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Exporting Legality

The Rise and Fall of Extraterritorial Jurisdiction in the Ottoman Empire and China

Mariya Tait Slys

THE GRADUATE INSTITUTE GENEVA

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How did two radically different legal cultures, those of the Ottomans and the Chinese, gradually acquire a legal architecture analogous to that of Europe? This Paper attempts to answer this question by providing a comparative study in legal history of the rise and demise of extraterritorial consular jurisdiction, utilizing a post-colonial and inter-disciplinary approach to international law. The study reveals that the establishment of consular jurisdiction during the nineteenth century was closely linked to the process of legal 'modernization' that affected many Asian and Arab societies. As such, this study contributes to the explanation of the gradual convergence of many non-Western traditional legal cultures with typically continental legal structures. This ePaper provides an in-depth analysis of the origin, further development and termination of this controversial institution of public international law as applied to the Ottoman Empire and China.

Mariano Garcia Rubio Prize 2013 in International Law.

MARIYA TAIT SLYS

Mariya Tait Slys holds a Master in International Law from the Graduate Institute and a Bachelor in International and Diplomatic Sciences from Bologna University. Before coming to Geneva, Mariya spent one year studying law and social sciences at the Humboldt University of Berlin. Her current research interests include postcolonial approaches to international law, critical legal studies, history, philosophy and epistemology of international law as well as, more recently, enforced disappearance in some Eastern European countries. Besides her academic interests, she also regularly volunteers for several international film festivals in Geneva and Lausanne. At present, Mariya is pursuing an internship for the International Commission of Jurists' International Law and Protection Programmes, while working as an assistant for the Graduate Institute's Executive Education department.

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Acknowledgments

1 I would like to dedicate this work to Daniel Siemaszko, for his endless patience and dedication in supporting me. My sincere gratitude goes also to Professor Andrea Bianchi, for his precious guidance, advice and supervision, and to all the professors whose courses I had the opportunity to follow during the past years for sharing their knowledge and ideas. I am equally grateful to Ms. Mary-Teresa Fees-Greaney for her valuable help with the English corrections when this thesis was first written, as well as to the entire team of the Graduate Institute's Publications Office for their meticulous editing and for ultimately rendering this publication possible.

Introduction

> 'Could we conceive the curiosity which would be produced if a Japanese or Chinese Junk should come, some beautiful morning, unexpectedly, into the harbour of New York or London, and anchored by the side of vessels of a totally different construction, containing men of different speech, complexion and costume; then might we imagine something of the curiosity of this people on beholding a foreign ship under similar circumstances, appearing on their shore.'
>
> **Peter Parker, 1838.**

1 When, over the course of the nineteenth century, Europeans intensified their contacts with Far and Middle Eastern societies, 'vessels of a totally different construction, containing men of different speech, complexion and costume' brought more than men. The ship that Doctor Parker refers to in his *Journal of an Expedition form Singapore to Japan* also carried within it some typically Western *ideas* of law, justice, politics, and civilization. [1] Such ideas had an enormous importance for the future of China, the Ottoman Empire and many other non-European polities that, prior to the rise of Continental imperialism, had been relatively insulated from Western intrusion. The astonishment of some of the Chinese and Japanese indigenous populations upon seeing Europeans for the first time, given today's globalized world, is hardly imaginable. How would we feel if, one morning, an alien ship, carrying creatures speaking an incomprehensible language and following radically different laws and procedures, landed on the shores of Lake Léman? And, after having found some tools for mutual comprehension, they told us all our previous conceptions of law and justice were wrong and backward? This thesis focuses on two case studies, in national and international law, of such early colonial clashes and encounters.

