Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte
Journal of the Max Planck Institute for European Legal History

Rechts Rg geschichte

Rechtsgeschichte
Legal History

www.rg.mpg.de

http://www.rg-rechtsgeschichte.de/rg22
Zitiervorschlag: Rechtsgeschichte – Legal History Rg 22 (2014)
http://dx.doi.org/10.12946/rg22/316-321

Rg 22 2014 316 – 321

Li Yang

Legal Orientalism, or Legal Imperialism?

Li Yang

Legal Orientalism, or Legal Imperialism?*

For hundreds of years, with the passage of time, the image of China in Western books is experiencing historic cycles, while the western scholar, as an observer, is also under mixed reviews. Voltaire and Leibniz make China fascinating and desirable in their books, with exaggeration and imagination; Montesquieu, Hegel, Max Weber, and even Henry Maine from the Historical School of Law, believe Chinese law is obviously beyond understanding by Western concepts as their legal history is different, which further makes traditionally Chinese law in modern times the object of western scholars criticized. It is natural to draw the conclusion based on discourse context in modern civilized countries.

In an odd way, in recent decades, the research on China seemingly has come to a new field. Since *Orientalism* by Edward W. Said came out in 1978, the idea of »Orientalism« in western context suddenly appeared on the horizon; the 1984 book *Discovering History in China: American Historical Writing on the Recent Chinese Past* by Paul A. Cohen, strived to get rid of the traditional discourse structure from colonial history, which push to a new high the empirical research on China-centered approach. These works undoubtedly develop a new domain of discourse for traditional Orientalism in the west. Of course, some scholars doubt the so-called study of »Asian Law« advocated by the west is still oriented publicly by political and economic gains of the country. [1]

Professor Teemu Roskula's new book *Legal Orientalism: China, the United States, and Modern Law* emphasizes on the combination of modern context and American view, and studies modern Chinese Law by making a comparison, which differs from the general idea of *Orientalism* studied by the Near East and from China-centered approach concerning China strictly only. It is obvious that the term »Legal Orientalism« is derived from the subject term in Edward W. Said's book. Edward W. Said defines Orientalism as a discourse politically, sociologically, militarily, ideologically, scientifically, and imaginatively, [2] while Teemu Roskula focuses the research of discourse on legal area and locates in East Asia, esp. China, to make a study of Orientalism with a new perspective.

In fact, since 1992 Teemu Roskula has kept on his research on Chinese law, with a series of articles highly commended and valued by academia, especially the representative paper »Legal Orientalism« published in *Michigan Law Review*, with 3 translated reprints in *Zeitschrift für Chinesisches Recht* (Germany, 2005), *Foucault and Law* (UK, 2010), and *Chinese Social Science Quarterly* (China, 2012) respectively. [3] Therefore, this book starts with this subject and constructs the research framework of Chinese law against the background of modern law. Then, such papers as »Law Without Law, or Is The ›Chinese Law‹ an Oxymoron«, »Conceptualizing and Kinship: Comparative Law and Development found in a Chinese Perspective«, »Canton Is Not Boston: The Invention of American Imperial Sovereignty« and »Colonialism Without Colonies: On The Extraterritorial Jurisprudence of The U.S. Court for China«, make up main chapters in the book and provide some indispensable materials.

Teemu Roskula is so passionate about the research of Chinese law, however, he also mentioned, the initial choice of Chinese law as the research object was taunted by his colleagues. Actually, he probably should not feel lonely. American scholars like Jerome A. Cohen, Victor H. Li, Stanley Lubman, R. Randle Edwards, and William C. Jones also devoted themselves to the research of Chinese law since 1960s, either by creating East Asian Legal Studies Program, or by setting up

* Teemu Ruskola, Legal Orientalism: China, the United States, and Modern Law, Cambridge, Mass.: Harvard University Press 2013, 338 p., ISBN 978-0-674-07576-4

Li Yang, Dr., Post-Doctoral Fellow Nanjing Normal University, China. Email: liyang1555@163.com

