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### Changing paradigms in understanding Chinese imperial law

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## **Changing Paradigms in Understanding Chinese Imperial Law**

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### **Abstract**

This essay evaluates and critiques the studies of Chinese imperial law in line with Edward Said's proposition of 'Orientalism'. It identifies three major stages: the classical legal orientalism, emphasizing the heterogeneity of Chinese and Western laws based on Western values; the 'neo-legal orientalism', stressing the homogeneity of the two by taking also Western culture as the assessment standard; and the oriental legalism, seeking Chinese subjectivity with Chinese perspectives and resources. The changes of the paradigms in assessing the legal culture in pre-republican China are related to the general intellectual transformations in the contemporary world. This essay proposes the approach of 'Confluent Legalism' that features drawing on diverse cultural essences of various nations in the world.

### **Key Words:**

Legal Orientalism, Neo-Legal Orientalism, Oriental Legalism, Confluent Legalism, Chinese Imperial Law

### **Introduction: Orientalism and Chinese Imperial Law**

Chinese imperial law is often regarded as one of major legal systems in world history for its long duration, vast influence, and unique legal spirits and characteristics. However, people's understanding and evaluation of Chinese imperial law have been widely divergent. Even today, debates continue. A crucial way to judge Chinese law is the heated topic of 'Orientalism' often discussed within academic circles.

'Orientalism' refers to the ideology and cultural practices created and constructed by 'Westerners' to interpret 'Oriental' social values. According to Edward Said (1935-2003), for centuries Westerners deliberately created and fictionalized an 'Oriental culture' with ignorance and contempt. In their depictions, 'Oriental' society is stagnant, with cultural backwardness and institutional arbitrariness. This discourse solidifies Oriental heterogeneity and establishes its status as the 'other' of the West. Moreover, Orientalism has become a way for Westerners to control the East politically and culturally, and even provided intellectual bases to justify colonial practices by European and American countries (Said 1978).

While Said's criticism of Orientalism discusses mostly Islamic culture in the Near East and Middle East and focuses primarily on literary theory and critique, the influence of Orientalism extends to other regions of the world and various disciplines and ideological and theoretical circles. Within the field of law, the study of Chinese imperial legal culture since the nineteenth century has been deeply influenced by Orientalism as well, which has led to the construction of 'Legal Orientalism'. Teemu Ruskola's recent work *Legal Orientalism: China, America and Modern Law*, elaborates on this discourse (Ruskola 2013). Ruskola defines 'Legal Orientalism' as 'a set of interlocking narratives about what is and is not law, and who are and are not its proper subjects'. He believes that within this system of discourse, China either lacks law or has traditional or primitive (as opposed to 'Western') law, thus lacking subjectivity and

agency (Ruskola 2013: 5, 6). The criticism of ‘West-centered’ Chinese legal history, of course, did not originate from Teemu Ruskola. Since the mid-1980s, there have been a growing number of scholars attacking the conventional biases against Chinese culture. William Alford, for example, has critically analyzed the misperceptions surrounding Chinese law by Western philosophers and jurists. Although he does not label the hegemonic discussions of Western intellectuals as ‘legal orientalism’, his criticism struck home (Alford 1984, 1986a, 1986b). After decades of efforts, the drawbacks and biases of Legal Orientalism have been challenged and criticized extensively by scholars worldwide. However, it should be noted that there are still issues regarding Legal Orientalism that have yet to be brought to concern and discussed deeply. Furthermore, after the criticism of Legal Orientalism arose the extremely influential Neo-Legal Orientalism. Then the late 1990s—especially the beginning of the 21<sup>st</sup>-century—witnessed the development of the paradigm of Oriental Legalism. This article intends to sort out and critique these ‘Orientalism’-related scholarly paradigms. It will demonstrate that although several major intellectual perspectives flourished at different times respectively, they remain simultaneously in contemporary intellectual world, which deserve more careful assessment and evaluations.

### **‘Legal Orientalism’: Heterogeneity of China and the West**

The mainstream modern Legal Orientalism originated in the 18<sup>th</sup>-century. It was closely rooted in the Western industrialization and imperialism/colonialism, and was carried on by the 20<sup>th</sup>-century thinkers (Alford 1997). For instance, Charles Montesquieu (1689-1755), contends that in a despotic state Chinese law's principle is ‘fear’ (Montesquieu 1990: 174). Georg Wilhelm Friedrich Hegel (1770-1831) perceives a Chinese society where change and freedom

did not exist and law supported despotism (Hegel 1956: 104, 111, 116). Max Weber (1864-1920) also asserts that China lacked an independent and rational legal system, which explains why Western capitalism failed to emerge in China (Weber 1951). John K. Fairbank (1907-1991) attributes the nondevelopment of capitalism and an independent business class in old China to the ‘nondevelopment of Chinese law’ (Fairbank 1976: 117-23). Within such a theoretical framework, law in imperial China is regarded as unjust and arbitrary because no ‘due process’ has ever evolved, and it emphasizes duties and collectivity rather than rights and the individual. Furthermore, Chinese law is subordinate to political authorities since there has been no separation of powers and no independent legal profession—from emperor down to local magistrates, one single person possesses all the governmental powers within his jurisdiction. Chinese legal culture is less developed for it has not been differentiated into different legal fields such as constitutional, criminal, civil, and commercial laws, and Chinese law has never been separated from morality (Cohen 1979; Pfeffer 1970).