2 The inspiration for this study stems from the observation that, today, the *structure* of most legal systems around the world is strikingly similar. There may be considerable differences in terms of substance, procedure or 'efficiency', but, almost all over the world, law is associated with courts, courts of appeal, university-level jurisprudential education, positive legal codes, a distinction between penal and civil legislation and so forth. In the course of a recent journey to Japan, I visited a university library in Fukuoka. While

walking among the bookshelves, I came to the section on law where I randomly picked up a volume with an English title. It happened to be an English translation of the Japanese code on penal procedure. I was surprised by how closely its structure, as well as its substantive, technical terminology, resembled European volumes on the subject. Hence, this thesis developed from a personal curiosity as to how this process of legal 'transplantation' had occurred, and what the systems governing some Far and Middle Eastern societies had been like prior to their encounter with the West and its culture.

3 This paper will explore the nineteenth-century rise of consular jurisdiction as the general practice of the vast majority of European and American states in their commercial (and other) relations with non-Western societies. Its main ambition is to illustrate how, through the rise and demise of nineteenth-century extraterritorial institutions, the indigenous societies of China and what is now Turkey were compelled eventually to 'positivize' their original normative systems. Arguably, it was through the flow of a considerable number of Western citizens, legal experts and, most importantly, legal ideas – and the parallel institution of consular jurisdiction to protect them – to the Ottoman Empire and China that the first encounters and subsequent clashes between some typical Continental notions of law and statehood and radically different, indigenous perceptions of normativity first occurred. As though by permeation or diffusion, such ideas took root in the minds and practice of local rulers and, perhaps paradoxically, said rulers eventually came to perceive assimilation as a prerequisite for the negotiation of the abolishment of extraterritoriality. As a matter of fact, because the revision of extraterritoriality was always conditional upon the implementation of massive legal reforms, based on the introduction of Western-informed, positive civil, commercial, criminal and procedural codes, it was at the very moment of its abolishment that the above-mentioned societies irreversibly entered the club of positivist legality and, consequently, 'civilization'.

4 China and the Ottoman Empire during the nineteenth and early twentieth century have been chosen as the substantial cases for this study due to a number of theoretical and historical considerations. Admittedly, extraterritorial consular jurisdiction existed in a variety of other polities in Asia and the Middle East. However, the surface of the globe that these two countries jointly cover is enormous, even more so in the past. Furthermore, neither China nor the Ottoman Empire were ever directly colonized by Anglo-European powers; thus, they were comparatively insulated from Western influence over the course of the past centuries. Each existed in a long-lasting imperial system, and possessed a strong cultural identity, an internally pluralistic legal order, and, when contrasted with European tradition, two radically different languages.

5 Consular jurisdiction followed remarkably similar paths within these two polities, from the increasing settlement of foreign expatriate communities within their territories, to the codification of aliens' jurisdictional privileges in the form of 'Unequal Treaties', to the implementation of massive legal reforms as the price of said Treaties' termination. Moreover, the encounter with Western nationals and ideas contributed to the rise of strong nationalist movements within both the Qing and Ottoman Empires, as well as to the outbreak of major revolutions.[2] Lastly, this study is especially relevant for the understanding of contemporary international law, as it examines a time of radical transformation of the international system, when international law was constructing its identity as a practice and as a discipline.

6 Dipesh Chakrabarty argues that 'concepts such as citizenship, the state, civil society, public sphere, human rights, equality before the law, the individual, distinctions between public and private, the idea of the subject, democracy, popular sovereignty, social justice, scientific rationality, and so on all bear the burden of European thought and history.'[3] Accordingly, the significance of this thesis today lies in its provision of an overview as to how, why and when the expansion of Continental models of legality first occurred. International law's function in this process as an acculturative institution should not be neglected, as it often acted as a 'gentle civilizer of nations'.[4] Institutions create order, conformity and reduce uncertainty; they establish norms of behaviour and may sometimes become self-reinforcing.[5] In order to provide a concrete example of the acculturative function an institution, legitimized under public international law, may perform, this study concentrates on extraterritorial consular jurisdiction. For while it may be difficult to truly 'think outside the boxes' in which we were born, it is legitimate to wonder how they were constructed.

