Is China "the Man From the Country"?

Frank S. Hong

Cook Ding Institute Working Paper 2021-001

I.

In today's financial world, the U. S. is undeniably at the center. But this configuration is not set in stone. China, on the periphery 40 years ago, is approaching the center at the pace unthinkable even when China joined the WTO at the beginning of this century.

But still, China is by no means preordained to make the center in the foreseeable future.

What is beyond dispute, however, the days of expecting China will become a "stakeholder" are gone. On July 25th, Wendy Sherman, Deputy Secretary of State of the U. S., paid a visit to China ostensibly for setting up "guard rails" for Sino-US relation.

In Kafka's parable *Before the Law*, the man from the country sought admission to the Law only to be stopped by the doorkeeper.

China, unlike the man from the country, will not wait until the moment "the only door" for China is to be shut down. As the late Lee Kwan Yew told Charles Rose in his 2009 interview, "[China does] not want to be an honorary member of the West." China, if anything, seems to be poised to challenge the very foundation of the Law, hence the often cited "existential threat".

Professor Donald Clarke, an American law professor, armed with his decades of scholarship on Chinese "law", has recently called out China's system as something other than a legal system. Don takes law seriously and urges fellow scholars to be brave enough to confront the "difference" so "fundamental" that one shall refrain from naming China's X as Western or American X.

The reason bravery comes into play is that anti-Orientalism is politically correct, at least in the mainstream American academia so much so that to call out China's lacking a prestigious X takes courage.

In his purported methodology piece entitled "*Anti Anti-Orientalism*", Don acknowledged that his title is "a conscious parallel to a 1984 article by Clifford Geertz entitled '*Anti Anti-Relativism*'". [1] Formal parallel with Geertz's title notwithstanding, Don is simply wrong in his understanding of Orientalism. Orientalism is so much more than a biased epistemological device that filters and processes myriad differences and similarities among nations or cultures. Don's Kenya-giraffes metaphor gives away his

failure to grasp Orientalism. Orientalism is not about a prejudice on what makes a good country or what institution has "prestige". [2]

As Said depicted it with penetrating insight, "[an American or European studying the Orient] comes up against the Orient as a European or American first, as an individual second. And to be a European or American in such a situation is by no means an inert fact. It meant and means being aware, however dimly, that one belongs to a power with definite interests in the Orient, and more important, that one belongs to a part of the earth with a definite history of involvement in the Orient almost since the time of Homer." [3]

Orientalists never have any interest in a dialogue with the Orientals. The Orientals are "problems to be analyzed, solved or confined"-- "a process that forces the uninitiated Western readers to accept Orientalist codifications as the true Orient." [4]

Said would have disagreed with Don's assessment - "it is probably also true that at least in the world of Chinese legal scholarship, there are not many true Orientalists around…" Orientalists do not exist as a band of individuals. They constitute a specie within a fitting ecosystem. Until the ecosystem evolves its way to a different configuration, one can count on Orientalists still going strong as in our current time.

II.

As Don's *objet petit a* is not the critique of anti-orientalism, we should move beyond this decoy and hunt down the real thing: what to do with "fundamental difference" (per Don) between the Rule of Law and the Chinese system?

To think that the Chinese as the men from the country seeking admission to the Law is merely a crude metaphor underestimates the magic realism overflowing from the Law.

Leland Stanford, president of Central Pacific, former California governor and founder of Stanford University, told the U. S. Congress in 1865, that the majority of the railroad labor force were Chinese. Without them," he said, "it would be impossible to complete the western portion of this great national enterprise, within the time required by the Acts of Congress." Ten years later, the Congress enacted the very first U. S. statute on immigration, the *Page Act* (1875) prohibiting the entry of Chinese women, and followed by the notorious *Chinese Exclusion Act* (1882) which did not get repealed until 1943, two years after China became an official allied nation of the United States in World War II.

