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Histories of Legal Orientalism

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Legal Orientalism has two histories. One is the Orientalist statements that we find scattered throughout Western modernity, which involve imaginations of Chinese legal consciousness in particular. The other is the history of the concept of legal Orientalism itself: how this concept is understood, used, and commented upon. Taking Hegel's philosophy as its entry and exit point to legal Orientalism, this article works out the importance of reflecting on both of these histories. Such reflection contributes to avoiding that the histories of legal Orientalism hinder cross-cultural communication between "Orient" and "Occident" and to enabling comparative legal learning. Against this backcloth, the article suggests that thinking about legal Orientalism should be complemented by the concepts of dialogue and Oriental legalism.

I.
HEGEL'S WAY INTO THE HISTORY OF ORIENTALISM

What does it mean to speak of legal Orientalism? The question looks simple, yet the answer is not quite straightforward. Hegel is sometimes said to spell out the key terms of classical European Orientalism when commenting on China. His account in the *Philosophy of History* is taken to suggest that: China is timeless and static, while the West embodies the realm of time and the dynamics of progress; Chinese individuals are lacking individual subjectivity and hence the quality as moral agents, which of course is different in the West; and Chinese are confused about the true nature of law, which Europeans like to think they have discovered. China in this account is "an antimodel and stands for everything that we would not wish to be – or admit to being."[1] If we accept this as a fair statement of Hegel's position, we can observe three things: first, that Hegel's position is remarkably anti-dialectical as it follows a binary structure that simply pits the West against the East;[2] second, that Hegel indeed presents us with a robust set of Orientalist propositions: the Orient appears in the self-congratulatory light of the enlightened Occident and, more specifically about China, everything is way off the mark from what a sensible observer of Chinese culture would conclude; third, that we see here two histories of Orientalism unfolding: there is Hegel's writing that performs one part of the history of legal Orientalism and there is the historiographical account of his Orientalism, which gives Hegel's account its conceptual form as Orientalism; a form that produces its own history.[3]

These histories are not radically different for they both relate in the concept of Orientalism. Still they are logically different and provide the basis to identify two very different speech acts: If Hegel *claims* that the Chinese are lacking individual subjectivity and a proper understanding of the nature of law, he is practicing legal Orientalism. If, however, we *point out* that Hegel's account is interspersed with Orientalisms, we are stating what results from a theoretical and historical reflection on such Orientalist practices. The importance to relate *and* separate these two speech acts becomes clear if we consider their performative effects: Some – presumably Westerners – could and indeed have taken the claim that the Chinese do not understand the true nature of law as a sufficient reason to provide them with a proper understanding of it. The story following on from this claim thus is the Western subject as the teacher of the Chinese and anyone else in the Orient lacking a proper understanding of law and its usefulness – extending, but not limited to rule-of-law, democracy, free trade, etc. On the other hand, some – presumably "critical" Western intellectuals and, perhaps, Chinese – may take Hegel's Orientalisms as a sufficient reason to conclude that there is nothing to learn from this ethnocentric thinker (anymore). The conviction may now rather be that Hegel and his followers are to be lectured on what is politically correct to think, say, and write about the Orient *and* Occident after having been enlightened by a learned history of legal Orientalism. The worry that the term Orientalism might be used to politically correct and block discussions on critical issues rather than to focus on the substance of arguments has been also formulated as follows: "While there is some merit in exposing 'Orientalisms,' I must confess that I am uneasy with the term, as it is often used in an overly polemical way to attack individuals and their motives rather than to focus on the substance of arguments."[4]

Two speech acts, two (hi)stories of legal Orientalism – and both of them strike me as a sad one. I cannot see what there was to gain on either side beyond the short-lived and deceptive glow of self-right-

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1 *Teemu Ruskola*, Legal Orientalism: China, The United States, and Modern Law (2013), 42–44.

2 For another example of such an anti-dialectical account, in which Hegel falls short of his own standards, see *Georg Wilhelm Friedrich Hegel*, Der Geist des Christentums und sein Schicksal, in: Frühe Schriften, Werke 1 (1970).