NOTES

1. Peter Parker was an American missionary and doctor, as well as one of the pioneering reporters on the Chinese and the Japanese cultures before the intensification of Western business in East Asia. The citation can be found in Peter, Parker *Journal of an Expedition from Sincapore to Japan: With a Visit to Loo-Choo, Descriptive of These Islands and Their Inhabitants, in an Attempt with the Aid of Natives Educated in England to Create an Opening for Missionary Labours in Japan.* (London: Smith & Elder, 1838). 8.

2. Accordingly, following the collapse of the Ottoman Empire, Mustafa Kemal Ataturk's Turkey assumed the international legal obligations of its predecessors, including extraterritoriality and the desire to abolish it. A similar process affected the Qing Empire, which in 1911 formally became the Republic of China. While it is important for the reader to keep in mind such instances of succession, this thesis shall not include the comprehensive analysis of state succession. Hence 'the Ottoman Empire' and 'Turkey', on the one hand, and 'the Qing Empire' and 'China', on the other, will sometimes be used interchangeably.

3. 'One simply cannot think of political modernity without these and other related concepts that found a climactic form in the course of the European Enlightenment and the nineteenth century.' In Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference*. (Princeton University Press, 2009). 4.

4. Martti Koskenniemi, *The Gentle Civilizer of Nations*. (Cambridge University Press, 2002).

5. For a similar approach applied to the post-WWII institutional networks, see G. John. Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order After Major Wars*. (Princeton University Press, 2009).

Methodology, Sources and Outline

I. Methodology and Sources

1 This thesis is a *structural* work exploring the historical process through which two political entities presenting remarkably different legal cultures were compelled to adopt a typically European legal architecture. More specifically, it will analyse and highlight the correlation between legal reforms and extraterritorial consular jurisdiction. Chinese and Turkish substantive laws are thus a matter of secondary concern, as the main focus of the research is the reformist macro-processes that affected the legal systems of these two countries. Hence this paper will examine procedural reforms, such as the institution of a hierarchically-organized system of courts and tribunals, as well as wide-scale codification projects in the fields of civil, criminal and commercial law. Moreover, it will emphasize the alleged structural deficiencies of the original Chinese and Turkish legal cultures in order to better demonstrate the direction that their subsequent reforms were compelled to take.

2 The epistemic school of thought through which the present research is approached is *post-colonialism.* Post-colonialism, however, should not be understood in terms of dialectically opposed colonized and colonizing *states*. As a matter of fact, one of the primary objects of postcolonial critique is precisely the 'constructed' and Euro-centric nature of the 'state' as the core cognitive category of international history and law.[1] Instead, post-colonialism will be interpreted in terms of a *hegemonic epistemology of law* that has been historically applied to China and the Ottoman Empire.[2] In other words, *legal cultures,* rather than states, will be taken as the primary units of analysis. The paper applies this theoretical framework to Turkish and Chinese law and, more specifically, to the historic claim made by many Western observers that these polities 'lacked a legal system' properly speaking.Through the study of the rise and fall of extraterritorial consular jurisdiction, the paper provides a parallel genealogy of certain Western 'Orientalising' discourses and links them to the consolidation of legal identity both in Western and non-Western cultures.

3 This will be accomplished through a comparative studyin legal history. Firstly, the establishment and termination of extraterritorial consular jurisdiction in the Ottoman Empire will be compared to the parallel development of the institution in China. In order

to better illustrate the similarities of this process, as well as to facilitate the identification of historically contingent differences, the two substantial chapters on extraterritoriality in the Ottoman Empire and China utilize the same structure, thematic order and titles. Secondly, a more anthropological approach will be used for a general comparison of the legal culturesof China and the Ottoman Empire beforeand after their encounter with the West. Hence, before engaging in the substantial study of consular institutions, I will attempt to describe generally these counties' traditional laws and political systems, emphasizing the major differences *vis-à-vis* the predominant European legal and political ideas of the same period. Finally, the thesis presents a more implicit study of nineteenth-century doctrines of sovereignty, territorial jurisdiction and sovereign equality in international law as compared to with the conceptualization of such notions today.