As Professor Teemu Ruskola noted in *Legal Orientalism*:

> It was precisely in the context of Chinese Exclusion Laws that immigration came to constitute a key index of what it means to be a sovereign power in a

> world of nation- states. It was the misfortune of Chinese immigrants— and of the U.S. Constitution— that the Chinese were America's constitutive Other in not only a figurative but legal sense: a group outside the nation against which the United States defined itself in terms of its constitutional law at a historical juncture when control over the flows of people across borders became a matter of national concern. [5]

Teemu seems to be pedantic in his reminder that *Chae Can Ping v. United States* (1889), known as the *Chinese Exclusion Case* for its affirmation of the constitutionality of the anti-Chinese immigration laws, remains good law. [6] In the summer of 2021, eight years after the publication of Legal Orientalism, or 132 years after the *Chinese Exclusion Case*, more than 500 Chinese students in the field of science and engineering were denied student visa ostensibly over the concern of their would-be stealing IP from America for the benefit of China's Civil-Military Fusion Initiative. This Trump era policy has the honor of getting a wholehearted endorsement from the card-carrying anti-racist democratic administration. The law, especially the US immigration law has always been the convenient "shield" that comes handy.

"Seemingly, whenever the Constitution came into contact with either China or the Chinese, it ceased to apply— whether with respect to Chinese immigrants wishing to enter the United States or Americans in China", Teemu so declared after exposing the magic reality in the U. S. District of Court of China, which was "awash in a surplus of law", except the U. S. Constitution. [7]

This is no moment for self-pity as a Chinese or for America. If Kafka's parable tells us anything, it is that the Law is meant to be a game of "difference" (in space) and "defer" (in time), which is what Derrida tried to convey with his neographism "*différance*". [8] The door is only for the man from the country. The doorkeeper is only one of many doorkeepers each being more powerful and harder to deal with along the chain. The university is suspended. The particularity in the rule of men is built in.

The arc of moral universe is long but bent towards justice. But how long is the time worth waiting or the space worth travelling? "Incalculable justice *requires* us to calculate," said Derrida. [9] Such calculation under the Law, or the non-law as Don would insist, is graced with legal fictions of "temporal spacing" and "spacing in time". [10] *ShuangGui*, one of Don's favorite examples from modern China, literally means "at the designated time and the designated location, to provide explanations for the issues relating to ongoing cases" until appearing before the Law.

Curiously, Don fails to see the formal and substantive parallel between *ShuangGui* and the U. S. District Court of China which was largely unknown until Teemu's groundbreaking exposé in *Legal Orientalism*. If the U. S. District Court of China is too remote in time and distance, we should not forget waterboarding in Guantanamo Bay, US-bound South American refugees buffered in Mexico at the U. S. "request", Indians

as “de jure foreigners in their own land under the logic of the U. S. Constitution”, [11] for over 100 years, Puerto Rico residents who were granted US citizenship by a statute in 1917 as opposed to the Constitution, regularly hold referendum on the political status of the territory only to be regarded as not legally binding, and this territory of over 3 million US citizens, larger than 20 States, have no representation in American Congress. If our spatial survey travels too far away from the center, let’s shift our gaze to the heartland where hundreds if not thousands of George Floyd whose encounter with white police officers at the “wrong place” and the “wrong time” makes the distinction between trial and execution a pointless exercise.

Not all the Law or the Law men start as the Law’s antithesis. The “fog of memos” and the memorable verbiage such as “unknown unknown” as the legacy of the late Donald Rumsfeld illustrates how the long arc is bent. The young Congressman Rumsfeld co-sponsored the Freedom of Information Act in 1966 only to find himself being remembered as the leading participant of the most secretive and lawless U. S. Administration in modern time with consequences of epic proportion.

III.

Don spared himself the real challenge in searching for the “fundamental” difference that is meant to separate the Chinese system from American rule of law by simply rigging his comparison chart: “Universal, desirable values become identified with America and particular, undesirable ones with China.” [12] That is, Mrs. Robinson in the China column, Virgin Mary in the U. S. column, assuming motherhood is at the issue, or Ideal Type for the U. S., messy sausage-making process for China.

