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Two Faces of Legal Orientalism

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"Legal Orientalism" is a critical theory, which aims to criticize and deconstruct the "universalism" constructed by the Western legal discourse and restore its locality and relativity. While denying that the East has a politico-legal tradition different from that of the West and treating the East as an object to be colonized and baptized, the West has lost the ability to improve its own politico-legal civilizations through equal dialogue among civilizations. For Chinese legal scholars, the significance of legal Orientalism's critical perspective is not to allow us to expose the "hypocrisy of Western law" with the theoretical weapons provided by Western scholars, but to help us getting rid of the predicament of "self-Orientalism", with an open and confident attitude to construct a legal discourse that embodies the equal subjectivity of all *civilizations.*

I. INTRODUCTION: "LEGAL ORIENTALISM" AS SECOND-ORDER OBSERVATION

In 1935, in crisis-ridden Europe, Edmund Husserl raised the question: "Is there an absolute idea in European humanity, rather than a purely empirical anthropological type (*bloß empirischer anthropologischer Typus*) like 'China' or 'India'? Only by answering this question can it be determined whether the feat of Europeanizing all other civilizations indicates a rule of absolute meaning of the world, one which is proper to the sense, rather than to a historical nonsense"[1] We must remind ourselves that Husserl was a Jew and as such under the dangers of racial persecution of his time – only one year later, he would be deprived of his teaching permission. Yet even in this situation, Husserl still had absolute confidence in European civilization. It can be seen that his confidence comes not from the strength of material superiority, but from his understanding of the "universal absolute meaning" contained in European civilization.

In the German-speaking world, the idea that only Europeans who uphold absolute ideas can accomplish spatial conquest and expansion in temporal dimension began with Hegel. In Hegel's view, the "Chinese" are outside of world history and lack the existence of subjective consciousness and free spirit. The main reason for this is their lack of the Christian faith: "For to us religion means the retirement of the Spirit within itself, in contemplating its essential nature, its inmost Being. In these spheres, then, man is withdrawn from his relation to the State, and betaking himself to this retirement, is able to release himself from the power of secular government."[2] China and India lie, as it were, "still outside the World's History, as the mere presupposition of elements whose combination must be waited for to constitute their vital progress."[3] The lack of subjectivity, the passive submission to authority thus set the Oriental on the opposite position of the Occidental: "This Oriental way of viewing things is opposed to that of the Occident: just as the sun sets in the West, so it is in the West that human being descends into itself, into its own subjectivity."[4]

Orientalism as a critical theory is a method of exposing "Orientalism" as an ideology. In Niklas Luhmann's term, it is a kind of "second-order observation," that is, "[an] observation of other observations."[5] At the level of first-order observation, since the differentiation between system and environment has not been established, "the communication system does not know that communication cannot touch anything other than communication itself." Therefore, people mistakenly think that their discourse is a description of the objective environment, "phenomenology is practiced as ontology," so "it is difficult to distinguish reality from fantasy of reality."[6] However, at the level of second-order observation, since the observer can see the different ways of expression and communication of different first-order observers in the same environment, and understand the distinction between the artificially constructed system and the external environment, he can criticize and deconstruct the discourse system of first-order observers.[7] As a second-order observation, the theory of Orientalism attempts to reveal the systematic fabrication beneath the discursive process through which the Oriental was presented as passive, lacking subjectivity, and unable to influence the process of Western world history. This fabrication is then compared with the self-understanding of Orientals. Both discursive systems are thus localized and relativized, depriving the Occidental system of its self-claimed universality and absoluteness. This kind of criticism or deconstruction can clear some obstacles to the awareness of the subjectivity of the Oriental, awaken a number of "Orientals" who are "self-Orientalized" (i.e. internalizing Westerners' understanding of the Oriental as their self-understanding), but it cannot replace the efforts of Orientals themselves to present their own subjectivity.

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1 *Edmund Husserl*, Die Krisis der europäischen Wissenschaften und die transzendentale Phänomenologie. Eine Einleitung in die phänomenologische Philosophie (1976), 14.

2 *G. W. F. Hegel*, The Philosophy of History (trans. J. Sibree, 1861), 138.