4 Thesourcesfor this project include original treaties establishing jurisdictional rights for Western nationals in China and the Ottoman Empire, as well as diplomatic correspondence and scholarly articles dating back to the origins of the institution. A variety of contemporary secondary sources, journal articles and monographs are also referenced, with the aim of providing an inter-disciplinary study combining different perspectives from the fields of international law, international history, legal anthropology and philosophy.

5 It should also be noted that this thesis is greatly inspired by Kayaoğlu's monograph *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire and China.*[3]In particular, we use the same case studies and share a similar, post-colonial approach to the functions of extraterritoriality in domestic legal institutionalization. There are, however, some important differences distinguishing our respective research. Firstly, Kayaoglu's primary argument is that extraterritorial consular jurisdiction had a pioneering role in leading China, Japan and Turkey towards the construction of state sovereignty. What I want to illustrate, in contrast, are the ways in which extraterritoriality contributed to the exportation of positivist legality. Sovereignty is in fact a much broader enterprise, as the process of state-building involves the radical transformation of domains such as the military, public education, the construction of novel infrastructures, the radical reorganization of the political administration, the creation of health-care institutions and so on. Examining positivist legality more narrowly thus provides a more specific focus of analysis, as it constitutes only one of the many facets of the modern state. Moreover, Kayaoğlu discusses the genesis of extraterritorial jurisdiction only briefly, while I aim to give its genealogy more historical depth. Additionally, I will provide an account of the law the Ottoman Empire and China possessed before their colonial encounter with the West. Lastly, I argue that, rather than extraterritoriality as such, the true legal imperialism is found in its legacy: massive legal reorganizations bringing radically different normative systems in conformity with Western ideas of positivist legality.

II. Outline

6 *Chapter 1* defines the notion of extraterritorial consular jurisdiction for the purposes of the present thesis. Following some theoretical reflections on legal pluralism, which characterized a great variety of legal arrangements in the past, a general account of the attribution of jurisdiction in cases involving aliens in ancient and medieval times will be provided. The main purpose of *Chapter 2* is to illustrate the general epistemic framework governing the establishment of consular jurisdiction in Asia and the Levant during the

nineteenth and early twentieth centuries. Accordingly, *No Law Behind the Great Wall* aims to deconstruct the narrative regarding the alleged 'lack of law' and 'deficient legality' that has been frequently applied to Far and Middle Eastern legal cultures. Additionally, the chapter will argue that such "Orientalising" discourses also contributed to constructing (international) legal subjectivity in the West. A brief account of the role legal experts played in this process, as well as of the importance of language in transmitting or distorting (legal) ideas, will follow. *Chapter 3* analyses the birth, development and abolition of the capitulatory system in the Ottoman Empire. Similarly, the rise and fall of extraterritorial consular jurisdiction in China will be analysed thoroughly in *Chapter 4.* Finally, the *Conclusion* will contain some closing remarks, as well as a more detailed summary of the research findings.

NOTES

1. See Dipesh Chakrabarty, Provincializing Europe: Postcolonial Thought and Historical Difference. (Princeton University Press, 2009). For further readings, see Walter Mignolo, Local histories/global Designs: Coloniality, Subaltern Knowledges, and Border Thinking. (Princeton University Press, 2012); James C. Scott, Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed. (Yale University Press, 1998); Prasenjit Duara, 'Why is History Antitheoretical?' Modern China , 24, No. 2. (1998): 105-120.

2. For further readings on post-colonialist scholarship as applied to international law, see Antony Anghie, Imperialism, Sovereignty and the Making of International Law. (Cambridge: Cambridge University Press, 2007); Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-century International Law', Harvard International Law Journal 40 (1999): 1-80; Eve Darian-Smith and Peter Fitzpatrick, eds. Laws of the Postcolonial. (University of Michigan Press, 1999); John L. Comaroff, 'Colonialism, Culture, and the Law: A Foreword', Law & Social Inquiry 26, no. 2 (2001): 305-314; Bhupinder S. Chimni, 'Third World Approaches to International Law: a Manifesto', International Community Law Review 8 (2006): 3-27; Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' International Community Law Review 10, no. 4 (2008): 371-378; Ratna, Kapur, 'Human Rights in the 21st Century: Take a Walk on the Dark Side', Sydney Law Review 28 (2006): 665 – 688.