Since the 1980s, however, more and more China scholars seek to challenge these misconceptions. They have critically appraised the intellectual bias which equates modern with Western and Western with important, and called for a ‘China-centered history of China’ which would begin with Chinese problems set in a Chinese context (Cohen 1984: 149, 154). In the study of Chinese imperial law, William Alford examines certain aspects of formal criminal justice process, and argues against some prevailing images in American scholarship such as the lack of separation of powers and due process. Thus, he contends, ‘we ought not to assume that the process was then seen only as a tool of state control little concerned with the attainment of individual justice’ (Alford 1984: 1243). Karen Turner maintains that the ‘rule of law ideal’ is not an exclusive product of Western legal culture—It is also advocated by Chinese, and that

'laws of nature', a set of higher principles embodied in the *Dao*, served as universal and normative standards in legitimizing laws and punishments in China's past (Turner 1993: 1-14; 1993: 285-324). Although these scholars do not label the prejudices on Chinese law as 'Legal Orientalism', they precisely attack such paradigm with thought-provoking insights, and have made pioneer contributions for new inquiries.

In the twenty-first century, scholars have targeted explicitly 'Legal Orientalism'. A representative work of critiquing Legal Orientalism in recent years is Teemu Ruskola's *Legal Orientalism*. Through the lens of Chinese experience, Ruskola analyzes the Western (especially American) construction of Legal Orientalism. He particularly summarizes its basic assumptions:

Whatever the differences among the various Orientalisms sketched thus far, they support a generally idealized self-image of the American legal subject and an overwhelmingly negative view of the Chinese nonlegal nonsubject: Americans are ruled by law, the Chinese by moral proverbs; Americans are individuals, the Chinese lemmings; Americans are democratic, the Chinese despotic; America is dynamic, China changeless; and so on (Ruskola 2013: 54).

In the book, Ruskola convincingly demonstrates that Legal Orientalism not only served as an epistemological lens examine Chinese traditional law, but also contributed to the construction of American legal prejudice and affected China's own legal reforms in modern times.

Drawing on Teemu Ruskola, among others, Li Chen provides a historical treatment of the creation of Legal Orientalism in late imperial China. Focusing on the Qing-British relations by the mid-19<sup>th</sup> century, Chen traces the changes of British views of Chinese law and argues that Legal Orientalism in the Chinese context was an on-going process of contestation and

negotiation. Actively participated by the Chinese forces as well as Western imperialists, Legal orientalism was produced in ‘an unfolding transcultural relationship’ (2016: 46). Elsewhere (2017), in examining the Qing legal reform in the early 20<sup>th</sup>-century, Chen analyzes how Chinese law was ‘Orientalized’ and ‘self-Orientalized,’ which contributed to the ‘traditionalisation’ of Chinese law.

A specific sub-field that addresses Legal Orientalism is the study of “international (public) law” in pre-republican China. Scholars often claim that, as ‘one of the first attempts at codifying an international set of laws’ (Patton 2019: 91), the ‘Peace of Westphalia’ of 1648 marked the birth of modern international law.<sup>1</sup> By establishing sovereignty of nation states and diplomatic procedures in the international community, the Westphalian treaties articulated civilized values and institutions that could not be found in non-Western countries—such as China (Liu 2014 and Fan 2020). For example, when Phil Chan asserts that the Qing dynasty China (1636-1912) resisted and rejected ‘international law’, he refers to the ‘Westphalian conception of world order based on the principles of state sovereignty and sovereign equality of states’ (Chan 2014: 864, 866, 868, 892). Nevertheless, as part of efforts in ‘overcoming Eurocentrism’ (Martineau 2014, Tzouvala 2021, Fassbender, et al. 2012, Chesterman, et al. 2019), many legal historians have discovered ‘international law’ in ancient China on China’s own terms. In fact, the search for an international legal order before the arrival of European imperialist powers can be traced back to the 1880s, when the American missionary William Alexander Parsons Martin (1827-1916) argued for the existence of international law in China’s Spring and Autumn Period of the Zhou Dynasty (770-256 BCE) (Martin 1883, Fan 2020, Carrai, 2020). Since then, a number of China scholars have published works on international law in pre-republican China. Chinese international law, according to them, not only developed when the

country was divided in the periods such as the late Zhou, the Three Kingdoms (220-280), and Liao-Song-Jin-Xia era (907-1279), but also worked effectively when the country was united. Through either equal-state or tributary relations, Chinese international law involved ‘rules for conducting diplomacy and making treaties, and precepts concerning the use of force, grounds for war, rights of neutrals, and absorption or division of states’ (deLisle 2000: 268; Fan 2020: 10, Liu 2014, Sun 1999). In other words, the values, principles, institutions, and norms of ‘international law’ and their historical development cannot be defined and judged solely by European models.<sup>2</sup>

Apparently, up to the present, the intellectual circles have deeply criticized the prejudices and presumptions of Legal Orientalism, and the new perspectives have gained solid ground and profound influence. Nevertheless, certain Legal Orientalist viewpoints on Chinese imperial law are still not acknowledged and brought up for critical discussion. The so-called ‘secularism’ is but one example.

