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Journal of Transnational American Studies

Title

Excerpt from Legal Orientalism: China, the United States, and Modern Law

Permalink

https://escholarship.org/uc/item/5d8273zc

Journal

Journal of Transnational American Studies, 6(1)

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Publication Date

2015

DOI

10.5070/T861025846

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Excerpted from Teemu Ruskola, *Legal Orientalism: China, the United States, and Modern Law* (Cambridge, MA: Harvard University Press, 2013).

CHAPTER ONE

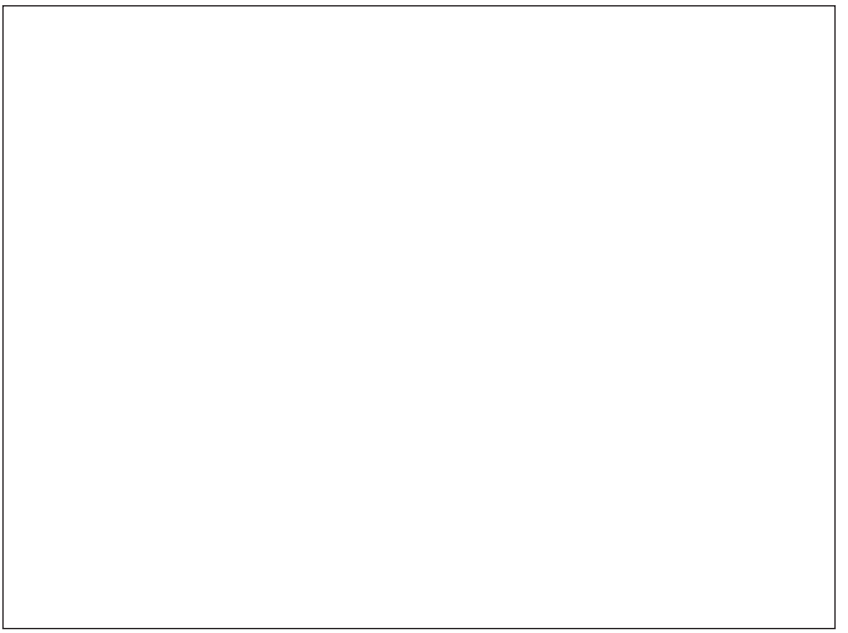
Introduction: Legal Orientalism

> "Law" . . . is part of a distinctive manner of imagining the real.
>
> —Clifford Geertz, "Local Knowledge: Fact and Law in Comparative Perspective"

> With the Chinese law . . . we are carried back to a position whence we can survey, so to speak, a living past, and converse with fossil men.
>
> —Edward Harper Parker, "Comparative Chinese Family Law"

LAW'S ORIENT CONSTITUTES a wide and uneven terrain. This book describes the itinerary of one particular journey across that terrain, with a focus on China and the United States. Law is a key aspect of the political ontology of the modern world. It is exceedingly difficult, if not impossible, for us to think of politics outside of the framework of states, and of states outside of law. At the same time, no understanding of the world today is complete without consideration of China's place in it. The difficulties begin when we seek to combine the inquiries into law and China. Where is China in law's world? And why is the United States an important part of the answer to that question?

If there is one image of China that is seared in the collective consciousness of the West, it is that of a solitary man facing a tank in Tiananmen Square on June 4, 1989. Indeed, after the end of the Cold War and the roughly contemporaneous massacre by the Chinese government of its own citizens, China has come to occupy the role of the leading human rights violator in the East—a position left vacant by the collapse of the USSR. While the People's Republic of China (PRC) has by now secured itself a solid reputation



Tank Man, Tiananmen Square, June 4, 1989.
Screen capture, CNN. Courtesy of Getty Images.

as a law breaker in chief, the United States has emerged as the world's chief law enforcer as well as its leading law exporter, administering programs for the promotion of rule-of-law everywhere—and perhaps nowhere as vigorously as in China.