3 Cf. *Pirmin Stekeler*, Hegels Phänomenologie des Geistes. Ein dialogischer Kommentar, vol. I (2014), 636–37. On the development of legal Orientalism as a field of research, see *Teemu Ruskola*, Legal Orientalism, Michigan Law Review 101 (2002), 179–234; *Teemu Ruskola*, The World According to Orientalism, Journal of Comparative Law 7 (2012), 1–4; *Carol G. S. Tan*, On Law and Orientalism, Journal of Comparative Law 7 (2012), 5–17.

4 *Randall Peerenboom*, The X-Files: Past and Present Portrayals of China's Alien Legal System Symposium – Celebration in Honor of Professor William C. Jones, Washington University Global Studies Law Review 2 (2003), 37–96, 57; see further *Neil McInnes*, 'Orientalism', the Evolution of a Concept, The National Interest (1998), 73–81.

eousness that comes with a "critical" attitude that does not reflect on its own position. All the more grateful should we be, I think, that the currently leading history of legal Orientalism does not leave us with such an unfortunate alternative. In his book *Legal Orientalism*, Teemu Ruskola develops a sensitive and sensible conceptual vocabulary on how to speak about and in a world of legal Orientalism.[5] A world he chooses to map primarily within the cultural triangle of China, the United States, and modern law. The finely balanced approach in Ruskola's argument shows notably in his presentation of Hegel's position, which has been summarized in its main propositions at the beginning of this essay. In using Hegel's *History of Philosophy* as his starting point, Ruskola wishes "neither to accuse nor to excuse its author" but intends to use it "merely as a textual case study, as it happens to provide a truly classic statement of many Orientalist ideas that continue to structure the perception of Chinese law even today – in Europe, the United States, and indeed even in China."[6] More generally, then, Ruskola recommends a cautious use of the term (legal) Orientalism. He rightly points out that ever since Edward Said's classic study on Orientalism[7] this term has obtained a distinctively pejorative connotation: calling someone an Orientalist has come close to calling someone a racist.[8] Ruskola clearly intends to distance himself from this kind of criticism in stating that "[b]y designating certain understandings of law and China as Orientalist, I do not mean to level an accusation..."[9] His endeavor of analyzing legal Orientalism shall be, as he puts it, a "more modest" undertaking, seeking to "*understand* the history and conceptual parameters of Orientalism and how they structure what can be said, and known, about China and Chinese law – and indeed about the United States and U.S. law as well."[10] In sum, Ruskola is not out for lecturing Europeans and Americans on political correctness in matters of legal Orientalism. His concern is a more profound one. It shows, for instance, when he refutes the opposite position, that is to say, the American legal subject lecturing the Chinese:

> To the extent that the American legal subject constitutes the paradigmatic and universal case, its task – its right as well as its duty – is to teach the Chinese, too, how to become (real) legal subjects. It is precisely this duty that animates much of the history [of legal Orientalism] analyzed in Chapters 4 and 5, where it takes the form of what I call the white lawyer's burden. And until that lesson has been imparted, there is little that Chinese conceptions of law and justice could possibly offer to American law. *This is hardly a promising recipe for cross-cultural understanding*.[11]

So the key word remains: "understanding."[12] Ruskola's analysis of legal Orientalism seeks to understand the history and conceptual parameters of Orientalism and thereby to enlarge the space for cross-cultural understanding for modern Chinese and American law. Importantly, Ruskola combines this hermeneutical approach with a particular hope: "Perhaps China can provide not only a target for U.S.-led law reforms but also a source of different visions, legal and otherwise."[13] An approach that emphasizes cross-cultural understanding and aims at cross-cultural learning certainly seems a more promising story coming out of an engagement with legal Orientalism. The question I wish to pursue hereinafter is therefore: What could be suitable concepts and strategies for making this story a part of the history of legal Orientalism? My comments will focus on two concepts: dialogue and Oriental legalism.

