

# Ancilla Iuris

Special Issue: Trajectories of Chinese Law  
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*Chinese Law: 6½ Trajectories*

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*This editorial essay maps the six trajectories of Chinese law presented in this special issue, introducing their key arguments and working out common themes. One such common theme is the importance of Orientalism as an analytical framework for the study of Chinese law. The essay suggests that despite recent advances, including those reflected in this issue, the theory of (legal) Orientalism is still not sufficiently complex for it to avoid defeating itself. Missing, in particular, is a theoretical understanding of Oriental, or more generally, cultural stereotypes, which seeks to answer the question: At what point does our speaking of something turn into a stereotype that distorts its true nature? The essay outlines an answer by drawing on Hegel and then restates Said's core thesis that the Orientalist bypasses the "real" Orient and reduces it to a mere stereotype of his own imagination. The restatement of Orientalism in this more robust theoretical framework shows that Said was right and wrong – in an important way.*

## I.

The trajectories of Chinese law are many. Multiple lines of development can be drawn for its long history with varying starting points and relays, with different links to contemporary issues, and converging or diverging views on the way forward. What trajectories are mapped out naturally depends on the situation of the author.<sup>1</sup> This special issue brings together six authors and hence trajectories of Chinese law. Three contributors to the issue received their primary legal education in China, and three in the United States and Europe, respectively. The setting thus allows for illustrating and arranging a dialogue across the legal traditions of East and West.

While each of the following articles has its individual take on Chinese law, there exist thematical and substantial crossing-points of the trajectories they describe and argue for. An important one is that all articles show some reservation in using the terms East and West or Orient and Occident. The common concern seems to be that these terms may suggest some cultural essence and be used as simplistic geographical shorthands that separate the legal landscape in opposing, fixed blocks. To be sure, such block-building is a salient feature of contemporary political and popular rhetoric and visibly on the rise – the trade war between the United States and

China, escalations over human rights abuses, and controversies surrounding the outbreak of the Covid crisis giving it further momentum.<sup>2</sup> But the arguments developed in this issue are, each in its own way, critical of such block-building. East and West are therefore not introduced as fixed cultural entities, yet as analytical categories. As such they most notably serve to highlight epistemological differences and difficulties.

Normatively the authors share the view that a parochial nationalism, which sets East and West on a collision course, is undesirable for engaging with Chinese law for reasons of reform or research. What they would like to see is a self-critical, equal, and conscientious comparative dialogue in a multi-polar legal world. Given this normative outlook, it is fortunate that the contributions of the Chinese and Western scholars to this issue can substantively be arranged not simply in two blocks, but in an alternating way – forming a double helix of Western and Eastern trajectories of Chinese law, as it were.

The alternating arrangement of the articles is facilitated by the fact that each of them touches, at least tangentially, on the topic of legal Orientalism. This concept basically captures how the West imagines Eastern civilizations and their legal traditions; its geographical and cultural reach therefore encompassing not only China or the Far East but also Near and Middle Eastern countries. The main predicament of Orientalist views is that they have little, if anything, to do with Asian peoples and cultures, and everything with how the West wants to see and know them as the "Other," be this positive or negative – as Oriental beauty or barbarians.<sup>3</sup> This distorted picture of the Orient was put on the academic agenda in 1978 with the publication of Edward Said's seminal book, *Orientalism*. The book argues in particular that Western epistemic control of the East would support colonial and neo-colonial practices in Asia. Orientalism became an analytical frame for legal studies in general from the mid-1990s, and for Chinese law in particular shortly after the turn of the century.<sup>4</sup> The by now classic study on legal Orientalism with modern American and Chinese law as its reference points was put forward in 2013 by Teemu Ruskola.<sup>5</sup> His book begins by tackling the Orientalist notion that law does not really exist in China because the Chinese state and its sub-

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1 See, generally, *Jon Hanson/David Yosifon*, The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture, *University of Pennsylvania Law Review* 152 (2003), 129–346.

2 For an analysis of the (non-)legal management at the initial Chinese epicenter, see *Philipp Renninger*, The 'People's Total War on COVID-19': Urban Pandemic Management through (Non-)Law in Wuhan, China, *Washington International Law Journal* 30 (2020), 63–115.

3 For a discussion of the concept and survey of the research, see *Thomas Coendet*, Legal Orientalism, in: Smits/Husa/Valcke (ed.), *Elgar Encyclopedia of Comparative Law* (forthcoming).

4 *John Strawson*, Islamic law and English texts, *Law and Critique* 6 (1995), 21–38; *Teemu Ruskola*, Legal Orientalism, *Michigan Law Review* 101 (2002), 179–234.

5 *Teemu Ruskola*, *Legal Orientalism: China, the United States, and Modern Law* (2013).

jects would neither live up to nor understand the modern concept of the rule of law. For the legal Orientalist, a comparative *legal* dialogue between American and Chinese law is a contradiction in terms. Ruskola counters this Orientalist divide between a lawful America and a lawless China by localizing the rule of law as a particular Euro-American ideal and by recalling the history of American legal imperialism in China from the mid-19th century onwards.