1 See Veronica Taylor, Asian Laws through Australian Eyes, Sydney: LBC Information Services, 1997, 61–62.

2 Edward W. Said, Orientalism, New York: Vintage Books 1979, 3.

3 See Teemu Ruskola's Curriculum Vitae, http://www.law.emory.edu/faculty/faculty-profiles/teemu-ruskola.html (2014.4.16).

courses on Chinese law without sparing any effort.[4] In recent years, the number of American scholars paying attention to Chinese law is rocketing. Involved in economic and social history, Philip C. C. Huang then turned to legal history since 1990s, putting forward a lot of provoking terms such as »the third realm«, »semiformal governance«, etc. Under the support of Philip C. C. Huang and the research group involving Kathryn Bernhardt, Bradly Reed, etc., the study on the history of Chinese law gradually formed an academic trend for researches from archival case records, and triggered an »intellectual earthquake«,[5] thus forming a research pattern on »New Legal History«.[6] In addition, William P. Alford for ages focuses on the study of traditional Chinese copyright law and regulation system, while Alison W. Conner makes great contributions to modern legal education in China, especially the in-depth research on Soochow University Law School.

Other than scholars who pursue »a China-centered history of China«, and explore micro historiography or social historiography centered on Judicial Archives, Teemu Roskula adopts a research approach of comparison or interdisciplinary orientation. This book focuses largely on one particular instantiation of legal Orientalism by studying Oriental law as »others«, and makes a tentative review on Chinese law under the perspective of the United States and modernity. It has made two contributions. First, it states whether Chinese law and the rule of law depends on the observer's definition of law, by combing and analyzing the western classical proposition »law and China exist in an antithetical relationship«, a widely shared assumption, with legal Orientalism as epistemological discursive analysis, approach Orientalism as a structure of legal knowledge. In the process of study, he surveys Confucian family law widely applied in traditional Chinese clan corporations, based on which further demonstrates Confucian family law as a kind of corporation law. Second, he shows a desire to banish the subjects of Oriental despotism outside of the borders of the United States resulted in the institutionalization of a kind of legal despotism inside the United States, through the analysis of anti-Chinese immigration laws or Chinese Exclusion laws, and the survey of the intent of congress to issue the act, especially the Supreme Court. Then, by describing the unexploited and uncharted United States of Court for China, through analyzing the development proposition of modern international law as well as the extraterritoriality, he indicates that the traditional mode of promoting jurisdiction through the control of a territory in some ways gets overturned, and the legal practice of the United States Court for China marks final implementation of colonialism without colonies and of legal imperialism.[7]

Furthermore, his standpoint is based on the postcolonial research framework, where the traditional straight western ethnographical research framework becomes useless, in turn a unique way of cultural imperialism is adopted, exercising an invisible influence on other countries by spreading civilization. Obviously, compared with the traditional research, postcolonial studies get more approachable. However, it should be noted that scholars on postcolonial study pay more attention to the imperialism of law (as a symbol) to culture or mentality of non-western countries. Teemu Roskula is no exception, advocating the rule of law shines brighter than ever, as likely the single most appealing index of modernity.[8]

To the question whether there are laws or rules of law in China, Teemu Roskula sees why scholars always criticize Chinese law and society by investigating the traditional epistemology of Hegal, Marx and Weber, that is, they have known »China is an anti-model and stands for everything that we would not wish to be – or admit to being.«[9] The developing western civilization is in urgent need of an »Others« to identify it, and then it is not difficult to understand these popular inquiries about China

4 See Su Yigong, Research of Chinese Law in Contemporary America, in: Peking University Law Journal 8,5 (1996) 69–73.

5 Neil J. Diamant, Book review: Sex, Law, and Society in Late Imperial China, in: American Historical Review 106,2 (2001) 546–547.

6 Chenjun You, How a ›New Legal History‹ Might Be Possible: Recent Trends in Chinese Legal History Studies in the United States and Their Implications, in: Modern China 39,2 (2013) 165–202.

7 See Ruskola (2013) 5–23.

8 Teemu Ruskola, Law Without Law, or is ›Chinese Law‹ an Oxymoron?, in: William &Mary Bill of Rights Journal 11 (2003) 657.

