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Legal Orientalism and its European Heritage: An Essay on Teemu Ruskola's *Legal Orientalism*

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Abstract

The debate about legal Orientalism has gained traction in Western as well as in Chinese legal scholarship. The benchmark of this field of study is currently Teemu Ruskola's Legal Orientalism*. While Ruskola's book focuses on the United States, China and modern law, the following article recommends reinterpreting his argument from a European perspective. Thus, the article first reflects on whether a European perspective is appropriate and explains how it applies to the following argument (I). It goes on to argue that* Legal Orientalism *provides a deconstructive argument, hinting thereby at what remains to be thought about the Orientalist legal discourse. It is notably the notion of "Oriental legalism" that points to something beyond legal Orientalism (II). The article therefore then comments on this concept and explores some further avenues for how to rethink legal Orientalism from a more European perspective. The main suggestion is that we should refine Ruskola's conceptual analysis of legal Orientalism as well as his presentation of the "Western" starting point (III).*

I.
A EUROPEAN PERSPECTIVE ON LEGAL ORIENTALISM

"I shall be calling *Orientalism*, a way of coming to terms with the Orient that is based on the Orient's special place in European Western experience."[1] Thus is the definition Edward Said used to start his ground-breaking book on Orientalism. With his book *Legal Orientalism*, Teemu Ruskola sets out to add the *legal* part to this story. Following Said, he understands Orientalism as "discourses that structure Western understandings of the East" and undertakes to study the "*legal* forms of Orientalism" so conceived.[2] Ruskola then gives his study of legal Orientalism a more specific focus in what he takes to represent the West, the East and law, respectively. For the West he focuses on the United States, for the East on China and for law he narrows it down to the rule of law. This "rough cultural mapping of the triangulated relationship among China, the United States, and law generates a number of assumptions" that the book sets out to address.[3]

Although most of the argument plays out within the triangle so defined, the book does not work without a European perspective. For historical reasons, Ruskola must and does, of course, draw on European sources to map the emergence of (legal) Orientalism. He also pointedly remarks that "European analytic categories are not universal" but, as a matter of an "ongoing legacy of European imperialism," both "indispensable and inadequate in helping us to think through the experiences of political modernity in non-Western nations."[4] As to law, this European heritage becomes especially clear in the notion of "Euro-American law," which the author uses throughout the book to expose the European roots of American legal Orientalism. Moreover, Ruskola chooses to work with a number of methodological tools developed in the European tradition——of central importance to the argument are Foucault's discourse analysis and Gadamer's hermeneutics. Against this background, it seems appropriate to make some dialectical observations regarding *Legal Orientalism* from a more European perspective.[5]

For the following argument, legal Orientalism and its European heritage therefore suggests two things: First and from the start, legal Orientalism is a European issue, too, and hence must be open for historical comments from a European perspective. In this respect, I will draw hereafter on examples from Germany and England. Second, the theory of legal Orientalism may be enriched with further authors closer to the European tradition. In this respect, I suggest to extend on the book's use of Derrida and to bring in Luhmann and Habermas.

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1 *Edward Said*, Orientalism (1978), 1.

2 *Teemu Ruskola*, Legal Orientalism. China, the United States, and Modern Law (2013), 4f. For an earlier version of the argument, see idem, Legal Orientalism, Michigan Law Review 179 (2002), 101–234. References hereafter are all to Ruskola's 2013 publication.