## II.

*Teemu Ruskola's* book on legal Orientalism connects the first four articles of this issue. The author himself opens the dialogue with a survey on how Chinese readers responded to the Chinese translation of his work. Having conceptualized his original argument as a self-critique of Western law in general and U.S. law in particular, Ruskola investigates what happens if such self-critique is transmitted to an Eastern audience. It is informative to learn that he had received the translation offer with mixed feelings, worrying that his critique could be harnessed by an increasingly muscular Chinese nationalism, while hoping that it might contribute to the re-evaluation of the Chinese legal tradition and to ongoing reform debates. It transpires from his essay that these mixed feelings about the politics of translation were justified – politics he links with the topics of self-Orientalism, Oriental legalism, and functional comparative law. It is only surprising at first glance that the Chinese debate centered on these issues, rather than the concept of legal Orientalism. After all, legal Orientalism is about how the Western self sees the East and consequently a book on this issue is for “us” (Westerners), rather than for “them,” as Ruskola confirms in his essay.<sup>6</sup> Though Ruskola explicitly declines to assess whether some of his Chinese reviewers got his argument right or wrong, he nevertheless offers some perceptive clarifications about his project, which further studies on legal Orientalism and related concepts would do well to heed.

The article of *Zheng Ge* provides us with a first-hand view of all the topics that Ruskola had identified as key issues of the Chinese debate over his book. Zheng understands legal Orientalism as a critical theory that deconstructs legal Orientalism as an ideology. More specifically, he proposes to understand legal Orientalism as a second-order observation. The legal Orientalist makes the Western observation of Chinese law as, say, despotic, backward, and

traditional. The theorist of Orientalism then observes this Western observation. In the process, the universal aspiration of the Western observer is exposed, localized, and relativized. Zheng points out that this process may awaken some *Eastern* observers, too, who themselves have become self-Orientalized, that is, who have internalized the Western understanding of the Orient as their self-understanding. In this respect, he offers a critical account of the drafting process of the newly enacted Chinese Civil Code – which strongly reminds the Imperial and Republican reform debates that Liang Zhiping's article analyzes later in the issue. Overall, Zheng thus acknowledges and, at the same time, relativizes the value of Western theory for developing a Chinese legal subjectivity: The theory of legal Orientalism may help to dispel self-Orientalism, but it offers no answer to what China's way to the rule of law and modernization shall be. He expresses the aspiration that such a Chinese path to an “Oriental legalism” may be developed in a legal discourse that embodies the equal subjectivity of *all* civilizations.

What Zheng describes as the first- and second-order observations of legal Orientalism, *Thomas Coendet* analyzes as the two histories of legal Orientalism. In his account, the two levels of observation correspond to two different speech-acts: The one consisting in making an Orientalist statement, such as the suggestion that the Chinese lack individual subjectivity; the other consisting in pointing out that such a statement is Orientalist. Each of these speech-acts produces a history that potentially blocks comparative legal learning. Coendet illustrates these histories with Ruskola's account of Hegelian Orientalism in which China is portrayed as an anti-model of the enlightened Western world. This critical reading could seem to suggest that Hegel's philosophy should be dismissed out of hand for reasons of political correctness and that, by extension of the argument, Western law with its Orientalist past should meet the same fate. Criticism of Chinese law on the basis of Euro-American legal ideals and concepts would then be *a priori* illegitimate. Coendet argues against such a facile reading of Ruskola's book. Based on a close-reading of the concepts of dialogue and Oriental legalism, he shows that this text rather enables us to envision a comparative legal dialogue between China and the West that neither loses its learning capacities nor its emancipatory potential.

Coendet's view strikes a chord with *Jiang Haisong's* reading of *Legal Orientalism*. This Chinese reviewer, too, follows the main threads that Ruskola discerns in his reader's guide to the reception of his book. With Jiang's article the Western reader thus gets a second look over the shoulder of a Chinese scholar considering the matter. This is informative, especially because Jiang introduces a number of

<sup>6</sup> For a more detailed analysis of this point, see *Thomas Coendet, Critical Legal Orientalism: Rethinking the Comparative Discourse on Chinese Law, The American Journal of Comparative Law* 67 (2019), 775–824, 780, 782.

Chinese academics who have developed arguments that are similar to, yet independent from Ruskola's account. Jiang is particularly critical of the latter's comparative argument that treats traditional Chinese family clans as functional equivalents to modern U.S. corporations. In a similar vein, he thinks that the degree of self-Orientalization in the Chinese law reforms after 1978 has been overstated. Ruskola's discussion of contemporary Chinese legal theory would then present a rather indiscriminate assortment of authors who have little in common besides their anti-Western stance. As a result, theoretical positions would be commended for resisting self-Orientalism, which are actually most controversial among Chinese scholars. Jiang deplors that such argumentative biases and problems might contribute to turning Ruskola's otherwise very valuable theory into a political myth for a conservative, nationalist agenda.