Let’s do one real example. Don placed Richard Posner, formerly a judge at the Seventh Circuit Court of Appeals on Team USA representing the rule-of-law adjudication. Posner acknowledged that his ruling is driven by finding a sensible solution to the problem presented by the case. But before making the ruling, he had to ask “whether it’s blocked by an authoritative precedent of the Supreme Court or by some other ukase that judges must obey…” Posner continued, “The time to look up precedents, statutory text, legislative history, and the other conventional materials of judicial decision making is *after* one has a sense of what the best decision should be for today’s society.”

Don tries to illustrate that even as Posner borders on advocating the theory of ignoring the law and searching for the best solution for the society, he is still bound by the “ukase that judges must obey”, the hallmark of the rule of law. Don may be doing a good job if he is teaching a class for 3L students. But he is not. He is searching for the fundamental difference that sets the Chinese system apart. His toolbox missed something that was already available decades ago.

In delivering a fatal blow to H. L. A. Hart’s reliance on “Secondary Rules” to define the concept of law as something fundamentally different from coercion by force, or a

gun at one's head, Stanley Fish wrote in 1988: [13]

> A mechanism is proposed with the claim that it will keep force -whether in the form of the gunman or the interpreter- at bay; and in each instance force turns out to be the content of mechanism designed to control it. No matter how many layers of rules, plain cases, cores of settled meanings, precedents one puts in place, the bottom line remains the ascendancy of one person - or of one set of interests aggressively pursued - over another, and the dream of general rules judicially applied" remains just that, a dream.

As one can tell from the two amusing epigraphs in *Anti Anti Orientalism*, [14] Don is faint hearted for this searching for differences. The real search for the fundamental difference that enshrines the Law invariably leads to the foundation of the Law that turns out to be the "basement" where, as Niklas Luhmann pointed out, "the corpses" are hidden, [15] or "something rotten in law" is laid bare. [16]

Luhmann framed the search for the foundation of law as asking "the third question" (also known as the second order question): "how can a society enforce a binary code [legality/illegality]? How can one ever be sure that the true is not untrue and the right is not wrong—given the experience which are reported in Greek tragedies or South American novels? And, in addition, what happens within the legal system when the society enforces its code?" [17]

Luhmann, Derrida and Agamben all confronted the law's paradox head on. [18] Surprisingly, while both Don and Teemu are thoroughly familiar with examples of law's antithesis in China and America, neither drew inspiration from Kafka's powerful parable on the law's paradox. They both failed to reach the "detached level of the observing of observers," [19] or to search for "the law of laws." [20]

At the right level of theorizing, the Chinese examples paraded by Don not only fail to make the case for the Chinese non-law, but actually spur us to look into the basement under the western rule-of-law tower. In so doing, we see China is no longer at the "penumbra". Rather, China is unsettling the "core" that undergirds Hart's confidence in the concept of law. The "core", to unpack this metaphor, is nothing but a set of beliefs deeply lodged in the heads of the relevant community. As Stanley Fish brilliantly stated, "there is always a gun at your head", and it could be a real gun, a reason, a desire, or merely a name, such as "country, justice, honor, love and God." [21] Or we may add, the feverish antipathy towards COVID vaccines shared by nearly half of Americans, which is indeed a force of killing.

IV.

What is Law is a metaphysical question that is for the most part pointless unless one finds its "cash value" (William James). In law practice, smart lawyers make good

money out of novel *distinctions* that can be persuasively told/sold. In legal history, as Luhmann pointed out, new regimes (equity, derogation, etc.) as exceptions (distinctions) to the then dominant rules (even "natural law") emerge from time to time, in the course of human struggles, only to be challenged by paradoxes that keep reappearing. [22]

Don, a hustler of the American rule of law sees the "cash value" of auctioning off the Chinese law that he has studied for decades as the Chinese non-law. "One of the kind of clever tricks that Americans play on themselves is to want to feel good about doing well, but not telling yourself that's what you're doing." "This is hustling, 'in the better sense of the word, but also the pejorative sense of that word'", according to historian Walter MacDougall who argues that the U. S. was founded by hustlers.

Towards the end of his paper, Don winks at the new regime on how American society in general, judicial system in particular should handle outputs from the Chinese system that he finds to be non-legal. Exactly as Said described, "however dimly", Don is aware of the power as an American and he is keen to use it, one way or the other, regardless of consequences.