3 Ibid., 6.

4 Ibid., 15 (borrowing from Dipesh Chakrabarty).

5 For earlier contributions to the debate, see e.g. *Qiang Fang*, Review of Books, American Historical Review 119 (2014), 851–852; *Idriss Fofana/ Peter Tzeng*, Recent Publications, Yale Journal of International Law 39 (2014), 405–408; *Pierre Legrand*, Noted Publications, Journal of Comparative Law 8 (2013-14), 444–459; *Lu Nan*, The Misuse of Functional Comparative Law and the Alienation of Orientalism: Starting from Teemu Ruskola's Legal Orientalism——China, the United States and Modern Law, Journal of Comparative Law 12 (2017), 187; *Michael Ng*, Judicial Orientalism——Imaginaries of Chinese Legal Transplantation in Common Law, in: Yun/Ng (eds.), Chinese Legal Reform and the Global Legal Order (2018), 211–237; *Jennifer Pitts*, The Critical History of International Law, Political Theory 43 (2015), 541, 547–550; *Carol Tan*, How a "Lawless" China Made Modern America: An Epic Told in Orientalism, Harvard Law Review 128 (2015), 1677–1704; *Timothy Webster*, Book Reviews, American Journal of Comparative Law 62 (2014), 811–818; *Li Yang*, Legal Orientalism, or Legal Imperialism?, Rechtsgeschichte——Legal History (Rg) 22 (2014), 316–321. For the Chinese discussion, see notably the following special issues: Renmin University Law Review 13 (April 2017); SJTU Law Review (September 2017); Xiamen University Law Review 17 (April 2017); and *Liang Zhiping*, Cong Falv Dongfang Zhuyi Dao Dongfang Falv Zhuyi: Chaoyue Dong Xi Fang Eryuan Duili [From Legal Orientalism to Oriental Legalism: A Breakthrough in the Binary Opposition between the Orient and the West], The Paper (Shanghai Book Review) (Oct. 11, 2016).

II.
DECONSTRUCTING LEGAL ORIENTALISM

For his epistemology of legal and political modernity, Ruskola relies greatly on the difference between the state and the individual. While he seems occasionally to deplore this dichotomy, it is beyond doubt that he reduces the modern legal discourse to these two actors: the "constrained modern notion of politics recognizes ultimately only two authentic subjects, as it were: the state and the individual."[6] In a further crucial conceptual decision, Ruskola incorporates law *into* society along the lines of Robert Gordon. He refers to this explicitly as "deconstructing the binary opposition" between law and society.[7]

This conceptual setting plays out within the triangle introduced earlier and makes it analytically very clear how the story of *Legal Orientalism* unfolds: the US' state, society and individuals can be subjected to the rule of law, whereas the Chinese on all these three levels are left with lawlessness. Once law's discourse has been staged with these oppositions, Ruskola develops his own deconstruction of it, which ultimately reveals Chinese lawlessness as an ethnocentric fallacy. Although Ruskola does not explicitly endorse a deconstructive approach, it quite obviously informs his thinking on legal Orientalism as it has informed postcolonial theory before him.[8] In an earlier paper on the matter, he writes: "we must deconstruct the radical normative contrast between the rule of law and the rule of men";[9] and in the book we read: "it is precisely the laws at the margins of a liberal democratic state that define its center,"[10] what can be easily understood as a hidden reference to Derrida's *Margins of Philosophy*.[11] We encounter such hidden references a number of times in *Legal Orientalism*; and while they do not make the book's background theories explicit, they generally indicate central features of the argument.[12] So it is with deconstruction, for the book indeed uses a classic deconstructive strategy in challenging binary oppositions, most prominently the one between US lawfulness and Chinese lawlessness.[13]

One may pause here and ask whether these oppositions and their deconstruction are not too schematic an argument. Is it plausible to map the relationship between China and the United States in such a black and white manner? In particular, is the fundamental opposition between US lawfulness and Chinese lawlessness not produced by an overly forced reduction of law to rule of law?[14] And are we really to assume that modern political epistemology boils down to the state and the individual? In brief, is it not quite uncritical to stage the problem like this? I think we must concede Ruskola these oppositions and reductions for the following reasons: Not only does he, himself, recognize that an opposition such as the state and the individual provides a "spare ontology of the modern state,"[15] that the contrast between rule of law and rule of men is "exaggerated and oversimplified,"[16] and that the juxtaposition of an American lawfulness and a Chinese lawlessness is "too simplistic and too static."[17] It is the book's very point to show how and why such simple oppositions have had and continue to have ruinous analytic consequences for understanding Chinese law and at times even backfire on American legal practice.[18] To put it differently, the discourse of legal Orientalism is not a world made of sober and fine-tuned theoretical distinctions, but of stereotypes, clichés and affects up to the point of "free associations" that will readily connect certain images with Chinese lawlessness.[19] To deconstruct crude Orientalist oppositions is therefore not only justified, it makes a necessary part of analyzing legal Orientalism.