*Jedidiah Kroncke* continues and broadens the scope of the discussion by placing the concept of Orientalism in a triangle with Occidentalism and comparative law. Kroncke's main concern is that traditional comparative lawyers would largely be locked into internecine battles over what counts as "good" and "bad" comparative law. In their quest for improving their method and the world by means of comparative law, they would tend to overlook its "dark side." Kroncke exposes this dark side of comparative law in developing arguments from legal anthropologist Laura Nader. Succinctly put, it consists in the use of comparative law by reactionary power holders to fend-off progressive domestic voices. So legal comparison is here not a fair-minded scholarly affair, but merely deployed to produce a crude cultural contrast between some alien foreign and the domestic legal tradition whose normative priors shall be defended. Such contrastive comparisons, Kroncke argues, allow domestic power holders to invoke the Oriental, Occidental, or global to control the local. A key example, which Kroncke borrows from Nader, is the control of women: Women arguing for political and social reform domestically have their legal situation contrasted with women in foreign countries and are instructed to appreciate the status quo. Kroncke, then, uses this analytical framework to critically discuss contemporary authoritarian agendas and identity politics, paying special attention to controversies in U.S.–China relations.

With the article by *Liang Zhiping*, we shift the focus from the critique of traditional comparative law to some of its more familiar, if still unresolved, methodological problems. Liang investigates the issue of whether Western legal concepts are suitable for analyzing non-Western legal traditions, taking the search for "civil law" in China as his core example.

His trajectory of Chinese law is the longest and most complex, reaching deep into China's past with focal points on early Chinese dynasties, late Imperial and Republican reform processes, and contemporary developments. The Orientalist thesis that no "real" law exists in China, which we know from Ruskola's work, returns here in the variation of ancient Chinese law lacking "real" *civil* law. Liang unmaskes the civil law label as a Western marker of progress and the attempt to prove it for China's legal tradition as yet another expression of legal Orientalism. He discerns such attempts in modern Chinese law reform as well as in contemporary legal history textbooks. For the better part, Liang illustrates his methodological challenge with a detailed analysis of an advanced treatise on early Chinese civil law and therewith the non-specialist benefits from a glimpse at substantive legal matters and their normative background, such as making a will. Liang concludes that using modern concepts for understanding and describing the ancient legal world may indeed be inevitable, yet this would not make intertemporal and intercultural communication futile. It would be paramount, however, that the modern researcher does not directly apply modern concepts to ancient Chinese texts. Concepts such as civil law may add to, even inspire our understanding of historical materials; however, it must be ensured that these materials are given room to unfold their own conceptual logic and that the societal issues they address are explained against the normative background of their own time.

### III.

It would neither be possible nor desirable to synthesize these six trajectories into one trajectory of Chinese law. The reader is rather invited to continue the dialogue on the basis of the conclusions she or he wishes to draw. There is one common thread through these articles, however, that warrants special mention and further elaboration: The contributors all consider self-reflection critical, no matter if they locate it on a conceptual or historical level, on the level of substantive legal issues or comparative methodology. At the same time, we have noted that each contribution links at some point to the theory of Orientalism as expounded by Edward Said. We think that self-reflection on this particular theoretical basis could and indeed should be taken further. To be sure, Said's work is not spared criticism in this issue; Jedidiah Kroncke even suspects that clinging on to Orientalism as an analytical framework means using "old critiques and old language in a world that seems to have passed by comparative lawyers."<sup>7</sup>

<sup>7</sup> See *Kroncke*, in this issue, 188.

Nevertheless, we believe that self-reflection on this particular theoretical heritage still deserves more attention – not only in general but also in the confines of an introduction to a special issue that serves as an invitation to the non-specialist in Chinese law and related theories.

Since my following argument merely concerns such a related theory, viz. Orientalism, we count it only as half a trajectory. One particular reason for adding it to the other six trajectories is the fact that debates on (legal) Orientalism can become rather heated.<sup>8</sup> So the uninitiated legal theorist or comparative lawyer may be bewildered by the jargon and hostility she or he faces when opening relevant texts and then unfortunately conclude that such ideas can be safely dismissed altogether. Responsibility for this sorry state of affairs is often shared between reader and author. It seems helpful, in this respect, to point out that the communicative breakdown between so-called critical legal theories (like the theory of legal Orientalism) and more traditional approaches (like legal positivism and functionalism) finds a parallel in the divide between “continental” and “analytical” philosophy.<sup>9</sup> On the attraction of the “analytical camp,” *Jochen Hörisch* once eloquently remarked:

Analytical philosophy operates as a discursive police: like Parmenides, Nikolaus von Cues, Hegel, Heidegger, Benjamin or Adorno one ought not to speak and think. Analytical philosophy is therefore irresistible to thinkers who do not understand Hegel’s, Heidegger’s or Benjamin’s writings and are a priori firmly convinced that this can only be the fault of these writings.<sup>10</sup>

Well put, but one must be sure to return the compliment. The author can have his fair share in the debate and the phenomenon that critical theories emerging from the “continental camp” can police thought and speech is just as good a proposition. These are now issues that also concern the reflection on Said’s foundational text *Orientalism*. First, we must note that Said’s thesis of Orientalism as a discourse that structures Western understandings of the Orient has itself resulted in a discourse that structures how the term (legal) Orientalism is and can be understood. As with the knowledge of the classic Orientalists, which Said deplored, the term legal Orientalism in its postmodern and postcolonial interpretation today polices, censures, and

silences what can be said about the laws and legal traditions of Asia.<sup>11</sup>