Both Western and Chinese scholars have long held that Chinese imperial law was ‘secular’ instrument serving the purpose of naked state power. Roberto Unger, for example, maintains that Chinese law, as a set of ‘imperatives of instrumentalism’, served as ‘a tool of the power interests of the groups that control the state’. One of the major reasons why China failed to develop a Western-type legal order, he asserts, is that the Chinese have not conceived ‘a `higher’ universal or divine law as a standard by which to justify and to criticize the positive law of the state’ (Unger 1976: 64-66, 76-83). Derk Bodde and Clarence Morris also concludes that ‘in China no one at any time has ever hinted that any kind of written law—even the best written law—could have had a divine origin’ (Bodde and Morris 1967: 10). Zhang Jinfan claims that, contrary to laws in Islamic and Indian societies where religions play a dominant role in legal



culture, Chinese law has little to do with religion; instead, it is overwhelmingly influenced by Confucian ‘ethical’ codes (Zhang 1982: 13, 35, 78). Zhu Yong characterizes the legal practices of ‘making law by imitating heaven’, ‘meting out punishments according to seasons’, and ‘granting amnesties when anomalies occur’ as manifestations of ‘naturalism’ in Chinese law. And one of the reasons why ‘naturalism’ became a striking feature of Chinese legal culture is that religion and theology did not fully develop and religion was never closely associated with the temporal polity (Zhu 1991: 143-156).

To negate the religious nature of Chinese imperial law, Chinese scholars have developed a theory of ‘ethical law’ (*lunli fa*). It argues that Chinese imperial law was based on ethical codes rather than on religious ideas, which demonstrates the ‘rationalization’ of Chinese culture. This concept can be traced back to the beginning of the 20<sup>th</sup>-century, when the reformer Liang Qichao (1873-1929) pointed out that Chinese ‘punishments aimed to promote the practice of ethical duties’ (Liang 1991: 61). This proposition was recently elaborated by scholars such as Yu Ronggen (1992) and He Qinhua (1992). In the fields, it is treated as an individual argumentation (Kong 2002), the dynastic legal principle (Ma 2004), an important value in Chinese intellectual systems (Luan 2005), and a principal marker that separated Chinese and other legal systems (Zhou and Wang 2007). In short, scholars in both West and China, regardless of their intellectual backgrounds, share a remarkable degree of agreement in the discourses on the ‘secular’ nature and role of Chinese law. Their assumptions have long influenced our understanding of Chinese history in general and its legal culture in particular.

I would contend that the negation of religiosity and assumption of secularism of Chinese imperial law derive from a definition of religion primarily based on the Judeo-Christian tradition. This tradition, with a personalistic idea of God, emphasizes the basic essential difference

between creation and Creator and the separation of the sacred from the profane. Its doctrinal elements and ecclesiastical or synagogical model, including the ban on magic and strict membership within only one religious community, also contrast with other religious beliefs and practices (Gernet 1982). Based on this tradition, some scholars view religion essentially as the belief in supernatural beings, especially the single transcendent God. Edward B. Tylor (1958), for example, defines religion as the belief in spiritual beings which range from the souls of the departed dead to the gods of the universe. And this definition of religion is ‘standardized’ in the *Webster's Third New International Dictionary*:

[Religion is] the personal commitment to and serving of God or a god with worshipful devotion, conduct in accord with divine commands esp. as found in accepted sacred writings or declared by authoritative teachers (Gove 1986: 1918).

Apparently, this stance excludes many practices as being ‘religious,’ such as those in which rituals or immanence carry more weight than ethical values or transcendence. Therefore, when people apply such a perspective to Chinese legal culture, and cannot identify the belief in a transcendent God who made a body of divine law and a Higher Law doctrine, they then tend to come to the conclusion that Chinese legal culture is ‘secular’.

To be sure, the Chinese did not envision a transcendent lawgiver who handed down divine laws to a Chinese ‘Son of Heaven’ like God did to Moses in the Judeo-Christian tradition. Nevertheless, does this simply deny the religiosity of Chinese legal culture? In other words, did the Chinese have some legal beliefs and practices that, albeit differing from the Judeo-Christianity, can be still be seen as being religious? After all, how shall we assess the religiosity

of a given culture—only on the Judeo-Christian basis (e.g., believing in and worshipping a single transcendent God), or with some other standards?

Actually, a great number of scholars have suggested alternative understandings of religion, which will help our re-evaluation of the relationship between religion and Chinese legal culture. For instance, the anthropologists Emile Durkheim (1905) and Mary Douglas (1960), argue that the core element of religion is not the worship of divine beings, but the expression of the collective values and function of social differentiation and symbolic rituals. In China field, Steven Sangren demonstrates a holistic Chinese culture by way of looking at the concept of and rituals regarding *ling* ('spirit' or 'magical power'). In doing so, he understands the power of supernatural entities 'as a function of their mediating order and disorder with reference to the entire set of cosmological categories' (1987: 230). In her study of the imperial ritual—grand sacrifice, Angela Zito (1997) emphasizes the relationship between the emperor and cosmic forces such as Heaven and *yin-yang* to be focal point in understanding the nature of imperial sovereignty. Instead of limiting their studies to supernatural beings, these scholars primarily base their research on the existence of a supernatural world and the relationship between the spirit world and human beings.