In *Limited Inc* Derrida, however, reminds us that deconstruction means not destruction, yet a *harbinger* of what remains to be thought beyond the destructivist and constructivist scheme.[20] In the book's epilogue, Ruskola uses the term "Oriental legalism" to indicate one conceptual element of what may lie beyond legal Orientalism.[21] In what follows, I will focus on this part of the book and the remarks and ideas surrounding this concept. The main argument will be that further thinking on legal Orientalism should refine the book's conceptual analysis and how it conceives of its "Western" start-

6 *Ruskola* (fn. 2), 21—cf. 2, 99, 109, 209.
7 Ibid., 36.
8 The disposition of postcolonial theory to deconstruction is furthered by the fact that the translator of *Jacques Derrida*'s Of Grammatology (1976), Gayatri Chakravorty Spivak, became a famous postcolonial intellectual.
9 *Teemu Ruskola*, Law Without Law, or Is "Chinese Law" an Oxymoron?, William & Mary Bill of Rights Journal 11 (2003), 655–669, 668.
10 *Ruskola* (fn. 2), 8.
11 *Jacques Derrida*, Margins of Philosophy (1982).
12 The most prominent example for this might be Ruskola's notion of the modern subject: "To be a modern subject—a person who owns one's body, is entitled to the fruits of one's labor, and has the right to political representation—is to be a legal subject." (*Ruskola* (fn. 2), 23, emphases omitted) This description pays homage to Lockean liberalism, famously expounded in *John Locke*, Two Treatises of Government (1988) (1689), esp. 285ff.
13 In the same vein, *Tan* (fn. 5), 1679. A further telling passage in this respect is: "What we have witnessed in this chapter [5] is thus a series of collapsing distinctions: distinction between legal Orientalism as a system of representation of Chinese law versus Chinese law itself as a historical and institutional practice; opposition between law versus Orient; territorial versus nonterritorial forms of law and colonialism; and, finally, an imperial inability to maintain a distinction between self and other...." (*Ruskola* (fn. 2), 196)
14 See text at fn. 3.
15 *Ruskola* (fn. 2), 209.
16 Ibid., 14.
17 Ibid., 6.
18 Cf. ibid., 14, 141ff.
19 Cf. ibid., 11, 31 and *Teemu Ruskola*, A Response to Professor Tan's Review of *Legal Orientalism*, Harvard Law Review 128 (2015), 220–224, 220f.
20 *Jacques Derrida*, Limited Inc (2001), 227.
21 *Ruskola* (fn. 2), 232.

ing point. This should allow for a more nuanced understanding of modern law's global discourse with all its historical depth and far-flung implications.

III. BEYOND DECONSTRUCTING LEGAL ORIENTALISM

For further thinking on the topic of legal Orientalism, it seems important to do away with the reductionist setting that underpins *Legal Orientalism*'s storyline. The conceptual reductions mentioned earlier are justified for the sake of the Ruskola's argument, however, for going further those concepts should be more differentiated.

We may start with the "spare ontology of the modern state" that reduces law's epistemology to the state and the individual as its main *actors*. On this point it seems to me that the book does not fulfil its deconstructive task. The narrative stays bound up in this opposition even where the author tries to look for "new subjects" within the realm of Chinese corporate law.[22] A truly deconstructive approach would entail not to looking for new *subjects* but rather to enquire what escapes the subjective perspective altogether. A theory of choice, which offers such a perspective, is Niklas Luhmann's systems theory because in this theory it is not subjects that matter, but social communication.[23] Quite some of Ruskola's observations could be stated much more powerfully from within this systemic epistemology. For instance, his insightful and convincing thesis that modern US rule (of law) has become a "colonialism without colonizers"[24] becomes even more radical if considered in systemic concepts: The discourse of legal Orientalism in its American version produces effects that reach far beyond the single actions of political and individual subjects. In other words, because those effects are systemic, they need not rely on colonizers any longer to colonize the Chinese lifeworld.[25]