This book starts from the premise that the complex and unstable relationship among China, the United States, and legal modernity is of utmost global significance. To map that relationship, it analyzes law as a fundamental element in the modern worldview that conceives the individual—the singular human being—as the paradigmatic existential, political, and legal subject and the state as the privileged medium for the instantiation of its universal values, through law. More than just a set of rules for regulating behavior, law in this larger sense is a structure of the political imagination—"a distinctive manner of imagining the real," in Clifford Geertz's words. One of its most important imagined Others is the Orient, and legal Orientalism is the discourse in which it is imagined.

The remainder of this book sets out to map key elements of that discourse and a historical itinerary of its global development. It is a compara-

tive and historical study about ideas of Chinese and U.S. law, and of how those ideas have produced distinctive subjectivities, articulated social relations, and shaped geopolitical conditions. In terms of its historical narrative, the heart of this book is the extraordinary and virtually forgotten story of how over the course of the nineteenth century a diffuse set of European prejudices about Chinese law developed into an American ideology and practice of empire, entailing the extraterritorial application of a floating body of U.S. law in an otherwise lawless Orient. It is only from a perspective that is both theoretical and historical that we can understand the effect that Orientalism has had on the development of both Chinese law and U.S. law, as well as on international law and Sino-U.S. relations more generally.

GLOBAL CIRCULATIONS OF LEGAL ORIENTALISM

The map of law's Orient here is a particular one, as is every map. Perhaps most importantly, the scale in the following chapters varies considerably, reflecting changes in the legal topographies they traverse and in the time periods they cover. To name only some of its concerns, this volume explores representations of Oriental despotism in the imagination of Euro-American Enlightenment thinkers; it reinterprets Confucian family law in late imperial China as a kind of corporation law; it examines the so-called United States Court for China, which sought to apply, among other things, pre-Revolutionary common law in early-twentieth-century Shanghai; it investigates the comparative standing of the United States and China in international law by examining the Boston Tea Party and the Opium War; it studies the enduring damage wrought on the U.S. Constitution by the enactment of Chinese Exclusion Laws near the end of the nineteenth century; and it links these historic studies with the legal geography of today's world by considering the political and phenomenological significance of the post–1978 legal reforms of the People's Republic of China.

This book brings these varied phenomena together under the compound rubric announced by its subtitle: China, the United States, and modern law. Rather than taking any one of these three categories as a pregiven object of knowledge, or adopting a single disciplinary approach, this book examines how China, the United States, and law are related to each other—historically, conceptually, culturally, and geopolitically. At the outset it is

important to recognize that it is by no means obvious to all observers that the three notions are in fact related in any particularly meaningful way. Indeed, the genesis of this book lies precisely in an examination of the widely shared assumption that law and China exist in an antithetical relationship. Originally this study began with the more modest goal of producing "just" a historical and theoretical analysis of Chinese law—an undertaking that would certainly have been demanding enough on its own. However, as I started my inquiry, I had no choice but to confront the fact that one of the defining cultural and political characteristics of China is law's putative absence there. In fact, when I am asked what I do for a living and I respond that I study Chinese law, with remarkable frequency my interlocutors inform me that there is no such thing, thereby suggesting politely (and sometimes not so politely) that I have made a category mistake in choosing my academic vocation.

At first such reactions simply irked me, and my responses were not particularly considered. ("People who study French or German law don't have to convince others that their subject matter exists!" I protested to colleagues.) However, given the consistency and manifest sincerity with which this "truth" about China was being offered, it became evident that it could not be simply ignored. Approaching the notion of Chinese law ethnographically, I decided to examine what motivates the belief in its nonexistence and what makes that belief so intuitively appealing to so many. Pursuing that inquiry has turned out to be both more fascinating and more complicated than I originally anticipated. On the one hand, it has become a study of China's ambiguous place in legal modernity. On the other hand, the notion of rule-of-law—of which China is seen as the antithesis—is claimed today most insistently by the United States. Hence, a genuinely global understanding of China's place in law's world demands a consideration of the United States' role in the legal production of modernity.