3. See Turan Kayaoğlu, Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China. (Cambridge: Cambridge University Press, 2010).

Chapter I – Definition and Early Origins of Extraterritorial Consular Jurisdiction

I. Defining Extraterritorial Consular Jurisdiction

1 For the purposes of this project, 'extraterritorial consular jurisdiction' generally refers to the exemption, partial or complete, of aliens from the territorial laws of another state or normative culture and the application, in disputes of a foreign or mixed character, of the laws of their country of origin by their consular representatives. In other words, similar to the prescriptive, adjudicatory and enforcement immunities that diplomatic agents enjoy today in the territory of host states, extraterritorial consular jurisdiction was quite frequently assigned to foreign nationals residing abroad in the nineteenth century.[1] The fundamental difference, however, is that most such foreign nationals were not official state representatives, but rather ordinary citizens enjoying jurisdictional immunities in another state or polity. Hence, whereas in Europe and the United States jurisdiction, particularly over penal matters, increasingly became an exclusive competence of the state on whose territory the conduct had occurred, in the Middle East and Asia, aliens were largely exempted from the application of local laws. Instead, any infractions or offences were assigned to the adjudication of a judge-consul.[2]

2 The form that extraterritorial consular jurisdiction – or 'extraterritoriality', as it has been generally referred to in past decades – often took was that of the so-called 'Unequal Treaties'.[3] Ingrid Detter defines an unequal treaty as 'an agreement, which favours the interests of one of the parties or of one group of parties' and promotes factual inequality through the legal fiction of sovereign equality.[4] Arguably, treaties technically considered to be agreements between equal and consenting states were a standard practice in the European diplomatic world. But 'exported eastward', they came to have a more negative connotation, defining the rules of engagement between expanding European and American powers on the one hand, and non-Western polities on the other.[5] In the case of extraterritorial consular jurisdiction, such agreements were particularly inequitable, as, in some cases, their genealogy indicates extremely violent enforcement, and the impossibility of their abrogation under the threat of the so-called 'gunboat diplomacy'.[6] Furthermore, the legal and other types of privileges that the treaties included were not

usually reciprocal. For instance, a Chinese citizen in the United States could not legitimately claim the same jurisdictional privileges that an American could in China during the same period of time.[7] Hence, as Western powers could not – or chose not – to directly colonize China, Thailand, the Ottoman Empire or Japan, they sought alternate ways to reconcile their growing desire for commerce with the need for order and security for their citizens abroad.[8] The maintenance of capitulations in Turkey and the establishment of the so-called 'treaty port system' in the Qing Empire thus appeared to be an almost natural solution.[9]

3 The primary epistemic argument used to institute or justify extraterritorial consular jurisdiction was usually an alleged 'lack of law and civilization' on the part of the host country – although the precise meaning of 'civilization' generally remained ambiguous.[10] As a matter of fact, due to more or less consistent religious and cultural differences between the local inhabitants and foreign nationals, Western states asserted that the legal systems of the vast majority of Asian and Middle Eastern countries were too brutal, fallacious, vague or impure to allow Western citizens to be judged by their laws and customs. Consequently, the argument insisted on the need for an institution that granted legal securities to foreigners until such time that the host legal systems achieved similar legality and 'civilization'. While the vehement discourse surrounding the 'Orientalization' of normativity in the Far and Middle East will be extensively discussed in the next chapter, Shalom Kassan expressed this logic in relatively gentle terms:

4 'In countries like China, Japan, Turkey, Egypt, Morocco, and various other States of the Levant and Africa, there exist or existed, fundamental and vital differences of social habits, standards of life, laws and customs, a diversity of moral sentiments and political institutions, with a primitive animosity towards foreigners due to differences in religious beliefs. Members of a European civilization could not, therefore, possibly abide by, and live according to, their regulations. Their ideas of justice were different from those of the Western world, and were not adequate to preserve the life, property and honour of foreign citizens before native courts.'[11]

5 Hence, over the course of the nineteenth century, the institution of extraterritorial consular jurisdiction, protecting the 'life, property and honour of foreign citizens' gradually spread throughout Asia and the Levant. Great Britain and France played a pioneering role in negotiating with or compelling local rulers to sign unequal treaties. Other nations followed. Moreover, it is important to note that, in addition to their inclusion in separate agreements, extraterritorial privileges were also subject to the so-called most-favoured nation clause, wherein the rights granted to one state by treaty were automatically expanded to any other country, interested in conducting business within its territories.[12]Therefore, and perhaps paradoxically, with the parallel consolidation of sovereignty and territorial jurisdiction on the continent, extraterritoriality developed into an almost natural legal tool for conducting international relations with non-Western polities. This legal tool would come to be employed for an entire century in China and an even greater time in the Ottoman Empire.

II. The Early Origins and Development of Consular Jurisdiction

a) Legal Pluralism and the Non-Territoriality of Laws in Pre-Modern Social Arrangements

6 The construction of absolute territorial jurisdiction as a core principle of the prescriptive organization of society is a modern invention.[13] The idea of the world map resembling a colourful puzzle, composed of an exact number of spatially delimited and separate pieces, each representing a different body of laws and mechanisms to interpret, administer and enforce them, is common sense today. However, throughout much of human history, the coexistence of empires, kingdoms, self-governed urban agglomerates, tribal political organizations and vast uninhabited lands, together with the dynamic groups of nomads, merchants, soldiers, pirates, mercenaries, explorers and religious communities, constituted a world map that more resembled the diffuse tones of an Impressionist painting, than the delimited boundaries of today. Various regional human units shared radically different yet coexisting normative systems, cosmological views and perceptions of the 'other', wherein the notion of a sovereign Leviathan sanctioning the ultimate legality of human behaviour presented a minor importance. In other words, the concepts of absolute sovereignty and territoriality in law were unknown, or interpreted very differently, in the pre-modern world.[14]

7 Thus, during the early stages of human development, authority did not necessarily imply territoriality, nor did it aim at achieving a cohesive unity. Only in second place were the main criteriacriterion for the attribution of legal rights and obligations territorial as the gates for entering a certain community of law were often of radically different natures. In this sense, elements such as common affiliation with a certain religious, social, cultural, gender, civilization or ethnical group played a primary role.[15] For the Sino-centric notion of the world, 'the notion of a state as a body of people within a territorial unit was not so important as it is today. Rather, the question as to whether one was a civilized member of the Sino-centric world according to the Sino-centric cosmology was crucial.'[16] It therefore appears that, prior to the nineteenth century, a considerable number of cultures around the globe employed other cognitive lenses, through which a particular territorial or normative reality could be seen. Empirical evidence reveals that certain human groups may have, indeed, inhabited a spatially contained and geographically contingent piece of the globe while sharing a common set of norms that prescribed or punished behaviour. This evidence is of crucial importance when searching for both the genealogy of such early communities of law and for the concrete outcomesof their historical development. Throughout much of human history, however, neither territoriality nor positivist legality constituted a direct answer to the question: '*Qua lege vivis?*'[17]