While, due to limit of space, this brief essay is not a place for an elaborate exposition of 'religion', I would argue concisely that the distinctive or unique essence in religious life is the belief in superhuman forces and practices based upon this belief. The superhuman forces, which might contain either superhuman beings or non-beings, are believed to be capable of producing strong effects upon human affairs. They are invoked, by means of certain ritual patterns, to achieve or prevent transformations of state in humans and their environment. This approach may enable us to evaluate religions across the world instead of limiting to Judeo-Christian tradition.

And with this approach, we may find that Chinese imperial legal cosmology, the official worldview and practices dealing with the fundamental structures and relationships of the cosmos that were promoted and endorsed by the governmental legal apparatus, had articulated rich religious meanings, including the triad of Heaven, Earth, and Humans, the world of spirits, the ruler's role as son of Heaven in mediating between Heaven and human beings, and the dynamic interaction between the world of spirits and the human realm. Chinese imperial law was envisioned as an instrument to manifest the Mandate of Heaven, and religion and law were thus unified as indispensable components of the official belief system and practices (Jiang 2011).

In sum, Legal Orientalism has been questioned, challenged, and attacked for critiquing Chinese imperial law on the basis of Western value systems. But certain conventional presumptions within the paradigm are still held firmly across scholarly fields.

### **‘Neo-Legal Orientalism’: Homogeneity of China and the West**

Since the 1980s, while traditional Legal Orientalism has been under increasing criticism, another powerful paradigm has emerged. That is, scholars have endeavored to argue for and prove the conformance and commonalities of Chinese and Western legal cultures. Unlike the traditional paradigm that depicts the ‘heterogeneity between China and the West’, this new framework emphasizes the ‘homogeneity’ of the two: If the West has anything good, China has it too; if the West is advanced, China is not backward. On the surface, this seems to correct prejudice and discrimination found in traditional discourses. In essence, however, this paradigm is not too different from the traditional Legal Orientalism. It still judges the legal practice of China (or the East) based on the cultural values and traditions of the West. Consequently, it

continues the earlier intellectual biases and misinterprets Chinese legal culture. I thus call it ‘Neo-Legal Orientalism’.

A representative case in Neo-Legal Orientalism in the study of Chinese imperial law rests with the exploration and exposition of ‘various laws’ (i.e., civil law, administrative law, procedural law, etc.). Differing from the so-called backwardness of the ‘combination of various laws and nonseparation of civil and criminal codes’ criticized by traditional Legal Orientalism, Neo-Legal Orientalism advocates the advanced and scientific nature of ‘concurrent use of various laws and separation of civil and criminal codes’. Scholars have explored the development and progression of these ‘laws’ (especially ‘civil law’) prior to the legal reform of the late Qing Dynasty (1636-1912) (Liu, Gao, and Li 2007). Although academic circles have voiced questions and challenges of this theory (Wang 2010: 20; Liang and Qi 1988; Yu 2001; Zheng 2005), it has still been very influential as, in a large part, it appears as if it were a criticism of the traditional Legal Orientalism.<sup>3</sup>

Nevertheless, I contend that the advocates of the ‘civil law position’ adopt precisely the ‘West-centered’ stance that they criticized in judging and evaluating Chinese legal culture on the basis of Western legal categories (Jiang 1988; 2005). Specifically, the ‘civil law position’ bears the following three major problems.

First, in terms of legal theory, ‘civil law position’ confounds criminal law with non-criminal laws. Since the said position is based on modern legal theory to analyze Chinese imperial law,<sup>4</sup> let us then look at its confusion in legal theory. Generally speaking, in modern legal systems, there are two main criteria that divide the legal categories, i.e., the social relations regulated by the law and the means used in regulating those social relations. Civil law acts on society with its specific relations and sanction measures. What it regulates are property and

personal relations between individuals or legal persons among ‘equal parties’, and the sanction measures it adopts include stopping infringement, compensating for economic losses, restitution and reinstatement, and extending apologies. Criminal law, in contrast, does not only regulate one particular kind of social relations. Instead, it protects all types of social affairs, be they political, economic, military, cultural, personal, social, and so forth. As long as the perpetrators damage these social relations to a ‘serious’ level, they will be subject to criminal law. The diversity of regulated social relations is a major characteristic of criminal law.