II.
LEGAL ORIENTALISM – DIALOGUE – ORIENTAL LEGALISM

One of the interesting characteristics of Ruskola's account of legal Orientalism is that he never trades in a negative Orientalism for a positive one. To illustrate the difference between these two Orientalisms with some historical figures: Ruskola does not suggest to shift from a biased Hegelian perspective, in which China is always lacking something, to

5 This is not to say, of course, that there is nothing to be criticized in Ruskola's book. A particularly controversial topic has become the question whether his comparative argument that casts traditional Chinese family structures as functional equivalents of modern American business corporations is methodologically sound, see the references in and the rejoinder of *Teemu Ruskola*, A Reader's Guide to *Legal Orientalism*, Ancilla Iuris (2021), 146–152, 151. Looking into the issue of Ruskola's multi-disciplinary orientation, see *Idriss Fofana/Peter Tzeng*, Book Review, Yale Journal of International Law 39 (2014), 405–408. For historical queries, see *Carol G. S. Tan*, How a 'Lawless' China made Modern America: An Epic told in Orientalism, Harvard Law Review 128 (2015), 1677–1704; *Qiang Fang*, Review of Legal Orientalism: China, the United States, and Modern Law, The American Historical Review 119 (2014), 851–852; *Timothy Webster*, Teemu Ruskola, Legal Orientalism: China, the United States, and Modern Law, Book Reviews, American Journal of Comparative Law 62 (2014), 811–818; *Li Yang*, Legal Orientalism, or Legal Imperialism?, Rechtsgeschichte - Legal History 22 (2014), 316–321.

6 *Ruskola* (fn. 1), 44, 42.

7 *Edward W. Said*, Orientalism (1978).

8 *Ruskola* (fn. 1), 6.

9 Ibid.

10 Ibid. (emphasis added).

11 Ibid., 55 (emphasis added).

12 Ruskola stresses the hermeneutical character of his analysis on several occasions: "my goal in this book is neither to prescribe nor to evaluate specific legal policies but, rather, to understand the nature, history, and political and cultural significance of Chinese law reform" (ibid., 22); there is no "un-Orientalist knowledge to be had. More modestly, but vitally importantly, what we *can* do is understand the history and conceptual parameters of Orientalism" (ibid., 6); it is only "through a critical awareness of this [sc. Orientalist] past and its continuing legacies that we can understand the world that legal Orientalism has made." (ibid., 234)

13 Ibid., 28.

a Sinophile perspective à la Voltaire, in which everything about China appears in a favourable light. It could be argued at length that the critical perspective Ruskola applies in his book is multidimensional, cutting across all of its central domains: the United States, China, and modern law. Consider only the following statement: "the task is not, and cannot be, the ultimate elimination of all analytic apparatuses of European thought, such as Western ideas of law. Indeed, we surely have an ethical duty to be concerned about the practices of subjection … in China as well as at home. Law provides one important way to address such practices …"[14] For present purposes, however, the more relevant point is to see how Ruskola applies his critical perspective to the issue of cross-cultural understanding. What does he suggest should be the lessons we learn from legal Orientalism for the future? I do not attempt to answer this question comprehensively, but two concepts Ruskola mentions briefly at the end of his book stand out: dialogue and Oriental legalism. Let us consider them each in turn. The concept of dialogue appears in the following context:

> In the end this book invites the reader to step back from the present, so overwhelmingly saturated with abstract talk of rule-of-law, and to consider the longer history of legal Orientalism … It is only through a critical awareness of this past and its continuing legacies that we can understand the world that legal Orientalism has made. This does not mean that we cannot continue to engage in an impassioned dialogue about the demands of justice globally and locally. It does mean giving up law's universalism as the foundation for such a dialogue – without either uncritically assuming or fully rejecting the more particular terms in which ideas of justice are ultimately understood, and lived.[15]