To conclude by way of paraphrasing Stanley Fish, *Anti Anti-Orientalism* reveals nothing but Don's head being the very gun under which he did "what comes naturally" to Orientalists. [23]

Notes:

[1] Donald Clarke, Anti Anti-Orientalism, or Is Chinese Law Different? The American Journal of Comparative Law, Vol. 68, 55-94, (2020).

[2] In Prof. Clarke's sister paper Order and Law in China, he suggested that in order to make a fruitful comparative study free of Orientalism, he would be willing to shed the prestige of the Rule of Law. This posturing is critiqued here.

[3] Edward W. Said, Orientalism, (Vintage Books, 25th Anniversary Edition, 2003), at 11.

[4] *Id*. at 207 and 67.

[5] Teemu Ruskola, Legal Orientalism: China, the United States and Modern Law, (Harvard University Press, 2013), at 142.

[6] *Id.* at 142 and 229.

[7] *Id.* at 166.

[8] Jacques Derrida, Margins of Philosophy, Translated, with Additional Notes, by Alan Bass, (The University of Chicago Press, 1982), at 3, 7-9 and 13.

[9] Jacques Derrida, Force of Law: The "Mystical Foundations of Authority", in Deconstruction and The Possibility of Justice, edited by Drucilla Cornell, Michel Rosenfeld and David Gray Carlson, (Routledge, 1992), at 28.

[10] Derrida, *supra* note 8, at 8, 9 and 13.

[11] Teemu, *supra* note 5, at 147.

[12] *Id*. at 55. On several occasions, Teemu pointed at this biased comparison. For example, *"All of law's universal virtues become associated with an idealized Euro-American rule- of- law, while all its particular shortcomings are conceptualized as a despotic rule- of- man attributed to others. However, once the imagined Orient becomes a field of direct Euro- American legal action, mediated through the institutions of international law and extraterritorial jurisdiction, those contradictions reemerge with a vengeance, in forms so exaggerated that law becomes its own caricature. As the contradictions become more difficult to manage, they can often only be denied or repressed— or simply blamed on the Orient, in whose name despotism now becomes law's ground, rather than its Other." Id.* at 154; *"The empirical basis of legal Orientalism is, and always has been, ultimately beside the point. It is a discourse of legal reason rather than of factual truth. Once China's lawlessness was established as a legal rather than veridical fact, that fact came to justify its exclusion as a state from the privileges of international law." Id.* at 11.

[13] Stanley E. Fish, Doing What Comes Naturally: Changes, Rhetoric, and the Practice of Theory in Literary and Legal Studies, (Duke University Press, 1989), at 516. (This chapter was originally published as Fish, *Force*, 45 Wash. & Lee L. Rev. 883 (1988))

[14] *The Question for the comparative method is "when are two things the same thing"? – Paul Bohannan; [T]he function of the imagination is not to make strange things settled, so much as to make settled things strange. – G. K. Chesterton*, *cf.* Clarke, *supra* note 1.

[15] Niklas Luhmann, The Third Question: The Creative Use of Paradoxes in Law and Legal History, Journal of Law and Society, Vol.15, No.2, 153-165, (Summer, 1988).

[16] Derrida, *supra* note 9, at 39 and 42.

[17] Luhmann, *supra* note 15, at 155.

[18] Gunther Teubner, The Law before its law: Franz Kafka on the (im)possibility of Law's Self-reflection, German Law Journal, Vol. 14, No. 02, 405-422, (2013), at 415.

[19] Luhmann, *supra* note 15, at 154.

[20] Jacques Derrida, Before the Law: The Complete Text of Pr*é*jug*é*s, translated by Sandra van Reenen and Jacques de Ville, (University of Minnesota Press, 2018), at 35-36.

[21] Fish, *supra* note 13, at 520.

[22] Luhmann, *supra* note 15, at 156-157. Luhmann quoted Wittgenstein's "What use is a rule here? Could we not (in turn) go wrong in applying it?".

[23] Fish, *supra* note 13, see the title of the book.

07/25/2021; revised 07/27/2021
Shanghai