A more important defining element for criminal law is its sanction measures: criminal punishment. Criminal punishment is the ‘soul’ of criminal law (Qiu 2003: 3). It is the essential divide between criminal law and non-criminal laws, and between crime and non-criminal acts. To put it another way: only criminal law can prescribe ‘punishment;’ and only punishment can define ‘criminal law’. The logical structure of the criminal law norm is as follows: rules of conduct + punishments + applicable conditions = criminal law. Any other kind of law does not bear such a logical structure. Apparently, ‘civil law position’ obliterates the characteristics of criminal law. For one thing, it equates the various ‘social relations’ regulated by criminal law with its various ‘kinds of laws’, thus viewing the sanction of ‘crimes’ in social, familial, and economic fields as ‘civil law’ per se. For another, ‘civil law position’ places ‘punishment’ in the so-called ‘civil law’, and creates a model of ‘rules of conduct + punishments + applicable conditions = civil law’. It even goes so far as suggesting that a legal provision can be both a criminal law and a civil law norm; the violation of civil law is subject to sanctions of ‘criminal punishments’ (Ye 1993: 5-6, 31; Kong 1996: 225). In order to reconcile this theoretical contradiction, this theory will then use the so-called ‘uniqueness’ of Chinese imperial law: ‘The ‘civil law’ norms in ancient China were unique, their contents were also unique, and the civil

social order constructed by this was still unique' (Xu 2000). Using the pretext of 'unique Chinese characteristics' reconcile its logical predicament and constructing a model of 'rules of conduct + punishments = civil law', this position cannot but produce confusion in modern legal theory.

The second problem in 'civil law position' is concerned with its methodology. Relating to the afore-mentioned theoretical confusion, this stance ignores the characteristics of criminal law in regulating multi-categories of social relations, and thus confusing economic transactions, property rights, personal status, marriage and familial relations with 'civil law'. According to this assumption, it appears as if criminal law only deals with violent acts of homicide, arson, rape and forcible robbery, but nothing else. This seems to have erred in 'switching legal concepts'. Therefore, the so-called 'minor issues concerning household, marriage, land, and debt' in imperial China should not be assumed to be 'civil legal relations'. In actuality, the confusion of the legal concepts causes certain disputes amongst 'civil law' scholars. For example, Philip Huang (1996) argues for 'civil justice' in the Qing dynasty in the cases concerning 'inheritance, contract, debt, land, marriage, and succession'. Similarly, when Xiangyu Hu uses similar cases to expound 'civil law' in the Qing, he views some of the 'civil cases' in Huang's work as 'minor criminal cases' (Hu 2014: 75-77). In his recent work, Hao Tiechuan compares Chinese imperial law and Roman private law and argues that the so-called 'civil law' that promoted 'private rights' did not exist in ancient [i.e., imperial] China. Meanwhile, however, Hao asserts that 'the law that dealt with "civil disputes" did develop' in China's imperial past, including the 'customary law' represented in '*li*' (propriety; ritual) and lineage authorities endowed by imperial law (Hao 2020). Apparently, such scholarly efforts in finding 'civil law' in imperial

China indicate the dilemma in reconciling the conflicting the ‘civil’ and ‘criminal’ features in present-day legal culture.

Another methodological problem with the ‘civil law position’ has to do with certain elements of subjective conjecture. It is, again, assumed that if people speak only of ‘criminal law’ in Chinese history, they then are liable to ‘cast a cruel, dark, and negative shadow over Chinese legal culture’ (Kong 1996: 1), and thus ‘turn a history of legal civilization into a history of punishments, repression, and despotism’ (Yang 2002: 194). However, ‘criminal law’ does not necessarily only serve as an instrument of ‘repression’; it does not only emphasize ‘duty’ without protecting ‘rights’ (de Bary and Tu 1999). Instead, Chinese imperial law played a multi-faceted role in social education, social order, economic affairs, social control (which includes repression) and institutional establishment, and so on (Jiang 1988; Yang 2016). In addition to making people perform their duties, the law simultaneously protected people's rights (including life, health, property, etc.). Judging from the nature and function of law, we can see that the entire legal system emphasized both people’s obligations and rights. One cannot imprudently set up an artificial divide that associates civil law only with ‘rights protection’ and criminal law only with ‘obligation enforcement’.

The third and most serious issue with ‘civil law position’ seems to be its lack of credible historicism. For one thing, it overlooks the ‘development of legal systems’, assuming that the social relations regulated by civil law nowadays (such as, again, household, marriage, land, and debt) must not have been regulated by the criminal law in the past; and, what are employed as civil law remedies (such as repayment of debt) at the present must not be considered as ‘criminal punishments’ in imperial times. But the historical fact is that a great number of social relations that are currently regulated by non-criminal laws were indeed regulated by criminal law in



various historical periods.<sup>5</sup> Furthermore, ‘civil law position’ overlooks the development of legal values. It disregards the fact that the distinction between various legal categories was acquired by the late Qing government from the West and Japan, but mechanically puts modern legal culture into the minds of imperial law makers so as to showcase the advancement of Chinese civilization. Finally, ‘civil law position’ fails to view the problems from the standpoint of historical context. The argumentation that law in imperial China was criminal in nature seems more valid because it was not only in line with modern legal theories, but, more importantly, it reflects the Chinese understanding of law in historical times more accurately. The Chinese held a holistic view on cosmic order, taking it as an entirety. They tended not to maintain a compartmentalized approach towards law. They not only practiced criminal law, but also labeled it ‘*xingfa*’ (criminal law or punishments), and regarded their violations as ‘*zui*’ (crimes). ‘Civil law position’ confuses both modern legal theories and historical contexts, thus misinterpreting the cultural spirit of Chinese imperial law. The debates over ‘criminal law’ and ‘civil law’, actually, are not merely a semantic or conceptual matter; rather, it entails a fundamental worldview about how to treat and evaluate Chinese legal culture and even the entire Chinese history.