9 See Ruskola (2013) 42–45.

in the west, involving the question why capitalism cannot be developed in China and the well-known »The Needham question« – why there is not modern science and technology in China. The answer of Weber to the former question is thought provoking, as he explains his research aims to express the significance of western civilization by stressing non-western civilization. Therefore, it is obvious that the image of China set up on such epistemology depends on western judgment. Under the western civilization, non-western law is objectivized as fall behind »Others«. So the superiority of American law comes from regarding non-western countries' law as outdated, feudal, or even nothing, based on their prejudices about legal Orientalism. The scholars believe there is no legal system in China, in that their definition of law is based on western law.

It can be seen from the analysis of these facts that the existence of law cannot be simply argued just through surveys. Then, Teemu Roskula makes a comparison of American law and Chinese lawlessness, while such juxtaposition is ultimately too simplistic and too static. As the author notes, the point of analyzing legal Orientalism as a discourse is emphatically neither to prove nor disprove either the historical or theoretical existence of Chinese law, the definition of law obviously so narrow as to exclude China from the legal universe smacks of the dogmatism of the untraveled. [10] When this question is put forward, the answer actually already exists in the questioner's hypothesis, that is, it depends on the observer's definition of law. He convinces »so long as we insist that real law is a Western notion, it will always be the West that holds the keys to the truth about law.« [11]

In the meantime, Teemu Roskula intends to explore the field neglected by traditional academia and even Chinese scholars, with a comparison method and interdisciplinary orientation of combining American legal culture with Sino-American relations history, from universality and particularity under modern law, and makes a ground-breaking study on Chinese law since modern times, thus succeeding in extending the research on Chinese law to the field outside that of Orthodox Confucian representations of law and the mundane adjudications undertaken by county magistrates in the late imperial period. Viewing thoroughly questions aroused from argument, the term legal Orientalism is inclusive, with various complex concepts, aiming to treat Chinese legal practice during the modernization process more reasonably and objectively. When investigating traditional Chinese companies, Teemu Roskula found traditional western scholars and even some Chinese scholars tended to believe most Chinese enterprises are family businesses, lack of basic corporate legal forms, and further pointed out this mode led to the fact that China has no genuine native predecessors to the modern business corporation, also referring to the fundamental question whether China is lawless. The author refutes this idea, redefining the difference of company systems between China and America, with stress on collectiveness and individualism, and then arguing in late imperial China many extended families constituted clan corporations in which Confucian family law functioned as a kind of corporation law. [12] Thus, Teemu Roskula indicated Chinese law had even construct similar structure to that of western law traditionally, and Chinese political and cultural values pretended to a universal status in East Asian, while he named it East Asian law of nations against European tradition of *ius gentium*. As an important measuring standard, legal Orientalism is not a special kind of pattern but a method or norm of investigation. This opinion has a market for its pragmatic function. As an echo, Peter L. Berger, a professor of sociology and religion in Boston University, classifies traditional Chinese concepts into vulgar Confucianism or post-Confucian ethics, and put forward two kinds of modernization: western modernization and oriental modernization. [13]

As legal Orientalism is not a fixed pattern, it can be formed and applied flexibly without specific subject, and present diversity in various fields. In

10 Mirjan R. Damaska, The Faces of Justice and State Authority: A Comparative Approach to the Legal Process, New Haven: Yale University Press 1986, 199.

11 Teemu Ruskola, Legal Orientalism, in: Michigan Law Review 101 (2002) 234.

12 Ruskola (2013) 24.

13 See Peter Ludwig Berger, In Search of an East Asian Development Model, New Brunswick: Transaction Books 1988, 3–11.

terms of legal Orientalism in the United States, the Chinese exclusion movement in the 19th century is undoubtedly representative. The movement was special for the involvement of the masses as well as the authority, finally causing the congress issuing a set of Chinese Exclusion Laws and quite a few judicial decisions, which implied legal Orientalism as a kind of discourse. The decision of Committees of Congress preventing Chinese people from civic rights and suffrage gave full play to such discourse. Chinese Exclusion Laws issued in 1882 marked China as a symbol of Oriental despotism defeated by American civilization norm thoroughly. In 1889, the Supreme Court even decided on specific cases that it had the right to deport long-term Chinese residents even those had lawful admission. [14] Obviously, Legal Orientalism is an essential reason leading to Chinese exclusion policy and a standard to measure civilization in the East and West.