Second, a charitable reader can hardly deny that Said’s thesis was and is – despite all its shortcomings<sup>12</sup> – pertinent to the fact that cultural stereotypes about the East are far more pervasive and stubborn than common knowledge imagines, because these stereotypes have become deeply ingrained in the common knowledge of the West. At the same time, one meets in Said’s text a strange mix of requesting respect for the Other with one hand and handing out criticism with the other.<sup>13</sup> For example, he indicts the leading Islam scholar H. A. R. Gibb of “pure Orientalism” based on the following passage of the latter’s 1945 Haskell Lectures:

The Arab mind, whether in relation to the outer world or in relation to the processes of thought, cannot throw off its intense feeling for the separateness and individuality of the concrete events. This is, I believe, one of the main factors lying behind that “lack of a sense of law” which Professor Macdonald regarded as the characteristic difference in the oriental. It is this, too, which explains – what it is so difficult for the Western student to grasp – the aversion of the Muslims from the thought-processes of rationalism. ... The rejection of rationalist modes of thought and of the utilitarian ethic which is inseparable from them has its roots, therefore, not in the so-called “obscurantism” of the Muslim theologians but in the atomism and discreteness of the Arab imagination.<sup>14</sup>

Certainly, a careful reader of Said will take notice if he comes across such a passage – and reach for the original for verification and context. If we read into the preface to the print version of these lectures, however, we readily see that their author is much more charitable, critical, and (dare say) knowledgeable than the above passage insinuates. To counter the ideologically charged atmosphere of his day, Gibb submits the duty that every investigator should “define precisely to himself and to his audience the principles which determine his point of view.”<sup>15</sup> He does so, locating himself firmly in the Christian tradition. This leads him to struggle with the universals of his particular faith over the follow-

8 See, for example, *Wael B. Hallaq*, On Orientalism, Self-Consciousness and History, *Islamic Law and Society* 18 (2011), 387–439.

9 For a convincing critique of the distinction, starting from the analytical side, see *Peter Bieri*, Was bleibt von der analytischen Philosophie?, *Deutsche Zeitschrift für Philosophie* 55 (2007), 333–344.

10 *Jochen Hörisch*, Theorie-Apotheke: eine Handreichung zu den humanwissenschaftlichen Theorien der letzten fünfzig Jahre, einschließlich ihrer Risiken und Nebenwirkungen (2010), 51.

11 For the concept of Orientalism, this has been already remarked by *Neil McInnes*, ‘Orientalism,’ the Evolution of a Concept, *The National Interest* (1998), 73–81.

12 For a critical review, see *Robert Irwin*, For Lust of Knowing: The Orientalists and Their Enemies (2006), Ch. 9.

13 This combination has also been observed in other debates surrounding traditional and critical approaches to comparative law, see *Russell A. Miller*, On Hostility and Hospitality: Othering Pierre Legrand, *The American Journal of Comparative Law* 65 (2017), 191–206.

14 *H. A. R. Gibb*, Modern Trends in Islam (1947), 7; cf. *Edward W. Said*, Orientalism (1978), 106.

15 *H. A. R. Gibb*, Modern Trends in Islam (1947), xi.

ing lines in a reflected and sincere way. He then reaches a highly remarkable practical conclusion:

While none of us can help exteriorizing the feelings and beliefs of other people, especially those of a different communion or creed, when we discuss them, we ought at least to be aware that we are exteriorizing and that to that extent we are doing violence to the intimate personal element which constitutes the mainspring of the religious life.<sup>16</sup>

Contemporary postcolonial theory, which takes *Orientalism* as one of its standard texts,<sup>17</sup> likes to express Gibb's point in the following phrase: "epistemic violence." So it turns out that Said's "pure Orientalist" is, simultaneously, a postcolonial theorist *avant la lettre*. And the irony goes further, he is even one of the *avant-garde*. For not only does he perceptively recognize exteriorization of the Other as an epistemological predicament that is common to all of us humans. He also suggests a fundamental ethic of discussion: We ought at least to be aware that we are exteriorizing and thus doing violence to the Other. That comes very close to what Ruskola suggests with his "ethic of Orientalism," by which he seeks to overcome Said's moralistic use of the term. In Ruskola's formulation of the predicament: "we cannot help essentializing others, and even ourselves," to produce our objects of comparison through our comparisons, but "we ought to consider the ways in which our comparisons subject others," that they enable certain subjects, while disabling others.<sup>18</sup> (In passing, we note that it would, moreover, be an appealing enquiry, to link Gibb's ethic and Said's (mis)representation of him to the famous debate along the continental-analytic divide between Jacques Derrida and John Searle. In an afterword, entitled *Toward An Ethic of Discussion*, Derrida contemplates the violence in this debate and the academic world more generally – and does so in a *self-critical* manner.)<sup>19</sup>

Said's representation of what he sees as "pure Orientalism" in Gibb is therefore at least misleading. Now it is important to recognize that this does *not*

affect the validity of Said's thesis as we have defined it above. Stereotyping others, on the one hand, while criticizing stereotypes, on the other, does not make the argument against stereotyping invalid – just as little as my argument against smoking is logically impaired by my smoking. More specifically and technically, Said finds himself in the performative self-contradiction of not being as charitable as he argues one should be. Such performative self-contradictions are not a *logical* problem in the argument for proposition A, but they still are an argumentative problem. Just what kind of problem is not always well understood. We suggest to understand it as a problem of framing.<sup>20</sup> Performative self-contradictions affect how an argument is framed: We perceive a (valid or invalid) thesis "in a different light" because of the contradiction we observe in the person who proposes it. Generally speaking, the frame of a performative self-contradiction affects the credibility of the proponent, not the logical validity of the argument. It cannot be emphasized strongly enough that framing issues like this one can have dramatic effects on the course of an argumentative dialogue.<sup>21</sup>