3 Ibid, 121.

4 *G. W. F. Hegel*, Lectures on the Philosophy of Religion (trans. R. F. Brown, P. C. Hodgson, J. M. Stewart, 2021), 260.

5 *Niklas Luhmann*, Theory of Society, Vol. I (trans. Rhodes Barrett, 2012), 168.

6 Ibid., 50.

7 *Niklas Luhmann*, Deconstruction as Second-Order Observing, New Literary History 24 (1993), 763–782.

After the mirage is dispersed, shall we see a vast desert or "One Belt One Road"? This depends on the self-justification of the "Oriental" in the historical process.

In Gulliver's Travels, Swift made up the fictitious Academy of PROJECTORS in Lagado. Experts and scholars in this scientific research institution are doing various weird experiments based on their own ideas and proposing various improvements to nature, society, and politics. Because they have no knowledge of the nature and operating mechanism of their research objects, nor are they interested in the slightest sense of these things, the proposal they put forward does not contribute to any meaningful "improvements."[8] In the preface to the new edition of *Orientalism* written before his death, Said compared American foreign policy think tanks to the Academy of PROJECTORS in Lagado, who tried to transplant American free market democracy, "without even a trace of doubt that such projects don't exist outside of Swift's Academy of Lagado."[9] The Orientalism that Said criticized is an attitude, and its psychological mechanism is insouciance. People who maintain this attitude lack the basic interest and desire to understand their research objects, and only care about selling their ideas. These people (intentionally or unintentionally) serve the cause of Western colonialism, constructing the East as a passive object, to be Christianized, civilized, and ruled by law, regardless of the fact that many of the Oriental civilizations had had a much longer history of civilized tradition than the United States.

After Said's *Orientalism* had been published, it received a lot of criticisms from the field of Oriental studies as it belittles the academic value of many scholars who have devoted their lives to the study of Egyptology, Sinology, Arabic Studies or Indology, and reveals the ideology of imperialism and colonialism beneath the scientific appearance of these studies. However, Said's book has had a huge influence outside its main object of criticism – Oriental studies – and has effectuated a "paradigm shift" in many fields. Teemu Ruskola's *Legal Orientalism* is an effort to apply the critical perspective of Orientalism to the field of law. His book is, however, not just an application of Said's theory but a development of it. The Orientalism criticized by Said focuses on Oriental studies of the early colonial empires such as Britain, France, and the Netherlands. These studies looked upon the Orient as an object and served colonial strategies of these European empires. The main target of Ruskola's book, however, is the United States' "rule of law" export strategy, which is a "colonialism without colonizers."[10] This strategy does not take the Oriental as an object; it tries to construct the Oriental as a new subject: the followers of America's lofty politico-legal ideals. This strategy has been very successful. Many Orientals (including the Chinese) have internalized American values and become "spiritual Americans". They believe that "the American moon is rounder than that of China." They use the American standard to evaluate the performance of their own country's political and legal institutions. Such self-Orientalization is not systematically analyzed in Said's works, and it is the main academic contribution of *Legal Orientalism*. This article attempts to critically evaluate Ruskola's book, while at the same time pointing out some important dimensions that have not been touched or are yet to be developed.

II. LEGAL ORIENTALISM AND THE CRITIQUE OF COLONIALISM

In 2003, after the United States and Britain unilaterally had overthrown the Saddam regime, the Iraqi Interim Government was established. There is an endless stream of Americans who considered Iraq as a clean slate whose past had been erased and whose future was open for them to paint. But if they wanted to have an office in Iraq, they first needed first to pass by at Jim O'Beirne's Pentagon office. O'Beirne basically hadn't considered the academic and professional qualifications of the job seekers but only considered their degree of loyalty to the Republican Party and the Bush administration. Therefore, among the people he sent to Baghdad to undertake the great mission of "rebuilding Iraq," there was a 24-year-old youngster who had never worked in financial securities markets and, nonetheless, was entrusted with the role as the head of the Baghdad stock exchange. Then, there was the daughter of a neoconservative commentator who was assigned (along with other five similarly inexperienced persons) to manage the $13 billion budget for the reconstruction of Iraq, although she never had any training or work experience in financial management.[11]