My main framework for exploring the relationship among China, the United States, and modern law is a complex of ideas I call "legal Orientalism." In his path-breaking monograph, Edward Said uses the term Orientalism to refer to discourses that structure Western understandings of the East. He emphasizes the extent to which the identity of the colonial and postcolonial West is a rhetorical achievement. In a series of imperial gestures, we have reduced "the Orient" to a passive object, to be known by a cognitively privileged subject—ourselves, "the West." As Said puts it,

"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 during the post-Enlightenment period."[1]

By now there are scores of studies of different varieties of Orientalisms. Remarkably, the study of specifically *legal* forms of Orientalism remains largely unexplored—the ways in which "the Orient," as well as the Euro-American "West," have been produced through discourses of law.[2] Given the centrality of law to the political modernity of the West and the fundamental way in which Said's analysis destabilizes the epistemological status of East–West distinctions, a global study of law's world cannot afford to ignore Said's challenge.

By the term legal Orientalism, then, I refer on the most general level to a set of interlocking narratives about what is and is not law, and who are and are not its proper subjects. This book focuses largely on one particular instantiation of legal Orientalism, and the remaining chapters illustrate how its narratives enjoy global circulation and how they have performed a variety of functions in various historical contexts, up to and including the present. Each of the chapters is concerned with defining an *Other* through its relationship to *law*. Of course, the West—to use the purposely imprecise term—has many Others, and the Orient is only one of them. At the same time, the Orient itself is a radically determinate category, denoting an entity of the European imagination that extends from Morocco in North Africa to Japan on the eastern edge of Asia. In this book the cultural world of China represents only one instance of Orientalism. It is not exemplary, but it is a historically and politically important case.

Focusing on Chinese law, then, I use the framework of legal Orientalism to ask a number of related, overarching questions: Who has law? Who gets to decide who has law? And, perhaps most importantly, what is at stake in asking the question? A statement that someone has or does not have law is not only a descriptive claim but also a normative assessment of a particular society. Inevitably, not having law implies missing something that one *should* have. In considering these questions, I examine the ways in which law has been a foundational element in the constitution of the modern Western subject and the nation-state. How, I ask, have ideas of the lack of Chinese legal subjectivity served to mark the conceptual outside of Euro-American

law, and the cultural and political outside of a Euro-American "Family of Nations"?

To reiterate, there is indeed a strong cultural tendency to associate the United States with law (even if excessively so at times), and a corresponding historic tendency to associate China with an absence of law (whether that absence be considered a vice or a virtue). The distinction is crucial because the emergence of law, in the sense of rule-of-law, is one of the signal markers of modernity. This rough cultural mapping of the triangulated relationship among China, the United States, and law generates a number of assumptions that provide the framework for scores of comparative studies of China. These include, most notably, the notion that China is traditional—or worse, primitive—while the United States is modern, as is the law that embodies its essential values. From these fundamental oppositions much else ensues, historically and conceptually, as this book aims to show.

It is important to acknowledge at the outset that ever since Said's classic analysis the term Orientalism has acquired a distinctly pejorative connotation. Calling someone an Orientalist is often regarded as akin to calling someone a racist, and usually it elicits a similar reaction. By designating certain understandings of law and China as Orientalist, I do not mean to level an accusation but simply to open an avenue of inquiry into the field of knowledge in which Chinese law is studied and understood. As I suggest in Chapter 2, in the modern world in which we live there is no pure, un-Orientalist knowledge to be had. More modestly, but vitally importantly, what we *can* do is 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.

It is vital to emphasize that the discourse of Chinese law is not, and cannot be, a self-contained universe. It is never *only* about Chinese law, or lack thereof. Chinese law is a concept with a global circulation and with global effects. Although it may be heuristically helpful to begin from a contrast between an (idealized) American law and a (caricatured) Chinese lawlessness, such a juxtaposition is ultimately too simplistic and too static. The ostensibly heterogeneous subject matter of the following pages reflects the dynamic, uneven, and worldwide traffic in ideas of Chinese law, and of Chinese legal perversity.