And so it is here: Some might gleefully point to Said's "othering" of Gibb and think that would warrant their refutation of his argument about the significance of Oriental stereotypes. As is clear now, they would be mistaken. What our re-framing of Gibb as a postcolonial theorist should cause us to rethink, however, is under what conditions we apply the predicate "Orientalism" to a statement that concerns the "Arab mind." Gibb's critical and emphatic self-localization, in which "we of the West are fellow-voyagers with them [i.e. Muslim believers], engaged in a common spiritual enterprise, even though our ways diverge," casts doubt on Said's devastating, apodictic judgment and impels a fundamental reassessment. That is to say, we are not concerned here with the question of whether Gibb's statement on the Arab mind classifies as Orientalist; we leave *that* reassessment to someone who is qualified to undertake it. Our concern is the theoretical question of how the conceptual logic of social stereotypes must be understood when we speak of the Arab and the Chinese or, for that matter, the American and the European as such or in itself. Said presupposes this logic in his use of Orientalism, while it obviously is a more fundamental issue about conceptual truth, which transcends the topics of Orientalism and Occidentalism. We can put the more fundamental question like this: At what point does our speaking of something turn

16 Ibid., xii.

17 See, for example, *Robert J. C. Young, Postcolonialism* (2020).

18 Ruskola (fn. 5), 54–55; see also Ruskola, in this issue, 152; for a more detailed analysis and comparison with Said, see *Coendet* (fn. 6), 802–805.

19 *Jacques Derrida, Limited Inc* (1988), 113 ("I knew, while writing my response to Searle, that it was not devoid of aggressivity. I have just reread myself: with a certain uneasiness, but also with the desire to be fair. I perceive even today in this violence of mine the very clear – and I hope distinctly formulated – concern to distinguish and submit to analysis the brutality with which, beneath an often quite manifest exterior, Searle had read me, or rather avoided reading me and trying to understand. And why, perhaps, he was not able to read me, why this inability was exemplary and symptomatic. And for him lasting, doubtless irreversible, as I have since learned through the press. In a more general way, I wanted to show how certain practices of academic politeness or impoliteness could result in a form of brutality that I disapprove of and would like to disarm, in my fashion.")

20 Building on *Harald Wohlrapp, The Concept of Argument* (2014), Ch. 5.

21 Wohlrapp points out: "the success or failure of individual argumentations depends almost entirely on this concept [of frame structures]." Ibid., 175; for the development and illustration of the framing concept in a legal context, see *Thomas Coendet, Framing the Law and Policy of Finance, Accounting, Economics, and Law: A Convivium* (2021).

into a stereotype that distorts its true nature? We cannot answer this question in an essay, but we can show why it is important to consider it for researching or even simply understanding legal Orientalism properly.

#### IV.

Speaking of the nature or essence of things, of how things actually or really are, still makes many philosophers and social scientists nervous.<sup>22</sup> First, it will therefore be helpful to recall that Said firmly rests his basic argument on such understanding, too. For he contends that the Orientalist would not engage with the “real” Orient, but rather experience the Orient as a figment of his own imagination.<sup>23</sup> The Orientalist imagines things and bypasses how they really are. Second, we note that Said offers no clear theoretical account of how the Orient as an idea and as an empirical reality are related to one another – as his use of scare quotes indicates.<sup>24</sup> How speaking about the essence of things is to be understood, however, has been discussed and pondered for a very long time, perhaps most deeply in Hegel’s *Science of Logic*.<sup>25</sup>

One of Hegel’s key analytical insights consists in that our speaking about how things actually are implies a three-fold structure. First, we can refer to things as they are in themselves (*an sich*), that is, as we understand them paradigmatically or in principle.<sup>26</sup> The cat as such has four legs, human beings as such are rational beings. Second, we have to

account for things as they are for themselves (*für sich*), that is, how they exist as particular empirical instantiations – as a particular cat or human being. For cats and human beings, we are used to refer to such particular instantiations by giving them a proper name: my cat Bob, my friend Bruno. Third, our knowledge about how things are in themselves allows us to infer how things *normally* are if we reference a particular instantiation of them. If someone tells me about his cat Bob or his friend Bruno, I normally can and will infer that Bob has four legs and that Bruno is a rational being. My understanding thus combines a judgement on how things are *in and for themselves* (*an-und-für-sich*). Now, matters get problematic because there are exceptions: Some cat may have lost a leg in an accident, and, for the same reason, there exist human beings who have lost their capacity to provide and respond to reasons. In both cases, we still address these particular instantiations as a cat and a human person. However, if we talk about them, it might be necessary to inform our listener about their particular situation because the default inference that is built into our concepts of the cat as such and the human being as such has become misleading for *these* cases.<sup>27</sup>

