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The Lessons and Myth of Legal Orientalism. Observations on Teemu Ruskola's Legal Orientalism

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Although postcolonial studies have prospered in the field of culture, they are still relatively new to the field of law, the field of Chinese legal theory in particular. In his monograph Legal Orientalism*, Teemu Ruskola has introduced the postcolonial concept of Orientalism to legal studies. The article suggests that his theory is of great assistance to rethink and break through the powerful Western narrative and concept of law, to develop a more pluralistic legal culture and to further the subjectivity of Chinese legal thinking. However, the overzealous emphasis on* Legal Orientalism *in China might easily lead to nationalism, cultural conservatism and an exaggeration of the cultural hegemony of the West, creating yet another kind of non-rational academic bias. The insights of* Legal Orientalism *are important, but the ongoing search for a Chinese legal subjectivity must be based on a constructive dialogue between the East and the West.*

I. FROM ORIENTALISM TO LEGAL ORIENTALISM

Edward Said introduced "Orientalism" as a paradigm to reflect on how the West dominates and interprets the East.[1] He writes: "without examining Orientalism as a discourse one cannot possibly understand the enormously systematic discipline by which European culture was able to manage – and even produce – the Orient politically, sociologically, militarily, ideologically, scientifically, and imaginatively..."[2] The Oriental world in this discourse is only a figment of the West's imagination, reflecting a huge gap in politics, military and the economy. From Said's perspective, the value, utility, power, and so-called authenticity of the representation of the Orient seldom depends on the Orient itself.[3] "Orientalism expresses and represents that part [sc. the Orient] culturally and even ideologically as a mode of discourse with supporting institutions, vocabulary, scholarship, imagery, doctrines, even colonial bureaucracies and colonial styles."[4]

Said's *Orientalism* marked the beginning of postcolonial theory and postcolonial analysis has prospered in the field of culture in recent years. But unfortunately, in the discussions about the ideological trend of postcolonialism not much attention has been given to law – one of the pillars of Western modernity – especially in Chinese legal scholarship. "Although there are numerous contemporary U.S. scholars who are cited with great frequency by Chinese legal thinkers – ranging from John Rawls to Richard Posner to Harold Berman– both postcolonial theory and Critical Legal Studies remain marginal in Chinese legal thought."[5]

Ruskola introduced Orientalism to legal studies by substituting Far East China for the Arab Middle East in the Oriental discussion and by stretching the concept to include the contemporary discourse on law-reform in China. Thus, his work carries great weight for Chinese scholars. In *Legal Orientalism*, he systematically discusses the discourse of legal Orientalism, arguing that this Western preconception of the East still is hard to overcome for the Western comparative legal mind. Many Orientalist ideas "continue to structure the perception of Chinese law even today – in Europe, the United States, and indeed even in China."[6]

Postcolonial theory considers Orientalism to be a political theory and a cultural conception that had been imposed by the West on the East. The Orient had been shaped into an odd myth by the ignorance and prejudice of Westerners. According to Said: "The Orient was almost a European invention, and had been since antiquity a place of romance, exotic beings, haunting memories and landscapes, remarkable experiences."[7]

In the same vein, so Ruskola, the belief that China has no law, or more precisely, no real law is a typical projection of Orientalism in the field of law. In this discourse, the typical U.S. individual acts as the universal subject of a universal human history progressing towards democracy and rule of law; while the masses in China are mere objects, submissive to the tide of human history and living under dictatorships. "It is a version of this view that continues to underwrite even today both American exceptionalism and Chinese exceptionalism: law as a key expression of the genius of the political order of the United States, and lawlessness as a constitutive feature of the Chinese cultural makeup."[8]

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1 *Edward Said*, Orientalism (1978), 10f.
2 Ibid.
3 Ibid., 23f.
4 Ibid., 9f.
5 *Teemu Ruskola*, Legal Orientalism: China, The United States, and Modern Law (2013), 223f.
6 Ibid., 42f.
7 *Said* (fn. 1), 1f.
8 *Ruskola* (fn. 5), 37f.