Teemu Roskula takes as the study subject the United States Court for China – a little-known story of the beginnings of Sino-American legal relations as the study object, exploring complicated relations among Europe, America and China under the political context of modern international law of the 19th century. In this sense, he thinks, legal and disciplinary structures of colonialism shows the entire historical process where modern international law initiated in Europe as to exclude the East, and gradually took it in through conquering. In addition to traditional pattern, there is an extreme special practical pattern of imperialism, namely informal imperialism, a new pattern over formal territorial colonialism. This concept is not created by Teemu Roskula but by Ronald Robinson and John Gallagher in the 1970s before, »informal imperialism is a process whereby agents of an expanding society gain inordinate influence or control over the vitals of weaker societies by ›dollar‹ and ›gun-boat‹ diplomacy, ideological suasion, conquest and rule, or by planting colonies of its own people abroad.« The power society then intended to use this strategy to »shape or reshape them (weak nations) in its own interest and more or less in its own image«. [15] The informal imperialism is not only reflected in economics, politics and culture in a narrow sense, but also extended to legal imperialism in a deeper level, perfectly embodied by the expansion of western rule of law. This court, judges and lawyers of western rule of law obviously contributed a lot in the expansion. Institutions represented by the United States Court for China and the U.S. legal professionals in China, superficial and objective, reflects the expectations of American legal imperialism. For example, the congress authorized the United States Court for China to apply Federal acts of the U.S. as well as special acts of Congress in the U.S. and to enact rules and regulations, for the sake of making up weakness of the applicable law. It's also important to note that as an extraterritorial court, the United States Court for China, does not apply relevant institutional rules from constitution of the U.S., even though under the jurisdiction of federal judicial system, which fully reflected another inappropriateness of the American legal Orientalism discourse.

If read carefully, there are still a few places need discussing in *Legal Orientalism*. Teemu Roskula believed though American imperialism in East Asia started with access to the Philippines in 1898, American legal imperialism in the Orient started half a century before Spanish-American War. The landmark event was the 1844 Treaty of Wanghia for getting the right of extraterritorial jurisdiction, and then before Spanish-American War, he believed the United States became a leader in the institutionalization of legal imperialism in the Orient. [16] The author cannot agree this view as to how to define the legal imperialism? Indeed, this term cannot be defined by any standard. Even so, however, it must refer to a subjective driving force in the process of legal imperialism. In fact, at the time of signing Treaty of Wanghia, whether the activeness of Caleb Cushing as one party can fully represent the overall situation in the U.S. is still need investigating. The United States of the time separating from British colonial domination less than a century, focused more on territory expansion and national system restructuring, with less interest in oriental countries. Caleb Cushing ap-

14 See Ruskola (2013) 141–146.

15 Ronald Robinson, Non-European Foundations of European Imperialism: Sketch for a Theory of Collaboration, in: Roger Owen, Bob Sutcliffe (eds.), Studies in the Theory of Imperialism, London: Longman 1972, 119.

16 See Ruskola (2013) 20–26.

pointed to China even has caused domestic discontent. Though intended to seize judicial privilege of other countries following Britain, it still acted passively over positively. So, only four years after obtaining extraterritoriality, the congress practiced the judicial privilege by passing an act to set consular courts. Thus, it is not exactly true Teemu Roskula's expression that signing of the treaty indicates the United States expanding its legal imperialism. The expression is inappropriate even during the next six decades. The United States didn't pay close attention to the extraterritorial judicial situation until sending Consular Inspector to make an investigation on consul and judicial status, then, the United States Court for China was set up, as the practical expression of legal imperialism. It is also inappropriate to regard as legal imperialism the occupation of the Philippines after the 1898 Spanish-American, as it is not strictly informal imperialism, but an accessory after conquering.