This real event from our own time, and countless other similar events, can help us understanding the basic points of *Legal Orientalism*: superior power (esp. military power) leads to intellectual arrogance. Being the first batch of countries with modern industry and war machines, England and a few

8 *Jonathan Swift*, Gulliver's Travels (1726/2005), 164.
9 *Edward W. Said*, Orientalism (2003), xiv.
10 *Teemu Ruskola*, Legal Orientalism. China, the United States, and Modern Law (2013), 198.
11 *Rajiv Chandrasekaran*, Best-Connected Were Sent to Rebuild Iraq, Washington Post (Sept. 17, 2006), A1.

other European countries conquered and colonialized continents old and new. After conquering the Orient, they studied it with a condescending and insouciant mentality, and thus lost the opportunity to improve their own civilizations through dialogue and mutual learning. Therefore, when China re-emerges as a world power, the Western powers' past contempt makes them unable to understand today's China and its developmental path.

In the HBO TV series Westworld, the characters in the play belong to two categories: hosts and guests. Hosts are intelligent robots. They have both reason and emotion, but the design principle is that they cannot have memories, so that their bodies can be rebuilt and their brains re-formatted after being damaged by their "guests." The guests are human customers. They come to the "park" where the host lives to indulge in their desires, and do all kinds of things that are impossible to do or punishable by law in the "civilized world," including raping and looting, killing and torturing. However, Dr. Ford (played by Sir Anthony Hopkins), one of the two master designers of the whole Westworld, implanted a virus in the master program, that is, "reveries." Reveries are actually memories, especially memories of pain, love, and hatred.

The significance of this drama is that it not only revives the old science fiction theme of "Robots Awakening," but also lays bare problems in the other two dimensions. The first is that the androids here actually have their true historical prototypes, who are the peoples of the "New World" and the Orientals that were colonized by the "civilized world" of the West. Westerners represent the Orient according to their own ideas and interests, conquer and transform it, and ignore the long history and civilization of it as a vain past. This Oriental past is given no relevance in the "modern" world, let alone a future. The second is that this kind of wanton ravages and aggression against others also corrupts the character of the "guests" themselves. We cannot expect that a person who ravages humanoids or animals will be gentle on other human beings. Shakespeare's celebrated dictum "violent delights have violent ends"[12] is a resounding theme throughout the drama, showing how inhuman desires lead to depravity and destruction of the "guests."

If Said's *Orientalism* pioneered a critical analysis of the first dimension, Ruskola's *Legal Orientalism* took into account both dimensions. On the one hand, Ruskola has delineated a hitherto largely ignored part of the history of the U.S. judiciary, which had constructed the whole territory of China as the "District of China," establishing a federal district court to exercise extraterritoriality in China. In such a context, he analyzed the damage caused by this colonial practice to Chinese sovereignty. On the other hand, he pointed out that such practice of exporting the "rule of law" by force corrupted the rule of law in the United States itself. The Federal Court for the "District of China" exercised jurisdiction over not only American citizens in China but also American "subjects" from the newly colonized Philippines, and in some cases American citizens who had never set foot in China.[13] The court's judicial standards included English common law before the independence of the United States, general congressional acts, the municipal code of the District of Columbia, and the territorial code of Alaska, parts of which continued being applied in China even after they were repealed in Alaska. "Indeed, virtually the only federal law that did not apply in the District of China was the United States Constitution."[14] Defendants in criminal cases tried by the U.S. Court in China did not enjoy some of the basic rights guaranteed by the U.S. Constitution, including the right to require a jury trial. Thus, the Oriental discourse of law damages not only the sovereignty, territorial integrity, and cultural traditions of the "Oriental countries" but also the constitutional principles and civil rights of the colonial empire itself. For example, the Orientalist thinking of treating the East as a "white man's burden" also solidifies racism in the United States, making blacks and other minorities regarded as a "white man's burden" too, although such an attitude contains moral obligations to help and educate, with a condescending gesture of contempt.[15]

In fact, respecting the existing cultural traditions of a country and thinking that laws cannot be artificially designed, let alone imposed by one country on another, is the consensus of a number of European conservative thinkers from Burke to Hegel. For example, Burke believed that history is a layered system, with constitutional order built on the top of a specific civilization accumulated over generations. The evolution of politics and law cannot be promoted by a few people who want to transform the world based on their ideas because this involves changes in the behaviors and habits of thousands of people:

> Because half a dozen grasshoppers under a fern make the field ring with their importunate chink, whilst thousands of great cattle, reposed beneath the shadow of the British oak, chew the cud and are silent, pray do not imagine that those

12 *William Shakespeare*, Romeo and Juliet (1597/2003), 133.