II. THE LESSONS OF *LEGAL ORIENTALISM*

Ruskola elaborates on the content of legal Orientalism, how it had been constructed and what enabled it. He traces its origins, focusing on the manifestations of legal Orientalism in classic works of Western thinkers, showing conclusively that "Montesquieu, Hegel, Marx, and Weber are classical European Orientalists whose work ultimately affirms the superiority of Western civilization and law."[9] Indeed, Western thinkers spared no effort to create this "barbaric and lawless", "stagnant and backward" exotic image of the East. Eventually, this image served the needs of the Western ideological system, to affirm a Western modern civilization that embodies the liberal spirit of enlightenment and the progression of law, and to provide theoretical resources for the West to lead or dominate the East.

Some Chinese scholars had argued in a similar direction already at an earlier point of time. Wang Hui, for one, pointed out that the Oriental discourse in post-Enlightenment Europe was establishing a knowledge of the East based on the differing ontology and epistemology between the two. Such Orientalist knowledge provided colonialism with an epistemological framework.[10]

This West-centered historical narrative and legal discourse needs reflection. China, being economically and politically increasingly powerful, is at a critical moment to think about its role in the world. And reflection on the Western heritage is one of its essential issues regarding political maturity and cultural self-understanding. So, the crux of contemporary Chinese legal philosophy is to realize and overcome the Western-centered mindset and establish the subjectivity of the Chinese legal worldview.

Against this background, the Chinese translation of Ruskola's book came out right in time, as it can provide a profound source of knowledge for exploration of the subjectivity of Chinese legal thinking and help to reflect on the hegemony of discourse and promote pluralistic civilization. As noted already by Chinese scholar Zhou Ning, it is necessary to rethink the Western-driven discourse, to deconstruct the Oriental image created by Western modernity, and to reveal the "intimidating structure" of cultural hegemony hidden in the Western discourse of modernity. According to Zhou, we should face the dangers and temptations displayed in this discursive structure and point out the direction for future social change with a right mind.[11]

Still more important than these ideological debates are, however, the real world effects that follow from them. Historically, legal Orientalism supplied tangible arguments for the West to conquer the East. Ruskola shows in this respect that Orientalist practices had given rise to the establishment of special courts and legal extraterritoriality up to 20th century China. Since the East was so barbaric and lawless, using civilized (Euro-American) law and regulations in foreign-related cases became a justifiable and common approach for colonialism. Furthermore, Orientalist prejudice informed the enactment of the Chinese Exclusion Laws in the U.S., which from the end of the 19th century barred the Chinese from entering the U.S. and from naturalization. Ruskola observes that some formulations in the public discussion of these law could have been taken straight from Hegel's *Philosophy of History*.[12]

And today, China is – in an Orientalist view – a typical example for a late-comer to legal modernity. Unsurprisingly, then, the general direction of the Chinese law reforms in recent decades was governed by the principle of "adopting and learning from Western law" (兼采西法 取法于西). Thus, legal reforms according to the standards of Western modernity have become the embodiment of the Chinese legal community's self-Orientalization. Even if this high-speed Westernization of Chinese law has achieved many important results, it also brought the differences between Western ideals and Eastern reality into sharper focus. Reflection on this is essential and the transformation from legal Orientalism to Oriental legalism advocated in Ruskola's book can provide us with a valuable reference point.

III. THE MYTH OF LEGAL ORIENTALISM

Legal Orientalism is a multifaceted phenomenon, and the misstatements and misunderstandings this narrative contains need to be realized and clarified. However, if Chinese scholars overzealously emphasize the studies of Orientalism and legal Orientalism, it might lead to nationalism and conservatism

9 Ibid., 44f.

10 *Wang Hui* (汪晖), Xiandai Zhongguo Sixiang De Xingqi: Di Yi Ce (现代中国思想的兴起) [The Rise of Modern Chinese Thought Volume 1] (2004), 2f.

11 *Zhou Ning* (周宁), Tianchao Yaoyuan (天朝遥远) [Western Images of China] (2006), 421f.

12 *Ruskola* (fn. 5), 45f.

under the name of reflecting on Western hegemony. The result would be a monist mindset and linear thinking that both Said and Ruskola actually criticize.