With Hegel we thus can understand that our concepts of how things *essentially* are, that is, how they are in themselves, have a pragmatic core. We expect that they provide us with a reliable orientation on how things normally are in the world as we find it; that they provide us with valid default inferences about particular instantiations of some class of objects, for instance, human beings. We confirm this pragmatic core of our concepts in successfully using them in our daily life; in making judgments about how things are *in and for themselves*. Where concepts and practice work together in such a harmonious way, our concepts are true because they correctly capture the essence of things in paradigmatic cases. However, our concept of how some thing is in itself ceases to be true if it does not convey a reliable general orientation about its empirical instantiations in the world. If I suggest that the lion in itself eats Big Macs because I have observed this in a zoo, I would be suggesting a misleading and

22 For instance, when it concerns the definition of capitalism, cf. *Geoffrey Hodgson, Conceptualizing Capitalism: Institutions, Evolution, Future* (2015), Ch. 1 (with a robust defense of definition).

23 See, for instance, *Said* (fn. 14), 5 (“But the phenomenon of Orientalism as I study it here deals principally, not with a correspondence between Orientalism and Orient, but with the internal consistency of Orientalism and its ideas about the Orient ... despite or beyond any correspondence, or lack thereof, with a ‘real’ Orient.”).

24 See *ibid.*

25 More specifically, in Book Two of Volume 1, entitled “The Doctrine of Essence” (*Die Lehre vom Wesen*). My understanding and presentation owe themselves to Pirmin Stekeler’s analytic, pragmatic reading of this text, see *Pirmin Stekeler, Hegels Wissenschaft der Logik. Ein dialogischer Kommentar. Band 2: Die objektive Logik. Die Lehre vom Wesen* (2020), 9–76.

26 Note that Hegel’s understanding of things in themselves (*an sich*) differs from Kant’s famous concept of the “thing-in-itself” (*Ding an sich*) – in some sense it is just the opposite. According to Kant, a thing that appears to us, say that glass on the table, is located in time and space and we grasp it by some *a priori* (transcendental) forms that are innate to our capacity of reason. So, because the glass is filtered through these transcendental forms, it will always evade our understanding how the glass is in itself. The “thing-in-itself” moves into a noumenal sphere beyond the world we can understand. Hegel criticizes Kant for this (unfortunate) suggestion for it remains wholly unclear what this should mean that things exist in a world somewhere beyond the world that we are living in. Consequently, Hegel’s doctrine of essence moves Kant’s “thing-in-itself” back into our world and terms it the thing “for itself” (*für sich*). The glass on the table is a thing for itself and if I ask you to hand it over to me, I rely on our shared understanding of what glasses are in themselves by which we mean not glasses somewhere in a world we cannot see and know, but glasses in the world that we inhabit. See *Georg Wilhelm Friedrich Hegel, Wissenschaft der Logik. Band 2* (1969), 19–24; and for the interpretation I adopt here, *Pirmin Stekeler, Hegels Wissenschaft der Logik. Ein dialogischer Kommentar. Band 1: Die objektive Logik. Die Lehre vom Sein* (2020), 46–47; *Stekeler* (fn. 25), 116–141.

27 Comparative lawyers, who start from the Western legal tradition, find here a formidable theoretical anchor why speaking of law beyond their tradition can mislead, notably their Western audience: For, as a rule, default inferences of a particular concept, such as law, are local, not universal. A Western reader of an article on Chinese law is prone to connect the English term *law* to the default inferences of his own legal tradition – default inferences that are, of course, not the same as for the Chinese word *fa* (法) and that are different still even within the Western tradition for *Recht, droit, diritto, ius*, etc. The crucial follow-up questions are then: In what comparative contexts is it possible and meaningful to use Western terms for law? If we do use them, what are the reasons for doing so and what are the necessary qualifications to avoid misunderstandings? Finally, if we address the problem by way of a definition that should encompass any law, that definition will necessarily be broad to be true, but will it also be too broad to provide useful orientation in the specific comparative context? As regards this last question, we recall Geertz’s rule-of-thumb: “Any sentence that begins, ‘All societies have ...’ is either baseless or banal.” *Clifford Geertz, Available Light: Anthropological Reflections on Philosophical Topics* (2000), 135.

hence untrue notion of the lion (in itself). To have a true concept of the lion in itself, my default inference has to provide reliable orientation on lions of our shared world. Producing and understanding such default inferences always requires cooperation and good judgment about the situations in which the default distinctions implied in a concept serve their pragmatic end reasonably well, or whether these distinctions must be specified or revised. Depending on the speech context, the paradigmatic statement “mammals do not fly” will work well enough. Pointing out that bats can fly too would then be missing the point in two ways: first, about what the statement intended to convey in the particular speech situation and, second, that for *none* of our concepts, which we use to express our knowledge about the world, could we come up with a definition that would not be subject to exceptions.<sup>28</sup>