Taking the influential ‘civil law position’ as a sample case, we see that in the efforts to readdress the prejudices of the traditional Legal Orientalism, many scholars have turned to argue for the homogeneity of Chinese and Western legal cultures. But often what they are exercising is still to use Western values and discourse to assess (or eulogize) the nature and ‘quality’ of Chinese law. Some of them might have done it unconsciously. Even in Teemu Ruskola’s *Legal Orientalism* which precisely labels and attacks the conventional Legal Orientalism, the author proceeds to judge and define Chinese lineage rules in terms of the Western ‘company law’.

While one can engage in a serious scholarly comparative study of Chinese lineage and Western company, it seems farfetched to place the cap of ‘company’ onto ‘lineage’ and create a ‘lineage-company’ model for Chinese society on the basis of Western experience (Lu 2017: 189-193; Li 2017: 60-61). All in all, when people claim to criticize West-centered paradigm and argue for the homogeneity of Chinese and Western legal cultures according to Western legal values and standards, they themselves slide into the ‘West-centered’ stance. Hence ‘Neo-Legal Orientalism’.

### **‘Oriental Legalism’: Chinese Subjectivity**

In the wake of criticizing Legal Orientalism, another trend of thought gradually emerged in the 1990s—Oriental Legalism. Oriental Legalism is a concept used in Teemu Ruskola's recent *Legal Orientalism*, meaning ‘Chinese universalism’ or ‘sinification of law’ (Ruskola, 2013: 233). Teemu Ruskola specifies some major contributions of several Chinese scholars, including Wang Hui's ‘New Left’, Zhu Suli's ‘indigenous resources’, and Xia Yong's ‘New Confucianism’ (ibid: 222-229).

Teemu Ruskola does not offer a theoretical concept of ‘Oriental Legalism’. It is Wei Leijie who sums it up:

Oriental Legalism is a discourse and idea that intend to reconstruct a new understanding and interpretation of law and legality. It aims to awaken the East, so as to regain subjectivity in equal dialogue with the West, and to have their own voice in the progress of legal civilization in the world. This can serve as a possible pathway to overcome Legal Orientalism (2018: 92).

In a sense, Oriental Legalism is an extension of the ‘China-centered perspective’ in the field of law (including legal history). At the core, its goal is to rid of dependence on Western legal framework and establish subjectivity and discourse of Chinese culture within legal realm. As Liang Zhiping (2016) puts it, ‘From Legal Orientalism to Oriental Legalism, this transformation not only means the surpassing the influence of Orientalism, but also indicates the emergence of Chinese subjectivity. This is precisely the voice that has become increasingly loud in contemporary Chinese society’.

In the study of Chinese imperial law, the position of Oriental Legalism has gained growing publicity, especially in mainland China. To a significant extent, this is a reflection of ‘the resurrection of China as a (relatively) rich and powerful state and its increasing self-confidence [that] have resulted in a new and more affirmative view of its political and cultural tradition’ (Pines 2019: 431). In the late 1990s, Shi Tongbiao (1999) discussed the impact of Chinese legal culture on the West, including Voltaire’s (1694-1778) admiration of the rule of virtue in Chinese law. Later on, Ma Xiaohong and her colleagues (2009) explored China’s traditional legal culture on its own discourse.

Perhaps the most thought-provoking voice in Oriental Legalism is the study of ‘ancient Chinese constitution’. In the afore-mentioned Neo-Legal Orientalism that claims the ‘homogeneity of China and the West’, although scholars often place emphasis on the advancement and development of ancient Chinese law, they have not gone so far so to argue for the development of ‘constitution’ in imperial China. This might have been due to the bias based on the West-centric standard that stresses ‘democracy and rights protection’ in contemporary constitutions and thus disqualifies pre-20<sup>th</sup>-century China to make any constitutional law. Under Oriental Legalism, however, people have started to identify traces of ‘ancient Chinese

Constitution’ and carried out multidimensional explorations. They have examined the constitutional significance, concepts, and practices of Confucianism (Yao 2013; Tu, Yao, and Ren 2014; Son 2016), and the structure, institutions, and operations of Chinese imperial constitutions (Yao 2012; Du and Zhao 2014; Su Li 2018a, 2018b). Although these scholars hold different perspectives, they generally believe that (pre-)imperial China developed and practiced rich ‘constitutional’ ideas and institutions.<sup>6</sup> This heritage may not only serve as a reference for China's modernization transformations, but also transcend national boundaries and exert constructive influence onto East Asia and even the whole world.

In scholarly fields, the proposition of ‘ancient Chinese constitution’ does not escape challenges. Simply put, the opponents make two points of contention. First, historically speaking, constitution is a guarantee of democratic rights in modern times; whereas in ancient China no such values and institutional structure existed. Secondly, in contemporary world, traditional Chinese cultures, though extensive and profound, are not sufficient enough to meet the needs of modern institutional transformation.