What can we discern from this passage for a dialogue occurring between Occident and Orient? The dialogue seems to combine a "critical awareness" of the history of legal Orientalism with "the demands about justice globally and locally." The terms on which a cross-cultural dialogue can take place consequently are: that a universalistic understanding of law (and the context suggests also rule-of-law) cannot serve as the foundation of such a dialogue, while at the same time this cannot leave the particular ideas about justice isolated and immune from critique if the dialogue aspires to operate on a global and local level. In fact, just a few lines earlier Ruskola envisages law as a "*critical transnational discourse*" that "is *both* the universal and the particular, and the very moment of their making."[16] We may bring this on a more familiar and succinct formula if we say: apparently, a critical transnational dialogue on legal issues needs to operate beyond the divide between a legal universalism and a legal relativism.[17] Moreover, the passage quoted suggests also a specific motive why to engage in a cross-cultural dialogue: "the demands of justice." It is not quite clear what Ruskola has in mind with this formula, yet I think we must understand the demands of justice at least to some extent as a placeholder for *particular* concerns about justice that are usually associated with the rule-of-law concept. Actually, just a little earlier Ruskola notes: "As the relationship between U.S. law and Chinese law continues to be negotiated, the high-flying notion of rule-of-law hinders that negotiation more than it aids it."[18] And he then makes the suggestion to replace the rule-of-law "with more modest and more definable concepts instead" to "achieve greater precision and to enable more effective communication across legal traditions."[19] In other words, Ruskola outlines a communication between legal traditions that does not rely on "abstract talk of rule-of-law" but that may include, among other things, a dialogue about specific rule-of-law issues reflecting particular demands of justice.

While this takes us some way in sketching the idea of a dialogue across legal traditions, it is of course no more than a starting point. The motives of the dialogue, for instance, remain incomplete. Even if we grant that justice is a legitimate reason to engage in such a cross-cultural dialogue, that surely is not the only reason to do so. We should remember Ruskola's more fundamental concern in his book, which is understanding and more specifically, his suggestion that China could be "a source of different visions, legal and otherwise" for the United States and, we may add, for other Western countries as well.[20] Thus, the more general motive for a cross-cultural legal dialogue becomes in this perspective that there is something to learn from each other. For traditional comparative lawyers that is, of course, a prime motive for engaging with other legal traditions. Suffices it to recall the well-known formula that comparative law builds up the "stock

14 Ibid., 56. For a detailed version of this argument, see *Thomas Coendet*, Critical Legal Orientalism: Rethinking the Comparative Discourse on Chinese Law, The American Journal of Comparative Law 67 (2019), 775–824.

15 *Ruskola* (fn. 1), 234.

16 Ibid. (emphasis added).

17 From the previous literature on this point, see, for example, *Ernest Gellner*, Relativism and Universals, Relativism and the Social Sciences (1985), 83–100; *Randall Peerenboom*, Beyond Universalism and Relativism: The Evolving Debates about 'Values in Asia', Indiana International & Comparative Law Review 14 (2003), 1–86; *Judith Schacherreiter*, The Fate of Ethnocentrism and Cultural Relativism in Comparative Law – Causes, Manifestations and Effective Strategies, Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 77 (2013), 272–299.

18 *Ruskola* (fn. 1), 233.

19 Ibid.

20 See supra at note 13.

of solutions" for legal problems.[21] Moreover, motivating the dialogue in this way is particularly important as regards the inter-cultural exchange between China and the West. Both worlds evolved into civilizations independently from each other, having reached an equal level in inscribing, elaborating, and commentating on their thinking. A dialogue on basic concepts and ideas can therefore start at an equal level and symmetrically, as against the asymmetric comparisons with smaller populations that, as a matter of fact, do not offer the same depth of comparative material.[22] In the comparative legal dialogue, China thus takes a central position, for its cultural resources are as rich as the Western ones and fortunately (still) different. Indeed, I think on this particular motive of the dialogue, we can even suggest that Ruskola's argument amounts to a defence of China and its legal tradition: it defends China as a resource for different visions, legal and otherwise. Legal Orientalism shall not block the view on these opportunities for cross-cultural learning.[23]

The motive of learning in a cross-cultural dialogue provides an apt transition to the concept of Oriental legalism as opposed to legal Orientalism. To see the transition, it is crucial to point out that the term legal Orientalism marks at best a path to realize the chances of a dialogue between the West and the East. However, even if we pursue this path, it will still remain the path of the *Western* self because the concept of legal Orientalism implies the self-reflection of the Western, not the Eastern legal consciousness. Theory of Orientalism has, in other words, always already locked itself into the problem of how to or, for worse, of not being able to properly understand the East. For that reason, legal Orientalism is not a concept that would allow us to map the *radically* different starting points and perspectives on legal modernity, which exist in the East. Oriental legalism, on the other hand, could mark such a conceptual space. Ruskola brings in this concept shortly before turning to the idea of the dialogue. Yet he provides us with not much more than a glimpse at the concept and we will therefore quote the context of its appearance at some length:

> As the global distribution of universality and particularity is being recalibrated – and there is no question that it is – it would be futile to predict what the new equilibrium might be. Perhaps China will in fact one day submit to rule-of-law in its modern Euro-American form, thereby confirming its universality. Or maybe it will recast law's rule in the form of an evolving Chinese universalism – an Oriental legalism, as it were. If law can resignify China, we must be prepared to accept that China can also Sinify law.[24]

Before pondering the passage, it should be remembered that Ruskola issued a clear guideline about what he is doing in the epilogue in which this statement on Oriental legalism comes in as a closing remark: "This book concludes by *speculating* on the future of both China and the United States in the world that legal Orientalism has made."[25] In line with this, Ruskola holds in the passage above that "it would be futile to predict what the new equilibrium might be" and consequently introduces his guesses with a cautious "perhaps." Turning to the matter itself, we then receive little hints what an Oriental legalism might be. At least, Ruskola identifies the concept with an "evolving Chinese universalism" in which, so it seems, "we must be prepared *to accept* that China can also Sinify law." That is a little unfortunate. To be sure, the West does not need to accept a Chinese universalism any more than China must accept a Western one. But if we omit the italicized words, (almost) everything falls into place: Oriental legalism could indeed signify a conceptual space for a Chinese universalism in which China could Sinify law.[26]

On how to fill the conceptual space of an Oriental legalism, I naturally have little to contribute because to my mind that concept should precisely mark an entrance to the global legal discourse that one does not approach from a Western perspective. Put differently, Oriental legalism should not provide the backdoor for yet another set of Western imaginations about law.[27] On the main, it is therefore for our Chinese and Asian colleagues to flesh out the concept – and they certainly do not require an invitation to do so.[28] I can only add some suggestions based on the foregoing remarks and on the observations a Western scholar makes when reading through the history of legal Orientalism. First, given the long history and continuing legacy of legal imperialism, which Ruskola describes so elo-

21 See *Ernst Rabel*, Aufgabe und Notwendigkeit der Rechtsvergleichung, in: Hans G. Leser (ed.), Ernst Rabel. Gesammelte Aufsätze, vol. III (1967), 9 (Rabel ascribes the statement to Zitelmann).

22 See *François Jullien*, On the Universal, the Uniform, the Common and Dialogue between Cultures, Michael Richardson/Krzysztof Fijalkowski (trans.) (2014), 78–9.

23 Programmatically identical, *François Jullien*, Il n'y pas d'identité culturelle. Mais nous défendons les ressources culturelles (2016).

24 *Ruskola* (fn. 1), 233.

25 Ibid., 28 (emphasis added).

26 One would still need to consider, however, that "Oriental" does not equate with "Chinese" and therefore the term "Oriental legalism" would rather call for a balanced approach that moves beyond a Chinese universalism, on the one hand, and a Western centrism, on the other. Along these lines, *Zhaoguang Ge*, What is China? (2018), 13: "We should recognize that the revival of the idea of Asia is a significant way of moving beyond the political borders of individual nation-states so as to construct an imagined political space that dispels state-centred biases from within and resists 'Western hegemony' from without." Against this background, a Chinese universalism would be more appropriately equated with the concept of All-under-Heaven (*tianxia*) – cf. infra note 29.

27 Imaginations that too often do not discount the dangers they entail – for a recent critical account of exporting Western law, see *Jedidiah Kroncke*, The Futility of Law and Development. China and the Dangers of Exporting American Law (2016).