Via systems theory one could also gain a more differentiated map of modern society, for this theory does not simply collapse all law into society.[26] Without ruling out the value of Ruskola's approach, such a more differentiated map would allow for *other* observations, which will in turn suggest *other* conclusions on one or the other point. Systems theory takes the view that modern society is functionally differentiated into sub-systems of social communication, most notably law, the economy, politics, religion, family, media and science. In this epistemology there is nothing special about an "*unlegal*" or "nonlegal" area of social activity, which Ruskola claims to be a particular Chinese feature.[27] Law's and the modern state's "will-to-power that insists on characterizing everything within its jurisdiction as either legal or illegal"[28] was deconstructed in this theory long ago——be it in the West or in the East.[29] In systems theory, law functions just as much via the "binary code of legal versus illegal,"[30] yet it also gives ample space to the unlegal in other social systems, be it politics, religion or the economy. Such a perspective is worthwhile because one might feel less at pains to squeeze everything into law; and this relaxes and sharpens the normative assessment and perspective on Chinese law and its role in the global legal discourse. For instance, if we can find Chinese family structures in Chinese corporate structures, it does not follow that we are to speak of law here. From the Chinese township and village enterprises (TVE), which Ruskola uses as an example to make this point,[31] we may not necessarily learn something about law. Maybe we learn something only about how to build a more responsible version of a market economy beyond the legal realm.[32] In short, systems theory makes room for granting the law both more importance and less importance at once. By the same token, one can vary the standing of law vis-à-vis other social systems. Ruskola's guess that "the future of law's world is, above all, a political——indeed, a geopolitical——question" is debatable.[33] Why isn't the future of politics' world a legal question or why is law's future not an economic one (or vice versa)?

As to the concept of rule of law, Ruskola himself convincingly concludes that "the contrast between rule-of-law and rule-of-men" should be replaced

22 Ibid., 213ff.

23 The theory's cornerstones include: *Niklas Luhmann*, Soziale Systeme (1984); idem, Die Gesellschaft der Gesellschaft (1997). Ruskola only refers to systems theory on one occasion, locating it in the German and hence the European domain——see *Ruskola* (fn. 2), 305.

24 *Ruskola* (fn. 2), Chapter 6.

25 Cf., ibid., 207ff.

26 The clash with functional differentiation is, however, not surprising. One must remember that functionalism is the main target of Robert Gordon's criticism to separate law and society, and it is his criticism Ruskola reiterates——cf. text at fn. 7 and *Robert Gordon*, Critical Legal Histories, Stanford Law Review 36 (1984), 57–125, 59ff.

27 *Ruskola* (fn. 2), 220.

28 Ibid.

29 See only *Niklas Luhmann*, Das Recht der Gesellschaft (1993), Chapter 9 and 12.

30 Cf. *Ruskola* (fn. 2), 220; *Luhmann*, ibid., Chapter 4.

31 *Ruskola* (fn. 2), 216ff.

32 Yet, if we accept the TVEs as a valuable example of how to re-design capitalism and re-imagine legal consciousness as distinct from the American discourse, what would a look at Germany's social market economy (*Soziale Marktwirtschaft*) after the Second World War have to offer? It appears that the German experience tells us that there need not be a conflict between such a model of a market economy and a(n) (American) rule of law. Moreover, whether TVEs were socially benevolent institutions throughout has been questioned: "Accounts as to what these TVEs were about vary greatly. Some cite evidence that they were private operations 'in all but name,' exploiting dirt-cheap rural or migrant labour——particularly young women——and operating outside of all forms of regulation. The TVEs often paid dismally low wages and offered no benefits and no legal protections. But some TVEs provided limited welfare and pension benefits as well as legal protections." *David Harvey*, A Brief History of Neoliberalism (2005), 128f.

33 *Ruskola* (fn. 2), 233.

"with more modest and more definable concepts."[34] The remark is all the more interesting because it follows on the heels of his suggestion that "we must be prepared to accept that China can also Sinify law," that we may witness "an evolving Chinese universalism——an Oriental legalism, as it were."[35] Whatever Oriental legalism may mean here, against the book's overall argument this cannot reasonably be taken to call for yet another version of legal imperialism. Ruskola explicitly states that he "seek[s] to universalize neither China nor the United States," yet "to provincialize both" and that "it does not seem especially useful to insist that any place or any time is more or less universal than any other."[36] Thus, it would be rather disappointing if Oriental legalism meant nothing more than turning a high-minded legal imperialism upside-down from its American head onto Asian feet. Replacing the opposition between rule of law and rule of men with more specific concepts would therefore be a good start to negotiating the relationship between US law, Chinese law and other parts of law's global world. Such an approach——one that is more specific——can be adopted without giving up on the emancipatory potential that stems from the rule of law idea.[37] Considered like this, the idea of Oriental legalism is not without appeal. It presents itself more like a sober negotiation on particular legal issues and a part of a larger "critical transnational discourse" of law.[38]