To me, the argument of ‘ancient Chinese constitution’ delivers mixed messages. I see merits in its assessment of historical constitutions. From the conceptual point of view, on the first place, ‘constitution’ should not be equated with ‘democracy’. Conventionally, of course, we tend to think that ‘constitution is the basic law of a nation that confirms the country’s democratic system, guarantees citizens’ rights by regulating and curtaining state power, and has the highest legal effect’ (Hu and Han 2007: 28). We have learned to demand that modern constitutions must serve as the fundamental law of the land that establishes a democratic system and specifies and protects people’s democratic rights. Nevertheless, in terms of its original intent and historical origins, constitution is just a set of laws defining the basic principles of governance and

structuring state power; as for stipulating the ‘democratic’ system and ensuring ‘human rights’, these are later developments, and vary from place to place. Throughout Chinese history, prior to the constitutional reform at the end of the Qing dynasty, the laws that embraced basic principles of governance and systems of structuring state authorities did exist. In some periods, it was enacted in a single document, like the *Da Ming huidian* (Collected Statutes of the Great Ming) of the Ming Dynasty (1368-1644). In other times, it existed as a set of laws, such as the *Tang liudian* (Six groups of statutes of the Tang) and other forms of laws such as the code, statutes, ordinances, and regulations during the Tang dynasty (618-906). They could also function as oral traditions, such as the laws of the Miao and Dong ethnic groups who had not developed writing systems. And—these laws did guarantee people’s ‘rights’ (although the concepts, contents, and scopes of their ‘rights’ differ significantly from those of modern times) as well as enforcing ‘duties’ (Guei 2006). The contention of ‘constitution’ in imperial China does not indicate an approach that, like the ‘civil law position’, applies a Western concept mechanically into Chinese culture, thus seeking the ‘progress’ based on Western standards. Instead, it depicts a historical process according to both the theoretical conviction about ‘constitution’ as the basic law of governing a country and Chinese own representation and practice about their legal establishments. The ‘constitutionality’ of Chinese imperial laws should not be denied based on the assumption that they did not stipulate what we know today as modern democratic system and human rights.

On the other hand, however, it would be rather narrow-minded to view the constitutions in imperial China as the sole values and institutional resources for China’s modernization cause. It is well known that throughout human history, different peoples have created rich and diverse civilizations, and that the modern world is a community based on interactions and mutual

learnings, as vividly demonstrated in the United Nations' *Universal Declaration of Human Rights* (1948). Realistically, no country can successfully solve its contemporary problems with only one cultural system. The one and only proper pathway for China's modern transformation is to integrate the rich and diverse cultures of various peoples and countries. From this point of view, it is reasonable to question some components in the proposition of the 'ancient Chinese constitution' itself.

Having briefly evaluated an important endeavor in Oriental Legalism (the proposition of 'ancient Chinese constitution'), we may come to a preliminary conclusion about the paradigm of Oriental Legalism. It is undeniable that this paradigm is an effort against the cultural oppression and discrimination by Western countries over non-Western nations. In the process of re-examining Chinese traditional legal culture, Oriental Legalism aims to take Chinese culture itself as the standard of discourse instead of relying on foreign values and experiences. This undoubtedly facilitates the generation and representation of Chinese discourse on Chinese law. The argumentation of constitutional laws in imperial China presents a dynamic instance.

Meanwhile, however, as a general paradigm, Oriental Legalism comprises broad and diverse intellectual threads. Its certain claims are indeed worth further considerations. Firstly, in terms of theoretical framework, Oriental Legalism needs to develop more cohesive perspectives. The dualistic model of 'East vs. West', the ambiguity of the scope and meaning of the so-called 'East', the uncertainty in the rules and methods of comparing various legal cultures, all need to be further explored (Lu 2017). Secondly, with regard to the contemporary application of this approach, there is public concern that Oriental Legalism might, with the excuses of 'national circumstances' and 'indigenous resources', only absorb the values and institutions of Chinese culture but reject other civilizations. This is most prominent in the argument of 'Confucian

constitutionalism' (Zheng 2013). The progresses of Chinese modernization in general and Chinese legal culture in particular depend on the integration of both Chinese cultures (including Confucianism) and the cultural essences of the other nations in the world. A best example of the integration of diverse cultural values is the adoption of the Universal Declaration of Human Rights by the United Nations in 1948 (Morsink 1999). Its very first Article ('All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'), for instance, articulates the collective wisdom of peoples of different legal and cultural backgrounds, including the Chinese (Will 2012).

### **Conclusions: Towards 'Confluent Legalism'**

In the past decades, seeing through the lens of 'Orientalism', the study of Chinese imperial law has gone through three major paradigms. They are, respectively, Legal Orientalism prior to the 1980s, Neo-Legal Orientalism after the 1980s, and Oriental Legalism after the late 1990s. The first, taking Western legal values as criteria, stresses the opposition and heterogeneity of China and the West and criticizes the backwardness and non-subjectivity of Chinese law. The second, in the name of readdressing the biases and prejudices of Western discourse, emphasizes the correspondence and homogeneity of China and the West, and holds that Chinese legal culture had achieved similar advancements as the West. In essence, however, it still takes Western culture as the assessment standard to judge the development of Chinese law. And the third paradigm incarnates the intellectual currents of 'local knowledge' and 'legal localization' in the field of legal history. It requires to use Chinese legal culture as the

independent or even sole perspective and resource, and do away with the dependence on Western values.