Teemu Roskula holds Chinese legal research, from the very beginning, studied orthodox Confucian representations, then in recent decades the mundane adjudications undertaken by county magistrates in the late imperial period.[17] Obviously, it is just the American research of Chinese law. There is no denying that American scholars' research orientation in some ways bring about reconsideration and inspiration for Chinese scholars, for example, Philip C. C. Huang, etc. advocating research from archival case records caused more attention of Chinese academia paid to full exploration and use of local archives. However, it doesn't mean that the research orientation of American scholars can represent that of Chinese legal history. Meanwhile, referring to the study of Sino-American relations history, Teemu Roskula, as an American scholar, holds that Chinese study of America focuses more on America during the Cold War and American imperialism on the East Asia (including Korea and Southeast Asia) after World War II. The latter study is popular in recent years. Therefore, he believes the modern diplomatic history of China and America is worth studying for lack of research. From Chinese perspective, it is undeniable that China does pay well attention the first two topic, however, it doesn't mean the study of the modern history of China and America is inadequate. There are famous works about Sino-American exchange history already at an earlier time. American scholars like Warren I. Cohen, and Chinese scholars like Tao Wenzhao are all leading authorities on the history of Sino-U.S. relation. What is more, numerous young and middle-aged scholars also devote themselves to the study.

In addition, when it comes to Lobingier, Teemu Roskula makes a wrong statement that he is the court's second and longest- serving judge.[18] Historical materials suggest that the United States Court for China set up in 1906 and ended in 1943 had five official judges during the 37 years, respectively Lebbeus R. Wilfley (1906–1908), Rufus Thayer (1909–1913), Charles S. Lobingier (1914–1924), Milton D. Purdy (1924–1934), and Milton J. Helmick (1934–1943).[19] Only two judges' terms expire, namely Charles S. Lobingier and Milton D. Purdy. Under the investigation and recommendation of the president Woodrow Wilson and the Secretary of State William Jennings Bryan, the Senate on February 8, 1914 officially passed the commission to appoint Charles Sumner Lobingier as the third judge in the United States Court for China. On February 14, after his expiration of the 10-year term as the Judge of the Court of First Instance of the Philippine Islands, Charles Sumner Lobingier hurried to Shanghai, taking office in the new Judge of the United States Court for China.[20] Also, when it comes to Peter Parker's missionary works and diplomatic activities, Teemu Roskula writes, »many of the substantive provisions of the Treaty of Wanghia were informed directly by articles published in the *Chinese Repository*, a missionary periodical edited by Parker and his joint Chinese Secretary, Reverend Elijah Coleman Bridgeman.«[21] Obviously, this narration is an evident misunderstanding of historical facts, while indeed, Peter Parker had never served as the editor-in-chief of *The Chinese Repository*, or at best, the periodical just issued some of his works. Moreover,

17 Ruskola (2013) 17.
18 Ruskola (2013) 163.
19 See: Brevia Addenda: Records of the United States Court for China, in: The American Journal of Legal History 1 (1957) 235.
20 See: Judge Charles S. Lobingier, in: The Green Bag 26, 8 (1914) 343.
21 Ruskola (2013) 138.

it can be seen from the notes that Teemu Roskula's inference is quoted from Tyler Dennett's *Americans in Eastern Asia*, which writes, »*The Chinese Repository* of which Bridgman and Williams were not merely the editors but to which they often the chief contributors …«,[22] specifying the editors are Bridgman and S. Wells Williams. In addition, this text originates from page 557, while Teemu Roskula listed page 577 in his notes. Obviously, Teemu Roskula's research on this question is inaccurate. In fact, in 1832, with the help of Robert Morrison, Elijah Coleman Bridgeman in Canton established *The Chinese Repository*. As an editor-in-chief and a significant writer, he delivered more than 350 articles in the periodical,[23] exerting a far-reaching influence.

In general, as Teemu Roskula said, Orient itself is a traveling concept. The object it refers to is not constant. So in some sense, legal Orientalism is a kind of expression, while the implied legal imperialism behind is the fundamental purpose. As such, though this book provides another research orientation for western scholars, trying to study the picture of Chinese law with a more comprehensive and objective perspective, the final conclusion of this book doesn't seem to get over the epistemology of traditional western scholars.

■

22 Tyler Dennett, Americans in Eastern Asia, New York: The Macmillan Company 1922, 557.

23 See: List of the Articles in the Volumes of the Chinese Repository, in: The Chinese Repository 20 (1851), 9–54.