Ruskola's elaborations surrounding such Oriental legalism include a further puzzling statement. It reads: "if we wish to take Chinese politics seriously … that is the risk we have to accept: the possibility of discovering that law is as much a religion as a political institution."[39] Putting aside the fact that such an equation of law, religion and politics is not quite a systems theory approach, it remains nonetheless strange. The context of the passage does not leave us with much information on how the author comes to hold this view. Since the book goes some length in linking Chinese ideas of kinship to law,[40] one could assume that the idea of "law as religion" connects to the religious elements in Chinese family ethics. One could then indeed see a link between law and religion. However, even if this reading is correct, it is questionable whether such religious elements per se point towards anything particularly Chinese. A glance at "old Europe" can teach similar things. To take just one famous example. In *Donoghue v Stevenson* we can study how Lord Atkin argues to introduce product liability into English law by drawing on the Christian neighbor principle.[41] In this case, we thus find a clear link from religion to law as we can find it in the example of the TVEs, provided that we consider their underpinning family ethics to be religious at least to some extent. Going one step further, comparing *Donoghue* with China's TVEs is especially interesting because both examples involve some "duty of care" towards others in the widest sense: While the manufacturer owes his duty of care to the consumer, the TVEs owe it to their "family members".[42] Yet according to Ruskola, the redistributive mechanism underlying such TVEs is limited "by the operation of the logic of … kinship: it does not extend to labor migrants from other villages, for example."[43] However, the corrective mechanism underlying product liability, which in *Donoghue* draws on the logic of the neighbor principle, operates precisely beyond the logic of kinship. It goes without saying that pointing out these similarities and differences is neither to suggest that corporate law and product liability would be functionally equivalent in any sense nor to favor a particular religious ethic, be it Confucian or Christian. Such examples should only invite us to appreciate and to account for the complexity in *both* legal traditions, the West and the East. In short, if Ruskola's suggestion of "law as religion" wishes to think along the lines just sketched, this would hardly be a Chinese peculiarity.

Yet there is at least one other way of understanding Ruskola's equation of law and religion, which also has the benefit of staying closer to the text. After having stated this proposition, Ruskola continues:

> While that [sc. equation] is a genuine risk, it seems hardly fatal, for it is unlikely that any political system can function unless supported by the faith of those it governs. As Antonio Gramsci insists, no political system that relies on sheer domination can last. To survive, it must be able to produce and reproduce the consent that sustains it, through the hegemonic institutions of civil society. Law is evidently a critically important institution in producing the subject of consent …[44]

34 Ibid.
35 Ibid.
36 Ibid., 59 and 234, respectively.
37 "To point out the historically contingent nature of this particular political soteriology [sc. the Euro-American rule of law idea] is to say nothing about its emancipatory potential." (ibid., 234)
38 Ibid.
39 Ibid., 233.
40 Ibid., especially Chapter 3.
41 "The rule that you are to love your neighbor becomes in law you must not injure your neighbor … Who, then, in law, is my neighbor? The answer seems to be——persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question." (*Donoghue v Stevenson* [1932] A.C. 562, 580)
42 "In a familiar pattern," the profits of some TVEs, "have been used to look after the villagers as a group. Consider Shuping Village in the Pearl River delta. Reorganized as Sanwan Group Shareholding Company, it became the primary provider of welfare programs of numerous kinds, in the form of medical care, day care centers, primary and secondary schools, nursing homes, financial aid to college students, and even living expenses and funerals." (*Ruskola* (fn. 2), 218) On the question whether such welfare operations indeed were "a familiar pattern," see the comments above in fn. 32.
43 *Ruskola* (fn. 2), 218.
44 Ibid., 233f.

Against these observations, which read almost like a legal creed, Ruskola then suggests replacing a "universal" or "particular" discourse of law with a "critical transnational discourse" of law, in which law is "both the universal and the particular, and the very moment of their making."[45] Certainly, this solemn tune sounds rather familiar to European ears; like a hymn in C Major: consent, civil society and critique. It would not be in line with Ruskola's *central* argument to *universalize* this position, for instance, along the lines of a Habermasian discourse theory of law.[46] Yet as those comments stand at the very *margin* of the author's argument, they invite a deconstructive reading: perhaps, the idea of modern law as a *critical* transnational discourse still hinges on a very old European idea. Thus, and against what has been stated earlier,[47] there might be some reservation against readily including Oriental legalism into a critical transnational discourse of modern law——however appealing that may be.

45 Ibid., 234.
46 Cf. *Jürgen Habermas*, Faktizität und Geltung (1992).
47 See text at fn. 38.

