the 2018 Constitutional Amendment with its re-merging of party and state organs under the rubric of "comprehensive party leadership". If anything, this has moved the country even farther away from genuinely "constitutional" checks on power. Ideologically, this institutional backsliding has coincided with an equally troubling trend toward the "rectification" of dissenting voices in society and academia.

However, leaving aside the widespread interpretative uncertainty about the current leadership's policy – which seems in equal parts "legalist" and anti-liberal – we ought not to lose sight of more long-term intellectual developments. Arguably, the most momentous shift since the late Hu Jintao administration pertains to what Eva

Pils calls the “intellectual premises on which the legal system is built”. For more than a decade now, nativist ideas have been simmering below the surface of the PRC’s officially-sanctioned “long march toward rule of law”, breeding a language of vitalism, anti-globalism, and political exceptionalism.

Global Constitutionalism and its Others: The Rise and Demise of Enlightenment Talk

In hindsight, the rise of Chinese statism and its lexicon of particularity (“Sino-speak”) have paved the way for the effective outlawry of an Enlightenment vocabulary that, for all its problematic history, is inextricably linked with the language of global constitutionalism. To be sure, the state of Chinese constitutionalism, or “anti-constitutionalism”, has always been feeble at best. And yet, seeing in the recent retrogression nothing but an ex post confirmation of the eternal return of the same (in the shape of the almighty party-state regime) risks underestimating the authority that “Enlightenment talk” enjoyed in the PRC until quite recently. Whatever the actual chances for progressive constitutional reform may have been during the early 2000s – the “political grammar” of global constitutionalism seemed largely beyond debate.

This constitutionalist grammar can be traced back to the 1990s, a decade which Albert Chen vividly described as a “legal enlightenment”, characterised by the seemingly “unqualified embrace at face value of the discourse of reason, subjectivity, liberty, equality, rights, progress and modernization”. In a 2004 lecture, prominent liberal legal scholar He Weifang felt no discomfort in telling his Chinese audience that, in “the present, the West’s constitutional system is […] almost universally recognized worldwide” and “can be described with Francis Fukuyama’s classic expression: the end of history”. The containment of state sovereignty by a global Juristocracy appears here as part of the historical mission of all “enlightened Chinese intellectuals”. A year later, He’s colleague at Peking University, Zhang Qianfan, conceptualised this as a broad shift from “ideology” to “science”, “self-centredness” to intellectual openness, “methodological holism” to “individualism”, “state sovereignty” to “individual rights”.

Enter the Counter-Enlightenment: From Epistemic Localism to National Particularity

Around the same time, at the height of “enlightened” reformism and constitutional “judicialisation”, there emerged what in retrospect looks like a counter-enlightenment avant-garde. In the eyes of these champions of particularity, appeals to liberal constitutionalism are but a sign of the “‘self-Orientalising’ mind-set of followers” (Tian Feilong); an unwarranted “scholarly self-confidence” of detached academics who “feel ashamed before the great constitution of ancient China” (Su Li). For those authors, speaking the language of the Enlightenment is tantamount to complicity in institutional Westernisation, intellectual heteronomy, and cultural self-denial: cosmopolitanism as a sin against the true life of the nation.

How did this discursive shift come about? It is a striking testimony to the globalised state of legal thought that the roots of the Chinese Counter-Enlightenment, too, lie in the post-Cold War years. This was the time when Su Li, upon returning from the United States, started advocating that Chinese legal reforms had to be built upon "local knowledge" and "indigenous resources". The familiar postmodern critiques of the dark sides of Enlightenment universalism were first translated into Chinese. More importantly still, this was also the time when the Basel-trained theologian Liu Xiaofeng first began popularising the work of Carl Schmitt. What follows is history: a veritable "Schmitt fever", in the course of which the "wisdom of this dead Nazi" (Koskenniemi) appeared like a shining hill in all this liberal gloominess, guiding the souls of disoriented Chinese conservatives out of the post-1989 predicament called globalisation.

A sense of crisis is tangible in the writings of these jurists from the late-2000s. Reading Chen Duanhong, we learn of "globalisation's neo-colonial challenge to nation state-building"; of the risk of "national disintegration", particularly for "naïve nations"; and of the "constitutional crisis" that was already looming in Hong Kong and Taiwan. Chinese legal theory, we are told, was suffering from a "paradigm crisis", a deep-seated lack of "autonomy" (Deng Zhenglai). No wonder, given that Chinese jurists were making themselves "slaves of a certain culture or ideology" (Su Li), "copy[ing] everything mechanically" from "Western textbooks" (Chen). The remedy seemed straightforward: throwing off the shackles of "Western Enlightenment tradition" and "international ideological standards" (Jiang Shigong), and "facing reality". It is hardly surprising what this entails: "the leadership right of the Chinese Communist Party is the fundamental fact of the Chinese Constitution" (Chen). The dead Nazi sends his regards.