So we learn from Hegel that those who fear that speaking about an object of study in generic terms (about law as such, for instance) would lead into “metaphysics” or who even think that there is no such thing (like law as such), or both, do not understand the logic of the ordinary language that we all use. Historians and anthropologists, in particular, may suspect that speech about law as such must lead into empirically unfounded speculations. Instead of conceptual clarification, they emphasize with Leopold von Ranke to “stick to the sources” and with Clifford Geertz to strive for “thick description.” Attempting to formulate conceptual paradigm cases or ideal-types will be seen as deficient against the complexity of history and culture. Instead, they might suggest, we must consider our object of study to be a broad continuum or sliding scale of various particular historical and cultural instances that cannot be reduced to a paradigm. To be sure, not every historical and anthropological enquiry requires us to formulate a paradigm for our object of study – it would be naive to think we could not understand anything before having it defined. It is, moreover, sound methodological advice to keep to the sources and aim for a thick description. But considering the sliding scale a solution for what our object of study actually consists in is deceptive: For, no matter how close to the sources you are and how thickly you describe, how do you know that you are on the scale? Countless studies in legal anthropology leave you wondering where the law part of it is. Speech about the essence of things is therefore better not put on the index, but instead analyzed in how its particular logic works. In this respect, Hegel guides us to pragmatically link the world with our concepts, not to split the two. Conceptual work on

28 Stekeler (fn. 25), 72 (“For there simply is no ... knowledge of the world without exception, where it is about empirical particular things. Not at last, this is due to the finite nature of all things, a fundamental residue of contingency in the world and the openness of the future, which must be acknowledged.”).

the essence of things therefore does not mean moving into a metaphysical realm detached from our lifeworld, but rather working on our orientation within it.

## V.

We can now reconsider Said’s problems with Orientalist stereotypes as opposed to the Orient and Oriental as they really are. As mentioned, Said basically criticizes that over time the Orient became a hallucination of the European mind, both positively and negatively. More precisely, the criticism is that the study of the Orient unfolds in a conceptual realm in itself, which does not care any longer about how things actually are on the ground, if it ever did. How the Orient and its people live for themselves is ignored. The result of concepts in themselves, which are not or no longer verified for whether they harmonize with the world as we normally find it, is that they degenerate into mere stereotypes. The notion that the Chinese as such shows no respect for rules or eats snakes is considered beyond question, to be true *a priori* – while it is, in fact, cultural essentialism and Orientalist nonsense, pure and simple. Hegel had his own way of characterizing stereotyping: as *abstract* thinking of the *unlearned* observer – for whom the murderer is just the murderer, the servant is just the servant, the soldier is just the soldier.<sup>29</sup> The Orientalist is such an unlearned observer who embraces abstract thinking. With Hegel’s doctrine of essence, we can now specify further that the criticism of Orientalist stereotypes is a criticism of *subjective* idealism: We criticize a conceptual world that springs from the mind of Western authors only.<sup>30</sup> And one problem with such stereotypes is that they mislead us about how things actually are in Asia, and this can have very real effects beyond the realm of the mere academic world, as the contributions in this issue illustrate.<sup>31</sup>

29 In his brilliant essay *Wer denkt abstrakt?* (1807) [Who thinks abstractly?], reprinted in *Georg Wilhelm Friedrich Hegel*, Jenaer Schriften: 1801–1807 (1970), 575–581.

30 Since the Hegelian analysis of the essence of things does precisely *not* end here, we can see by the way that Hegel’s idealism has nothing to do with such subjective idealism – a position that Hegel forcefully refutes in making his case for an *objective* idealism, see Stekeler (fn. 25), 30 (note 16), 42.

31 Moreover, for comparative lawyers, we have here once more a valuable theoretical entry point for methodological reflection: Caring about things *for themselves* implies the methodological suggestion to understand them in their own terms, rather than in the terms we have made for them. For the comparative lawyer, who necessarily *embarks* on her investigation into foreign law with the concepts of her own tradition, this suggests in other words to immerse herself into foreign law as it is *for itself* – cf. *Vivian Grosswald Curran*, Cultural Immersion, Difference and Categories in U.S. Comparative Law, *The American Journal of Comparative Law* 46 (1998), 43–92. *Liang*’s contribution to this issue can be understood as an argument for immersing oneself in the historical context of early Chinese civil law in order to understand this law *for itself*, while accepting that we start with a Western understanding of civil law *in itself*.

Cultural stereotypes are, however, not only damaging because they offer poor orientation. They are also ethically deficient. Stereotypes generally deprive things from the dignity that they have for themselves (*für sich*), that is, as particular individual objects. We see this in (for this reason failed) works of art that try to capture some thing in words, music, or a photograph, but produce nothing but a poor cliché of it.<sup>32</sup> For stereotypes that concern the human person, the deficiency is even more obvious and serious. It notoriously matters for human beings how they are named personally.<sup>33</sup> Consequently, nobody likes to be captured in a ragbag of the stereotypical American, German, Chinese, etc.; especially so, if she or he actually wants to identify her- or himself as American, German, Chinese, etc., rather than to claim (as is always possible) that a certain characteristic might be true for the paradigm, but not in her or his case. If we want to be just to individuals, therefore, we have to care for how we form and use our generic concepts that involve them.