The point is not necessarily obvious, so it may be useful to support it with an introductory example that also illustrates the development of this

book. In the early stages of my research, when I still envisioned the project as essentially a historical and theoretical study of Chinese law, I learned that in 1906 the U.S. Congress passed a law entitled "An Act Creating a United States Court for China and prescribing the jurisdiction thereof."[3] The new court, equivalent to a federal district court, assumed civil and criminal jurisdiction over American citizens within the "District of China," which in turn was coincident with the Qing Empire. The court sat in the semicolonial port city of Shanghai, and appeals from its judgments were taken to the Ninth Judicial Circuit in San Francisco, with further appeals to the United States Supreme Court in Washington, D.C. Expanding its original mandate, the court eventually construed its jurisdiction to include not only American citizens in the so-called District of China but also American "subjects" from the newly colonized Philippines, and in some cases American citizens who had never set foot in China.

As I studied the court further, I was stunned not only by the improbable fact that it had existed and the vast jurisdiction that it exercised, but also by the plain weirdness of the body of law that it applied in China. That body included English common law as it existed prior to American independence, 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, to mention only some of the main sources of the court's jurisprudence. The court had only one sitting judge at any one time, and when he was away (either riding circuit in the cities of Hangzhou, Tianjin, or Canton, or being investigated for official misconduct in Washington, D.C.), prisoners sometimes had to wait for months for a trial. Indeed, virtually the only federal law that did *not* apply in the District of China was the United States Constitution. Hence, there was no right to a jury trial nor to constitutional due process, among other legal niceties.

In sum, all of this struck me as something rather like from *Alice in Wonderland,* the kind of befuddled jurisprudence one might expect to emerge from the courtroom of the Queen of Hearts, not from a court of the United States—which should not even be sitting in China in the first place.[4] Yet the tribunal operated for several decades and its jurisdiction was not formally abolished until 1943. As I became increasingly fascinated with the extraterritorial operation of American law in China, I pursued the topic as a discrete project. However, as I also continued my prior research into the

historical and cultural representations of Chinese lawlessness, it soon became impossible not to recognize just how oddly disjunctive, yet related, the two projects were. While the District of China may have been full of American law, the way in which the United States Court for China exercised jurisdiction over it was hardly law*ful* in a more fundamental sense. Paradoxically, that erratic jurisdiction was justified precisely, and perversely, by the United States' claims of alleged *Chinese* lawlessness.

In order to understand this paradox, I concluded that an examination of how U.S. law operated in China must proceed simultaneously with a study of how Chinese law has been represented in the United States, which in turn is linked further to global discourses about the nature of Chinese law and justice, or lack thereof. As it turns out, and as Chapter 4 elaborates, those discourses have historic, and enduring, effects even on the *domestic* structure of U.S. law, not merely on its extraterritorial operation. Notably, a belief in the incapacity of the Chinese to understand, let alone embody, the virtues of individual rights and rule-of-law came to provide a crucial justification for anti-Chinese immigration laws passed by Congress beginning in 1882. When Chinese would-be immigrants contested the laws, the U.S. Supreme Court upheld them on the basis of an extraordinary theory. It held that in certain areas, including immigration, the federal government possesses "plenary powers": a discretionary authority unconstrained by the Constitution. Ironically, a desire to banish subjects of Oriental despotism outside the borders of the United States resulted in the institutionalization of a kind of legal despotism *inside* the United States. It is in this sense that ideas of Chinese law constitute, indeed, a transnational discourse with global effects. As Chapter 4 insists, those effects were significant and far-reaching: it is precisely the laws at the margins of a liberal democratic state that define its center.

EXCEPTIONAL EMPIRES OF THE UNIVERSAL AND THE PARTICULAR

Both China and the United States are, or view themselves as, exceptional in many regards. Perhaps most importantly, they are the last two major empires that remain standing in the beginning of the millennium. The achievement is remarkable, considering the violent collapse of several other empires with whom they shared the global stage at the dawn of the twentieth century,