Constitutional Anti-Globalism: In Search of the Juridical *Volksgeist*

At the risk of granting too much theoretical coherence to an eclectic set of polemical statements, we can identify three elements which situate the above arguments within a global genealogy: i) political "realism", that is, a deliberate confusion of social factuality with legal normativity; ii) "organic" anti-formalism; iii) historicism and cultural essentialism.

i) "Facing reality", under the guidance of a Schmittian ethos, implies recognising an "existential law" of national integration (Chen), "a law of necessity that upholds the state" (Su Li). "A rule of law without party leadership", writes Wei Leijie, "is by no means a viable choice". Instead, the *factum brutum* of China's polity "must be confirmed normatively" (Chen). If there is a "gap" between constitutional text and reality, this surely has nothing to do with insufficient enforcement (as "Westernisers" would have it), but rather with a false representation of the "living" or "unwritten constitution" within the profane constitutional text. *Ex facto ius oritur*.

ii) In conservative thought, the insistence on "real life" shifts the task of jurisprudence: from "subsuming" social facts under legal norms, to the corporatist

“mediation” between and “integration” of different “collective entities”. This is the idea underlying Chen’s “living constitution”, which “integrates” state and society. Or that of Jiang’s “unwritten constitution”, which sanctions the “organic unity” of party and state. Strikingly, the same lexicon of vitalism and organicism is utilised by self-declared “conservative liberals”, too. For Gao Quanxi, constitutionalism is a “living political skill”, subject to an “indigenous normativity” which cannot be mechanically transplanted. Law, in this worldview, is “embedded” in different “forms of life”. “Transplanting the American model of judicial review”, writes Liu Han, “would require transplanting the whole set of constitutional cultural beliefs that backs up and sustains the American constitutional system”. For Jiang, these lifeforms are patently incommensurable: “Westerners” could never hope to “truly understand the Chinese philosophical tradition of the ‘unity of thought and action’”, nor the intricate institutional flowering of its political genius.

iii) Historicist legal thought departed from Hegel’s proposition, in his *Rechtsphilosophie*, that all nations are imbued with a specific “consciousness” and “emerge with their own particular and determinate principle, which has its interpretation and actuality in their constitution”. For Su Li, too, “it is the life of a nation which creates its laws, whereas legal scholarship can merely theorise upon them”. “The theoretical task of political constitutionalism”, writes Chen Duanhong, is to provide an “interpretative framework for a people to understand their own political existence”. As this political existence is rooted in a concrete lifeform and “grounded in this great native land” (Jiang), it breeds peculiar and incompatible forms of legal reasoning.

The Dilemmas of Self-Assertion: Theoretical Paradoxes and Unsettling Legacies

There is of course a long tradition of such national self-fetishisation in “Western” legal thought. Think of Rudolf von Jhering, who was describing Roman jurisprudence as “an alien law in a foreign tongue” and postulated a “gaping rift that opens up between such a law and the national legal sentiment”. Or of Roscoe Pound, who lamented that the intrusion of Roman law had corrupted the naturalness of the American common law tradition. Or, indeed, of Carl Schmitt, who decried the “displacement” of “medieval Germanic thought” by the “abstract normativism” of “Roman law” and “liberal-constitutional” thinking. If anything, this goes to show that, time and again, legal globalisation reproduces the same vocabularies – which are then strategically appropriated by local actors in an appeal to either global convergence or “radical difference”.

Since it draws on the same lexicon of particularity, Chinese neo-conservatism is troubled by a “performative contradiction”. Despite its professed mission of presenting the Chinese model as an „institutional alternative to democratic governance for non-Western states” and an “entirely new rule of law civilisation”, it is evidently as much an outgrowth of academic internationalisation, indeed “Westernisation”, as its liberal nemesis. Thus, liberals like Ji Weidong, Xu Jilin, or Gao Quanxi have long suggested that, while neoconservatives make use of a

global discourse of anti-modernism, they also reject the institutional underpinnings that have enabled this discourse to globalise in the first place, and hence their own epistemic basis.

After the Storm: Toward an "Enlightened" Counter-Enlightenment?

To the extent that the PRC's rise as an illiberal party-state has put a lid on many of our unspoken teleological assumptions, a simple return to the status quo ante of pre-2008 liberal complacency seems both unlikely and undesirable. Moreover, the resulting global disenchantment might be more ambiguous than it seems at first. Historically, the Counter-Enlightenment not only lent itself to national mystification; it *also* animated a sensible resistance to the Enlightenment's penchant for ahistorical abstractions. Herein lies the plausible core of the Chinese critique of legal transplants, of the naïve belief in the straightforward transferability of a liberal polity.

Such an "enlightened" Counter-Enlightenment, which internalises its laudable sensitivity to social context without subscribing to national obscurantism, is arguably what informs "conservative liberals" like Gao Quanxi in their critical reinterpretation of Schmittian concepts. At its most intriguing, Gao's "organic structuralism" is a passionate call for the extra-legal conditions of a liberal *Rechtsstaat*; a kind of "Böckenförde dictum" with Chinese characteristics. The decisive question, perhaps, will be if the Chinese Counter-Enlightenment can escape the fate of its European counterpart – of devolving into an unreflective, and potentially dangerous, nativism.