13 *Ruskola* (fn. 10), 7.
14 Ibid.
15 See *Winthrop D. Jordon*, The White Man's Burden: Historical Origins of Racism in the United States (1974).

> who make the noise are the only inhabitants of the field; that, of course, they are many in number; or that, after all, they are other than the little shrivelled, meagre, hopping, though loud and troublesome insects of the hour.[16]

Hegel spoke highly of Napoleon, calling him "the world spirit on horseback," but he also pointed out that even a figure like Napoleon who rode through Western Europe and North Africa could not take France. The modern political and legal system formed after the Great Revolution could not be imposed on other countries, because human beings are deeply embedded in history and tradition: "Material superiority in power can achieve no enduring results: Napoleon could not coerce Spain into freedom any more than Phillip II could force Holland into slavery."[17] Rather unfortunately, this kind of benevolent considerations sensitive to the uniqueness of nations has not been applied to the Oriental nations by these thinkers. Through reflections on the conflicts among European civilizations, Burke and Hegel were able to conduct second-order observation and criticism when thinking about how to preserve Britain and Germany's civilizational subjectivity in the face of the "universalist" wave brought about by the French Revolution. But they were unable or unwilling to apply this kind of observation when they were thinking about the Orient.

It is worth noting that Montesquieu and Hegel's descriptions of Oriental despotism and the Chinese people's lack of universalist faith and inability to develop individual subjectivity have now been internalized by many Chinese scholars. "Self-Orientalism" has gradually become the way for many Chinese intellectuals to understand their own tradition and Western civilization since the encounter between China and the Western powers in the late Qing Dynasty. The Chinese tradition is considered as originally lawless, while the West is the birthplace of the rule of law. So, the West is worshiped as a more advanced civilization and as the model and goal for China to imitate and reach, respectively. This general attitude, which becomes the mainstream of contemporary Chinese legal consciousness, has also entered the official political discourse. For example, the White Paper on Rule of Law, which represents the Chinese Party-State's attitude towards rule of law, unequivocally announced: "The rule of law signifies that a political civilization has developed to a certain historic stage. As the crystallization of human wisdom, it is desired and pursued by people of all countries."[18] Although official expressions generally add attributive terms such as "Chinese characteristics" and "socialist" before "rule of law," they serve rather decorative purposes. In legislation and judicial decisions, we rarely see any references to indigenous Chinese sources. The majority of Chinese legal professionals cannot talk about law without citing Western liberal theories about rights and liberties. Civil law, in particular, which is most closely related to the daily lives of ordinary people, is basically dominated by legal doctrine (*Rechtsdogmatik*) borrowed from Germany. In the process of drafting the Civil Code, the legislators conducted neither sociological surveys of Chinese civil and commercial practices, nor historical investigations into traditional Chinese understandings of land rights, contracts, and family.

Furthermore, self-Orientalization hinders the understanding of Western legal systems. Chinese scholars usually lack in-depth knowledge of the formation mechanisms and the historical logic of specific western legal systems. Since modernity originated in Western Europe, Western countries adjusted their legal systems in accordance with the pace of changes in their own society, economy, population, and ideas. To some extent, "spontaneous order" is a description of this rhythm and sequence. However, China, which was forced into modernity, started by copying Western legal texts first, because copying laws and transplanting concepts and doctrines is easier than establishing a new order, developing the economy, and transforming society. It is also more congruent with armchair scholars' tastes and interests. After all, people who live their mundane lives did not have any opportunity to participate in the legislative cause. When the laws were copied, people's real concerns were often not taken seriously. The self-Orientalism of Chinese intellectuals thus internalized the colonialists' rhetoric without second-order reflection and criticism. Rhetoric is not the real considerations behind colonialism. British scholar Todorov once wrote:

> Whoever wanted to legitimate colonial conquests avoided speaking in terms of self-interest, and instead chose essentially between two positions: calling on these same humanitarian values, and claiming, therefore, that the goal of colonization was to propagate civilization, spread progress, and bring good throughout the world; or else rejecting humanitarian values as a whole, and affirming the inequality of human races and the right of the strong to dominate the weak. These two strategies of legitimation are

16 *Edmund Burke*, Reflections on the Revolution in France (1968), 181.
17 *Hegel* (fn. 2), 453.
18 *State Council of China*, White Paper on the Development of Rule of Law in China, available at: http://www.gov.cn/zhengce/2008-02/28/content_2615764.htm. Quoted by *Ruskola* (fn. 10), 198.

> contradictory; but precisely because it was a matter of justificatory discourse and not of true motives, they were often found side by side in the work of the same ideologue of colonialism.[19]

Copying Western legal provisions and concepts, and then using Western colonialist rhetoric to describe and evaluate China's political, economic, and legal practice – this approach to rule of law clearly fits the Orientalist characterization and positioning of China: Western law is placeless law, that is, universal law applicable to all places; while China is a "lawless place," waiting to be cultivated by Western law.[20] Hundreds of millions of Chinese people thus became fish that cannot swim, waiting for lawyers who have mastered Western legal knowledge to teach them how to swim. Clearly, they have never heard of the French proverb: *"Il n'est pas nécessaire d'apprendre au poisson à nager"*. In this respect, Ruskola made a convincing argument based on his study of the history of the U.S. Court for China. He points out: "U.S. law has its own spatial and temporal structure – a constitutive set of territorial and historical associations – that did not allow for one-to-one translation to the circumstances of China."[21] One of the main justifications for the extraterritorial U.S. Court was to "provide a model of rule-of-law for China, yet its own operation was far from exemplary."[22]

Thus, it appears that Ruskola's *Legal Orientalism* has two faces. One is the artificial construction of the Orient as the "Other," another is the subjective construction of the West itself. The tension between these two faces led to the simplistic understanding, the suppression and dissolution of the Orient's inherent complexity and civilization, on the one hand, to the distortion and radicalization of the West's self-understanding, on the other. Once the Chinese had internalized this Orientalist mirror image into the their self-understanding, it also led to their self-denial and superficial "Westernization" without really understanding the West and its law.

III. FINDING A CHINESE WAY TOWARDS THE RULE OF LAW

The particular strength of *Legal Orientalism* lies in the successful application of what Gadamer calls the "fusion of horizons," namely: observing US law from the perspective of China and, at the same time, observing Chinese law from the perspective of the United States. The intersection of these perspectives allows the reader to find some common factors facilitating the understanding between these two different legal systems. The significance and potential of this method are shown most vividly in Chapter 3: "Telling Stories about Corporations and Kinship."

It is generally believed that in China, the family is the most basic political-legal entity, and that country and family hence are organizationally isomorphic. In the West, on the other hand, the individual is the basic legal subject. There, social, economic, and political organizations are the result of voluntary association of individuals through contracts. However, Ruskola believes that "in China family law has historically performed many of the functions that modern corporation law performs today,"[23] which includes the core function of modern company law, that is to say, separation of ownership and control as well as fiduciary duties of managers. The owner of family property includes dead members, living members, and unborn members, while the manager is the living patriarch. The managing patriarchs must ensure that the clan's ancestral hall be endowed with sacrifices and the ancestors continue to enjoy ceremonial worship. On the other hand, they must also consider the future development of the family and the education of descendants (for this purpose "educational funds" were established within the clan). This is similar to the relationship between a trustee and beneficiary under a family trust. In socialist China, "work units" have acted as substitutes for families for a long time, taking care of the young, the elderly and sick, and the dead. Such a moral economy put the community members' well-being before efficiency considerations. In the United States, on the other hand, corporate law to a significant extent also reflects features of family law, such as the personalization of the company, the fiduciary duty of managers to shareholders, and the "mandatory disclosure clause" that embodies paternalism. If we give up our obsession with doctrinal delicacies, we will find that in a functionalist sense, family law and company law have great similarities, and in many ways can substitute for each other's functions.