Thus it follows that we are to consider the voices of the individual in our generic concepts and revise these concepts if they fail ethically or pragmatically. However, it does not follow that we only could produce or use stereotypes where we state the essence of things in generic terms. To speak of the German in itself does not inevitably end up in stereotypes, which we could then describe as either Teutonism or self-Teutonism. Of course, speaking of the German in itself may degenerate into cultural clichés and stereotypes, in which the German is either evil or genius, or both.<sup>34</sup> However, the most recent and most profound study on what it is to be German is an impressive statement that we can get to the essence of things without being trapped in cultural essentialism, worrying nationalism, or damning judgments. This study rather offers a self-critical reflection on the dialectic between a German nationalism and a German universalism that itself unfolds along a dangerous dialectic between genuine cosmopolitanism and cultural superior-

ity.<sup>35</sup> So we take this study as a further reminder that we should be careful how we operate with terms such as Orientalism or Teutonism – because perhaps the problem is not on the side of the supposed Orientalist or Teutonist but on the side of the uninformed user of such concepts. There is a point where performative self-contradictions (about stereotyping) matter not only ethically, but also for the person who is uttering them. It is the point where they turn self-defeating – people *really* do die from smoking (no irony intended). For this reason alone, we must disagree with Said’s reading of Gibb: It stands for a methodology that is potentially self-defeating and thus unwise to adopt.

But to conclude on a lighter note, we may suggest that where ever possible (knowing that this is not always the case), we may try to see failures to express adequately how matters are in different cultures with some leniency and humor, especially that we do not take offence where none was intended. The following anecdote, perfectly illustrates the spirit of this concluding thought:

In 1952 I left for London to do some research on English legal history: a real adventure for a continental who entered the United Kingdom through the gate marked “aliens” at Dover. I certainly felt strengthened by the support of my teacher in Ghent, the late Professor F. L. Ganshof, and by the knowledge that an outstanding English legal historian, the late Professor T. F. T. Plucknett, was prepared to act as my supervisor, but I was less encouraged by Ganshof’s last words to me before I left: “Don’t forget, Van Caenegem, that the universal laws of logic do not apply in England.” This odd statement, coming from an academic who knew the Anglo-Saxon world well, impressed me less, when a few weeks later I overheard an English fellow student saying to a friend leaving for Ireland: “Don’t forget that the universal laws of logic do not apply in Ireland.” It soon became obvious that there was no cause for uneasiness, and during my stay in England I was able to get to know the history of the common law, which is an exciting experi-

32 One is reminded of Adorno’s criticism of how Richard Strauss depicts the sunrise in his *Alpensinfonie*: “Die Armseligkeit des Sonnenaufgangs der Alpensymphonie von Richard Strauss wird nicht bloß von den banalen Sequenzen, sondern vom Glanz selber bewirkt. Denn kein Sonnenaufgang, auch nicht der im Hochgebirge, ist pompös, triumphal, herrschaftlich, sondern jeder geschieht schwach und zaghaft wie die Hoffnung, es könne einmal noch gut werden, und gerade in solcher Unvereinbarkeit des mächtigsten Lichtes liegt das rührend Überwältigende.” *Theodor W. Adorno*, *Minima Moralia: Reflexionen aus dem beschädigten Leben* (2018), 125–126.

33 While it varies how personal names exactly matter, contemporary research suggests that personal names are a feature of any human society and that they are an important feature of personal identity, for surveys see *Ellen S. Bramwell*, *Personal Names and Anthropology*, in: Hough (ed.), *The Oxford Handbook of Names and Naming* (2016), 263; *Emilia Aldrin*, *Names and Identity*, in: Hough (ed.), *The Oxford Handbook of Names and Naming* (2016), 382.

34 While negative Teutonism hardly requires referencing, one could ask in what respect a book on the German genius is an instance of positive Teutonism: *Peter Watson*, *The German Genius: Europe’s Third Renaissance, the Second Scientific Revolution, and the Twentieth Century* (2010).

35 *Dieter Borchmeyer*, *Was ist deutsch? Die Suche einer Nation nach sich selbst* (2017), 29, for a pointed statement of the thesis: “Mit der Anmaßung eines ‘deutschen Europa’ ist es glücklicherweise endgültig vorbei. In dem *Versuch über Schiller* aus dem Jahr 1955, dem Todesjahr Thomas Manns, finden wir gewissermaßen sein letztes politisches Wort: Die ‘nationale Idee’ sei durch die jüngste Geschichte zur Barbarei regrediert, entwürdigt, ja abgewirtschaftet: ‘Von ihr aus, jeder fühlt es, ist kein Problem, kein politisches, ökonomisches, geistiges mehr zu lösen.’ Das gilt heute mehr denn je. Deutschland scheint in besonderem Maße aufgerufen, seine von Thomas Mann reklamierten universalistisch-kosmopolitischen Überlieferungen der Einheit Europas zugutekommen zu lassen. Das kann es freilich nur, wenn es sich nicht nur diese Überlieferungen immer wieder vor Augen führt, sondern auch deren gefährliche Dialektik reflektiert. Dazu möchte das vorliegende Buch nachdrücklich beitragen.” The book is currently translated into Chinese. For a Chinese counterpart, see, for example, *Zhaoguang Ge*, *What is China? Territory, Ethnicity, Culture, and History* (2018).

ence in itself, but has the additional charm, for a continental, of surprise at its utter strangeness.<sup>36</sup>

<sup>36</sup> *R. C. van Caenegem*, *The Common Law Seen from the European Continent*, *Legal History: A European Perspective* (1991), 165–183, 165.