Thus, in the remainder I argue that the theory of legal Orientalism contains the potential to become a political myth for Chinese legal thinking. It is important to see that this potential is partially due to Ruskola's argument itself. In his ambition to redress Chinese legal thought from demonization, he makes a number of questionable claims. In other words, his motivation leads to a biased judgment and the resulting theoretical view may ultimately contribute to an overly flattering view of the Chinese legal civilization.

1. Chinese Family Clans as Corporations?

Problematic is, for example, Ruskola's claim that Chinese traditional family clans took on the functions of a modern U.S. corporation. Against legal common sense, he argues that traditional Chinese family law shared historically multiple functions with modern American corporate law. More specifically, his argument is that clan organizations, just like companies, were voluntarily associated; their main purpose was to pursue material profit; their ownership and centralized management were separated; they operated like legal persons; ownership could be transferred; and liability was limited.[13] In short, Chinese family clans and the modern corporate form were in fact homogeneous, rather than fundamentally different.

Indeed, there were new insights and detailed research in this argument. For example, Ruskola referenced some copies of clan genealogies and regulations to suggest that there was at least a small market for the sale of "shares" in large "clan corporations" where the shares were sold to non-kin.[14] However, if inspected more closely, most of the arguments do not stand.

Ruskola equated clan corporations to voluntary associations. But, in fact, the individuals were born into a certain family clan and so their rights and obligations were still determined by birth. So the family clan was more of an association by fate than a voluntary association. Moreover, Ruskola may have listed some contracts and clan genealogies to show that ancestral trusts had been formed according to property relationships and, to be sure, sometimes kinship was defined by property and sometimes a poorer family branch might have been simply sloughed off from the clan genealogy.[15] But this does not show that such kind of clan genealogy was typical in traditional Chinese society. Typical was rather that members from the same family clan helped each other. Besides, excluding poorer members from the clan did not conform with traditional values and rituals.

More importantly, the biggest difference between a "clan corporation" and a modern company is that the traditional clan cannot be understood as an association of *individual* shareholders. The social and legal context of the time had no concept of individual moral personality or rights consciousness to support such view. Being a member of a traditional clan primarily was a matter of obligations rather than rights. Thus, it is misleading to think that the status of a family member matched with the status of an individual shareholder who can, at least to some extent, assert his rights as an owner of a company. In the same vein, the idea that the traditional family clans pursued material profits just like modern companies causes misunderstandings. Pursuing profits was merely based on the clan's collective ethics and not understood as a mission to accrue "shareholder value" for individual clan members.

Thus, overall, between traditional clans and modern corporations, heterogeneity outweighs homogeneity. Ruskola's arguments did not rebut the traditional view that he sought to challenge, that is to say: Chinese legal history exhibits an underdeveloped corporate law, if such law exists at all. At the very least, we cannot find such corporate law in traditional Chinese family law.

2. China in the WTO:
   A Matter of Self-Orientalization?

To emphasize the Western cultural hegemony and the lack of subjectivity on the Chinese side, Ruskola inevitably exaggerated the Western influences on some Chinese legal reforms that, on reflection, seem rather pragmatic. In the epilogue "Colonialism without Colonizers," he writes, "if [the U.S.] extraterritorial empire was a kind of colonialism without colonies, one might view many aspects of China's modern law reforms as a colonialism without even colonizers."[16] But such a general conclusion is too absolute and nothing more than a form of alarmism. Moreover, it implicitly denies a genuine achievement from the Chinese law reforms since 1978, casting them as mere expressions of self-colonization or self-Orientalization.

In particular, Ruskola considers China's joining of the WTO as an event of self-Orientalism,[17] thereby challenging the politically correct view in China on

13 Ibid., 73f.
14 Ibid., 84f.
15 Ibid., 75f.
16 Ibid., 199f.
17 Ibid., 206f.

the politics of "Reform and Opening-up." To mount this challenge, Ruskola even takes China's side and criticizes that "when China entered the WTO in 2001, its accession protocol was of record length and filled with unprecedented ad hoc directives for the reorganization of China's economic and legal systems. Collectively, these directives exceeded both quantitatively and qualitatively what had been demanded of any other member of the WTO..."[18] According to his analysis, an important reason for these extraordinary demands was that China had not managed to get rid of its label as a "lawless country" and thus had to accept the rules made by Western "lawful powers."