8 Recognition of the previous existence of a plurality of prescriptive systems, transversal and parallel to that instituted by the nation state, requires, however, an approach to normativity unhindered by the norms, assumptions and practices of the Western state system.[18] Inevitably, this recognition will also inform one's premises and ability to conduct research on matters related to the historical dimension of international law.[19] When engaging in the study of societies that radically differ, in geographical, temporal and cultural terms, from the dominant contemporary cognitive and historical *milieu*, the

greatest methodological error is to analyse them utilising the value system and epistemological orientation of the 'here and now'.[20] In other words, it is important to avoid falling into the trap of classifying and interpreting historical matters through the exclusive lens of today's (positivist) perspective. Although this is far from an easy task, being aware of the tendency towards such anachronistic analysis is already the first step towards the deconstruction of the grand-narrative, which reduces international law to merely 'a law between sovereign and equal states based on the common consent of these states'.[21]

b) Selected Instances of Consular Institutions in Pre-Modern European Societies

9 Early consular arrangements that may be considered 'extraterritorial' existed for centuries before humanity settled into formally equal sovereign states. Frequently, the host community did not strictly subject foreigners to its territorial jurisdiction, nor was the law applicable to disputes always the *lex fori.* Because legal rights and obligations were primarily bestowed upon members of the same religious, ethnical or/and professional community, aliens often enjoyed a different legal status, wherein they would either live in accordance with their own laws and customs or be subject to a special, equitable jurisdiction.[22] Additionally, special magistrates or consuls, appointed by either the expatriate community or the hosting city, exercised in a relatively autonomous administrative and political system, an adjudicatory jurisdiction with competence in exclusively foreign or mixed cases.

10 A good example of arrangements similar to the subsequent institution of consular jurisdiction is provided by what may be one of the first recorded arbitral cases in legal history. In 370 B.C., in Ancient Greece, the son of an Athenian banker Apollodorus brought a private suit against a man known as Callipus of Heracleotae.[23] The plaintiff was an Athenian citizen, while the defendant was an alien permanently domiciled in Athens. The defendant came from the city of Heraclea, a town situated on the south eastern coast of the Black Sea.[24] The dispute involved a certain Lycon of Heraclea who, before sailing for business to Lybia, deposited in Pasion's bank the amount of 1,640 drachmas.[25] Lycon's profession was similar to that of today's 'international investor' – in addition to his own direct engagement in overseas business, he lent money to other merchants for their trading voyages. The merchants would, in return, pledge their ships or the goods they carried as security. Subsequently, the investor would ask for repayment of the loan, with interest, for his financial services.[26]

11 As carrying all of one's capital when travelling was risky, Athenian merchants customarily entrusted a third party with safeguarding their finances while they were away. The choice of Lycon fell to the bank of Pasion, Apollodorus' father. Unfortunately, the trip ended tragically, for pirates attacked Lycon's ship, and wounded Lycon, who died at Argos. As Lycon had no natural heirs, a dispute arose regarding the legitimate heir to his fortune. Apollodorus recounts that, shortly after learning of Lycon's death – Callipus went to Pasion's bank to ask the cashier if the bank knew the deceased. The bank's cashier answered that, yes, they did know him: 'For he banks with us. But why do you ask?' 'Because', answered Callipus, 'I'll tell you. He's dead, and I'm the Heracleian consul. I want you to show me the accounts so that I may learn what he left. For it is my business to look out for all Heracleian affairs.'[27]

12 Callippus was the *proxenus* of the Haracleotae people in Athens. The semantic meaning of the term *proxenos* is 'public guest or friend'.[28]In addition to providing an example of the remarkable modernity of commercial litigation in Ancient Greece, the case provides crucial evidence of one of the earliest, if rudimentary, articulations of a system of consular jurisdiction in the history of international law.[29]Apparently, the *proxenus* was traditionally a national of the foreign *polis*, formally appointed by either his community of origin or the public authorities of the host city. His functions were strikingly similar to those prescribed by the modern corpus of consular law.[30] Moreover, it appears that the *proxenus* sometimes acted as an arbitrator in 'international' as well as private disputes, exercising adjudicative jurisdiction in cases involving foreigners of his 'nationality'.[31]