Using the principles of modern U.S. company law to explain the traditional system of Chinese ancestral worship and using the latter's principles to re-examine the former will help us see the social and cultural functions of economic organizations and the economic functions of families and social orga-

19 *Tzvetan Todorov*, The Morals of History (trans. Alyson Waters, 1995), 48–49.
20 *Ruskola* (fn. 10), 156.
21 Ibid.
22 Ibid.
23 Ibid., 62.

nizations. It can enrich our understanding of the law itself. In criticizing Ruskola's research, Chinese scholar Long Qinglan pointed out:

> The Western corporate system originated from the Papal Revolution in the 11th to 12th centuries. It was one of the products of competition and cooperation between religious forces and secular forces in the Papal Revolution. The ancestral hall culture is rooted in the deep-rooted attachment to the concept of family in the Confucian tradition, and it also incorporates the self-cultivation and cultivation of the Confucian values. If the ancestral halls of the East and the Western companies are put back into their respective cultural and economic context, you will find that they are two completely different social organizations, which are not comparable.[24]

This criticism sounds fair, but it ignores the following structural factors. First of all, before Columbus "discovered" the New World in 1492, the world was composed of several centers that did not encounter each other frequently. The political, economic, and cultural systems represented by each center were all self-contained, each with its own internal mechanisms and logic. However, the process of globalization that has gradually unfolded since then has made cross-systemic conflicts, comparisons, and mutual learning inevitable. It can be said that comparativism is the knowledge effect that globalization inevitably brings with it, and that comparison inevitably requires certain systems or cultural elements to be appropriately stripped of their local roots to allow for comparisons from a functionalist perspective.

Secondly, just as the Western corporation has moved far away from its canon law roots, China's marriage and family system has been transformed radically from its original forms in traditional society. In some respects, our own history looks like a foreign country. For laws that must respond to contemporary issues, it is a very meaningful undertaking to see how legal forms have historically evolved in one's country by referring to foreign experience if that history itself is no longer able to justify the legal forms' currently existing.

Finally, in today's functionally differentiated society, the integration mechanism that held family, society, culture, law, and politics together no longer exists. Even in China, which is still in the process of modernization, the law has acquired a certain degree of autonomy relative to other social systems. The cultural roots of legal forms may not be the most important factor determining its current functioning. It is possible to criticize Ruskola's lack of more detailed and in-depth analysis of the comparative materials, but it is not possible to deny the significance of his insightful comparative theses.

To add another of his insights: "there exist subject formations in post-Maoist China that combine aspects of normative Confucian, socialist, and liberal selfhood, thus transcending a simplistic public-private dichotomy with the state on one side and the lone individual on the other."[25] In fact, in today's Chinese law, the family and the collectives are still very important legal entities. For example, in the Rural Land Contract Law, one party is the village as a collective economic organization or the village committee, and the other party are rural households. According to the Chinese Constitution, rural land is owned by village collectives. The rural households get the long-term right to use it by entering into contracts with their respective villages. These are status-based contracts. You cannot enter into a contract with a village if you are not a member of the village. This blurs the boundary between status and contract, individuals and collectives. The traditional Chinese family ethic has become a stabilizer in large-scale social transformations such as urbanization and industrial restructuring. It notably assisted China in passing the test of large-scale layoffs caused by the restructuring of state-owned enterprises in an orderly manner. These yet unresearched experiences are rich mines worthy of being explored.

Thus, the way out of self-Orientalism is not Occidentalism. The benefits of reading *Legal Orientalism* is not that we can use American self-criticism to criticize the United States, but that dialogue and mutual learning between equal parties are essential for the progress of civilization. We can achieve better understanding of ourselves only if we have a better understanding of the other. After all, there is more than one way towards rule of law and modernization. China has already paved its own way of economic development. And China is developing its own rule of law. If the Western world abandons its arrogance and Orientalist bias, and engages in genuine dialogue with China, both sides can win. In this respect, Ruskola hints at something called Oriental legalism. In China, we call this "rule of law with Chinese characteristics."

24 *Qinglan Long*, Corporations or Ancestral Halls: Stories behind Comparative Law, Politico-Legal Forum (政法论坛) 32 (2014), 172–182, 173.

25 *Ruskola* (fn. 10), 219.