This is of course an insightful analysis worth reflecting upon, but without doubt it is also an overstatement. At the time of the negotiations, the economic policies and legal institutions of China were indeed quite simply far behind general global standards. So, by entering the WTO, China was – rather pragmatically – forcing *itself* to law reform. This can hardly be seen as a mere product of self-colonization or self-Orientalization. As a result, China became the world's second-largest economy with a greater influence globally than before its WTO entry. How then could China be considered a victim of the West and self-colonization?

3. Ruskola's Chinese Legal Theory

I think that for all of his intellectual sophistication, Ruskola became obsessed with his theoretical paradigm and this lured him into strange arrangements of the comparative material and its assessment. In particular, to highlight the efforts of Chinese scholars to resist the Western legal discourse, Ruskola discusses a number of modern Chinese legal theorists in a rather indiscriminate manner. His selection includes theories so diverse as Zhu Suli's theory of indigenous resources, the Confucian-based liberalism advocated by Xia Yong, Jiang Qing's political Confucianism, even former President Hu Jintao's political ideal of a "socialist harmonious society" and the theory of the "Three Supremes" espoused by former Supreme Court President, Wang Shengjun.[19] If the book had been published later, it would surely also have included the current President's vision of the "Chinese Dream."

Such a wide assortment demonstrates that the author – a scholar from a foreign country – has researched modern Chinese legal thought with great sensitivity. Nevertheless, it also shows a lack of more refined comparative reflection. The contemporary theories of Chinese scholars are presented in familiar bureaucratic rhetoric and so several paragraphs of the book read like the Party's People's Daily. What confuses me most is that Ruskola lauded one of the most controversial articles by Zhu Suli ("Taking the Rule of Men Seriously") for its successful resistance to self-Orientalization. He commends Zhu for hedging his bets on both rule-of-law and rule-of-men, for suggesting that the Western rule-of-law is not the only possible way to live and be human.[20] Overstating a specious article that preaches the rule-of-men for the purpose of criticizing the West-centered rule-of-law is not sober scholarly assessment, but adopts the political principle that "the enemy of my enemy is my friend."

In fact, the Chinese legal theories of Ruskola's assortment have not much in common, except their anti-Western stance. The legal Orientalism he criticizes is the discourse of a West-East dichotomy that distorts and demonizes the East. However, what about using this dichotomy to praise the East and criticize the West without careful examination? The dichotomy turned this way might cause even more problems. From the academic debates between the localist Chinese and the Westernized camp, to the political slogan "either the East wind prevails over the West wind or the otherwise," to the not uncommon black and white mindset of our citizens, one can see that the Chinese intellectual terrain is just as much, or even more, obsessed with the West-East dichotomy. Such reflection is what has been missing in many articles praising *Legal Orientalism*.

4. Legal Orientalism as a Myth

Legal Orientalism in general and Ruskola's book in particular offer themselves to a distinct political use: one that exaggerates the impact of Western thinker's misinterpretations of China or even accuses them of demonizing China and, subsequently, denies their significance for the enlightenment in China. As a matter of historical fact, Hegel's and Montesquieu's views on Oriental despotism and the unenlightened national character of China may not stand up to scrutiny. But it is undeniable that their criticism played an important role in China's political and ideological revolutions and is still influencing the debates on law reform and the current search for a national identity.

Modern Chinese thinkers – such as Yan Fu, Liang Qichao, Chen Duxiu, and Hu Shi – were inspired by such Western criticism to initiate the self-enlightenment movement in China. As Zhang Yongle remarked: "undeniably, during revolutions, European scholar's criticism of Chinese feudal monar-

18 Ibid.
19 Ibid., 223 ff.
20 Ibid., 227f.

chy had been transformed into an advertisement for revolutions. From Montesquieu to Marx, twisted descriptions of traditional Chinese society were never absent. However, using such Western criticism does not mean subjecting oneself to the world's hierarchy and following the path lined up by Western powers, it was only used to push forward the agenda of the revolution."[21] Still, we fear that in Ruskola's theoretical perspective all this would be reduced to a mere demonstration of self-Orientalization.