Speaking of ‘going through’ these three paradigms is not to claim their linear historical changes, but simply to sort out the dominating characteristics and major changes at different time periods. The newer currents certainly bring certain (sometimes revolutionary) changes to conventional ones; but the new has not necessarily replaced the old. A result of Legal Orientalism, the claim of ‘secularism’ of Chinese law is still widely shared in the fields. A number of achievements under Neo-Legal Orientalism (such as Chinese ‘imperial civil law’) have become the mainstream and dominant thinking. And propositions of Oriental Legalism have just started to burgeon. The state of the fields, therefore, features coexistence of various paradigms.

The rising Oriental Legalism has two trajectories. The first is concerned with the assessment of Chinese legal history, and holds that the understanding and writing of China imperial law should be based on China’s own experience. The second has to do with the reform of contemporary society and design for China’s future, and (sometimes) asserts that China’s modern transformation should take Chinese culture as the primary or even the sole recourse. The first aspect seems to have gained more advantages than Legal/Neo-Legal Orientalism in evaluating Chinese legal history. The argument for ‘constitutions’ in imperial China indicates a prominent example. As for scheming China’s modern transformation, however, Oriental Legalism should have a more extensive and open vision. For China’s future, I believe, the approach of ‘Confluent Legalism’ that features drawing on diverse cultural essences of various nations in the world should be adopted (Howson 2009).<sup>7</sup>



The changes of the paradigms in assessing the legal culture in pre-republican China are related to the general intellectual transformations in the contemporary world. The new currents such as postmodernism, post-colonial studies, and global history have certainly affected peoples' views on Chinese cultural values and historical experience. Meanwhile, the changing perspectives on Chinese culture and history have enriched our understanding of the general intellectual history of our times. This assessment of the study of Chinese legal history should provide insights on both fronts.

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<sup>1</sup> See also Hershey 1912 and Krasner 1999. For some critiques of the 'Westphalian myth', see Osiander 2001 and Piirimäe 2010.

<sup>2</sup> In Chinese scholars' works, Maria Adele Carrai observes four strategies in 'provincializing Europe and overcoming Eurocentrism' (2016).

<sup>3</sup> Huang Zongzhi (Philip Huang) (2001: 13): 'For a long time, the American academia has held a basic view on Chinese legal culture: In Chinese legal tradition, political freedom and rights were not developed, and such kind of freedom is the foundation of Anglo-American modern civil law. [The Chinese law] lacked such tradition, and thus could not become modern civil law. For this reason, academia generally holds that in the Qing dynasty there was no 'real' civil law. In order to correct this mistake, this work uses considerable length to analyze and discuss the concept and practice of civil law'.

<sup>4</sup> For example, when Philip Huang (1996: 5-6) explains the use of the concepts of 'civil law' and 'civil adjudication' in his discussion of civil law in the Qing Dynasty, he states: 'I use 'civil law' in the same meaning as the modern Chinese term *minfa*, or *minshi falü*. It refers to codified legal stipulations dealing with 'people's matters' (*minshi*), distinguished from 'punishable matters' or 'criminal matters' (*xingshi*). Its scope and content are well indicated by the headings of the four substantive books of the Republican Civil Code of 1929-30: 'Obligations', 'Rights Over Things', 'Family', and 'Inheritance'.

<sup>5</sup> This is the same as the proposition of 'non-separation of law and morality', which ignores the social and legal changes and argues that the moral matters that are not regulated by law in contemporary societies must have also belonged to moral norms rather than legal issues in imperial China. Nevertheless, it is

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commonly known that what is merely considered as moral norms in contemporary societies could be punished as unforgivable heinous crimes (such as ‘lack of filial piety’).

<sup>6</sup> Of these scholarly pursuits on the constitutions in imperial China, Su Li’s works adopt a much broader definition of ‘constitution.’ Unlike the formalistic understanding of constitution as Constitutional documents or constitutional law, Su Li’s ‘constitution’ refers both to the action of constituting a political community and to the fundamental institutions that play a constituting roles’ (2018a: 16-20, 231). Su Li’s approach is more elaborated in his Chinese edition of the book, which examines the fundamental framework of ancient (i.e., pre-republican) Chinese state: family/lineage, state agencies, and cultural/ideological principles, most of which would not involve a legal category of ‘constitution’ (2018b). In that sense, Su Li’s study of Chinese imperial ‘constitution’ differs from other scholarly works, including this essay. For a critique of the problems in Su Li’s arguments, see Yuri Pines’ review (2019).

<sup>7</sup> A notable scholarly effort is made by Jiang Qing, the Chinese intellectual who advocates “a religious Confucian constitutional order’ (2013). Despite its title—*A Confucian Constitutional Order: How China’s Ancient Past Can Shape Its Political Future*, Jiang’s book draws a constitutional framework that would embrace a popularly elected legislature that is often seen in modern democracy and a symbolic monarch that resembles those in the United Kingdom as well as Confucian elements, which indicates a sense of constitutional balance between Chinese and Western traditions.