28 On the reactions of Chinese scholars to the concept, see *Ruskola* (fn. 5), 150.

quently and critically for Euro-American law, it would be somewhat disappointing if Oriental legalism would mean nothing more than turning a high-minded legal imperialism from its American head on Asian feet.[29] One would rather hope that an Oriental legalism would prove to be an imaginative space in which the flaws of legal Orientalism are not mirrored, but avoided.[30] Second, if we link the concept of Oriental legalism back to the concept of a cross-cultural dialogue, one would expect that a Chinese universalism would just as well need to move beyond the universalism/relativism divide – thus, taking to heart Ruskola's suggestion that "it does not seem especially useful to insist that any place or any time is more or less universal than any other."[31] Considered in this way, Oriental legalism could indeed mark a conceptual space that points towards a comparative dialogue between China and the West with increased learning capacities. A dialogue in which both are learning from the other – without either side taking the role of the teacher.

III. HEGEL'S WAY OUT OF LEGAL ORIENTALISM

Where do these thoughts about a cross-cultural dialogue and an Oriental legalism lead us as regards the histories of legal Orientalism? I mentioned that the concept of legal Orientalism implies the self-reflection of the Western legal consciousness. If everything goes well, legal Orientalism becomes a dialectical process in which the modern *Western* subject reaches a higher understanding of its own legal consciousness. This process evolves with and against Hegel in three stages.[32]

The process starts with an *anti*-dialectical understanding of law's Orient, which was summarized in Hegel's Orientalist propositions at the beginning of this essay. Thus, the Western self of the first stage is the modern subject with its rights and remedies that allow and compel it to solve the legal problems of all mankind. Its map of the world is divided into lawless and lawful places and its mission is to carry the universal truths about the rule-of-law to the most distant corners of the globe.

The Western self of the second stage is the subject that has been enlightened by the critical history of legal Orientalism. From its vantage point overlooking the history of Euro-American legal imperialism and Orientalism, it looks down upon the modern subject with its at best naïve understanding of rule-of-law and human rights. Its new universal truth is the one of a legal and cultural relativism that imprisons different legal traditions within their own values and ideas of justice. And it therefore zealously watches over the political correctness of any critical question one dares to utter about the laws and lands beyond the Western hemisphere.

The Western self of the third stage accepts that describing its predecessors in such a way means to caricature – but only a little. It does not assume that anyone is per se better placed to judge upon ideas of law and justice. At the same time, it does not take this as a reason to remain unconcerned or silent about practices of subjection in law's Orient or at home and, consequently, acknowledges the critical potential of its own legal tradition together with the responsibility for its imperialist and Orientalist legacy. On the third stage, the Western self thus resembles a conscientious subject. It considers its own culture and legal tradition as a valuable, yet not superior starting point. Rather it appreciates the possibility to entertain a dialogue with other legal traditions for this dialogue is its chance to learn; to learn about its own legal ideas and values as well as to consider and assess ideas different, and to discover the ones that can be developed together.[33]

29 For an argument on how to balance the more specifically Chinese concept of All-under-Heaven as opposed to Oriental legalism, see *Ge* (fn. 26), 148 (arguing that this concept could provide a "framework for unity in diversity" while at the same time it might also "lead to ambitions to gain hegemony").

30 In a similar vein, *Thomas Coendet*, Legal Orientalism and its European Heritage: An Essay on Teemu Ruskola's *Legal Orientalism*, Ancilla Iuris (2019), 17–22, 21f.

31 Ruskola (fn. 1), 234.

32 See *Georg Wilhelm Friedrich Hegel*, Phänomenologie des Geistes, Werke 3 (1970), 465–66; for interpreting these three stages in the present context, I essentially rely on *Pirmin Stekeler*, Hegels Phänomenologie des Geistes. Ein dialogischer Kommentar, vol. 2 (2014), 625–27.

33 A structurally related (though not identical) discursive position has been marked in Chinese scholarship as regards the question whether it is still meaningful to engage in the writing of national histories of China. The concern is that – relying on concepts laid out by "fashionable Western theories," like the postmodern or the postcolonial, – "scholars wrongly look down on national histories in the belief that it is backward and even nationalist to insist on writing national histories in this day and age. I ask in response: … Why must we 'rescue history from the nation' and not understand the nation within history?" *Ge* (fn. 26), 2 and 21. Certainly, a very sensible question.