Even more crucial, however, is that critical reflection on Western hegemony can easily incite nationalism and political conservatism. Actually, Ruskola references Wang Hui's assertion that critiques of Eurocentrism have the tendency to lead to Chinese nationalism rather than a critical examination of the nature of Chinese modernity under the lens of a longer global history of colonialism.[22] Ruskola's predicament is that his own theory can hardly escape the same destiny, thus turning legal Orientalism into a myth for a nationalist agenda.

Said's *Orientalism* and Ruskola's *Legal Orientalism* were meant to critically reflect on the Western tradition, and that is meaningful. If Ruskola as a Western scholar criticizes Western thought, this shows Western academia's culture of openness, inclusiveness, and the capacity for self-reflection, which are qualities that we should highly respect. Nonetheless, if introducing this kind of work in China only results in its degradation into a weapon for attacking Western thought, its critical spirit will be self-defeating. In an ironic turn of things, its misplacement then only shows the narrowness and closed mind of Chinese scholarship.

Already Said noted that the biggest misunderstanding of his *Orientalism* was the over simplification and stylization of his argument as an anti-Western theory in which, on the one hand, the whole Western world becomes the enemy of the non-European nationalities and countries that had once been subjected to Western colonization and prejudice and, on the other hand, one would misplace their praise of these other places and people and consider *Orientalism* as a support even for Islamism and Islamic Fundamentalism. A similar thing might now happen to *Legal Orientalism*, as Liang Zhiping pointed out in his review of the book.[23] Unfortunately, the argumentative problems and biases we have mentioned above might contribute to such an understanding of Ruskola's work.

So it appears that Zhou Ning was right when he remarked (years before *Legal Orientalism* was published) that the image of China in Western modernity is a double-edged sword. On the one hand, "understanding it is important for the reason that, in the post-colonial era, it can allow us to think independently and critically, so that we would not fall into the trap of self-colonization and lose the cultural subjectivity of a Chinese modernity." On the other hand, "understanding it is also dangerous, as it may fuel nationalist passion and cost us the opportunity for political rationality and maturity in the era of neo-imperialism and post-totalitarianism."[24]

Also other Chinese scholars have been aware of the dangers of abusing Western theories as a political myth. Scholars like Xu Ben and Lei Yi observe that some of the "third-world criticism" is ignoring the reality of native societies and in drawing on Said's critique chooses to promote a nationalistic strategy of cultural resistance.[25] For a remedy, scholars like Xu Jilin and Dong Leshan emphasize (if substantively vague) that we should adopt a more rational strategy of "sharing" and "communicating" to avoid the unhelpful East-West dichotomy of post-colonial criticism.[26]

And yet, amongst all the comments on *Legal Orientalism*, reflections like these are disturbingly rare. In our opinion, the appropriate attitude would be that the argument of *Legal Orientalism* deserves, but also requires careful examination and that the particular notion of an Oriental legalism should be worked out in a dialogue between China and the West. We should not create new biases to eliminate old ones.

21 *Zhang Yongle* (章永乐), Zhongguo Falv Pinglun (中国法律评论) [China Law Review] 4 (2016).
22 *Ruskola* (fn. 5), 223f.
23 *Liang Zhiping* (梁治平), Dongfang Zaobao Shanghai Shuping (东方早报·上海书评) [East Morning Post: Shanghai Book Review] (9 October 2016).
24 *Zhou* (fn. 11), 16f.
25 *Xu Ben* (徐贲), Er Shi Yi Shiji (二十一世纪) [Twenty-first Century] 2 (1995); *Lei Yi* (雷颐), Du Shu (读书) [Read] 4 (1995).
26 *Xu Jilin* (许纪霖), Dong Fang (东方) [East] 5 (1994); *Dong Leshan* (董乐山), Du Shu (读书) [Read] 5 (1994).