13 Similarly, with the expansion of its military and economic hegemony, Rome, in the age of antiquity, became a natural centre for migrants searching for work and protection. Consequently, Roman courts found themselves increasingly compelled to deal with cases involving aliens. However, the exclusion of foreigners from the enjoyment of civil and political rights equal to those of the restricted group of Roman citizens rendered the application of the Roman *jus civile* impossible. It was thus in response to such novel exigencies of Roman legal life that the system of peregrine praetorship was developed.[32] In 242 B.C., Rome instituted the office of the *praetor peregrinus* to complement the activities of the *praetor urbanus*, and adjudicate cases involving foreign litigants. Hence, somewhat akin to the case of the *proxenoi* in Ancient Greece, Rome assigned a special jurisdiction to resident aliens, even though the *praetor peregrinus* was 'just' a Roman officer administering the *jus gentium* to foreigners. Thus, while a comprehensive account of the legal arrangements to which foreigners were subject in other ancient societies is beyond the scope of this thesis, it is fair to note that scholars of other pre-medieval entities argue that the custom of conferring a special jurisdictional status to aliens also existed in other ancient societies.[33]

14 During the Middle Ages, the so-called system of the *personality of laws* developed. Following the break-up of the Roman Empire after a series of barbarian invasions, novel problems arose within European legal life. The great cultural and ethnic plurality characterizing Europe at that time, together with the lack of rigid geographic boundaries to structure and confine normativity along the lines of exact territorial delimitations, led to a pluralism and fragmentation of laws. In the absence of a territorial state, and in a world where religious and kinship ties played a considerable role in establishing the outer boundaries of a community of law, interactions came to be governed by the principle that each person could follow his or her own laws of origin.[34] Accordingly, in the words of Bishop Agobard: 'It often happens that five men, each under a different law, would be found walking or sitting together'.[35] This led to the subsequent proliferation of a complex legal system, characterized by conflicts of laws in mixed litigation, as well as by the prescription of a plethora of rules by competing religious and political authorities.[36]

15 The results of the application of the doctrine of the personality of laws were particularly interesting, as the doctrine provided the flexibility necessary for the parallel development and the proliferation of so-called judge-consuls. With the expansion of commerce, continental merchants began to travel increasingly throughout Europe and onwards to further destinations in the Levant and the territories of the Russian Empire.[37] Hence, both contacts and conflicts between the bearers of competing laws multiplied. According to Keeton, 'to these origins may be traced the functions of the mercantile consul' – the practice of appointing a representative within a given community of traders

for the sake of adjudicating disputes either involving aliens exclusively or in mixed litigation cases.[38] Apparently, the practice began in the Italian city-states of Venice, Florence, Genoa and Ancona, where it consisted of special jurisdictional arrangements struck either directly with the rulers of the hosting polity or between commercial organizations.[39] The members of the Baltic Hanseatic League also negotiated similar legal privileges for their merchants and, according to Shin Shun Liu, 'the German merchants and other inhabitants of Wisby on the island of Gothland in the Baltic enjoyed [such] privileges in the Republic of Novgorod in Russia.'[40] It was therefore as a result of this highly adaptive, pluralist, and privately-oriented tradition of the commercial consuls in the Middle Ages that the East India Companies subsequently developed their autonomous adjudicatory bodies and jurisdictional concessions, obtained directly from local rulers.[41] Similarly, as the case of China will illustrate, the East India Companies pioneered extraterritorial jurisdictional arrangements in East Asia.[42]

16 Admittedly, matters dating back to the pre-modern age may easily become the subject of academic speculation. The study of history is always about making choices, which inevitably implies the exclusion and simplification of the complex and indeterminate nature of a distant reality in order to provide support for one's more proximate arguments. From the evidence examined above, it nevertheless appears that, at least to a certain extent, foreigners in ancient and medieval times enjoyed some separate jurisdictional status, and were not subject to the laws of host societies. This separation was primarily due to the general belief that substantial religious, kinship or professional ties were needed for a person to belong to a certain normative community.[43] For this reason, evidence of the admission and coexistence of a plurality of legal systems on a same territory exists. In these systems, different arbitrators who often had the same nationality and religion as the litigants judged cases involving foreigners. The arbitrators thus decided in accordance with a different body of laws, particularly in civil and commercial matters.

17 Whereas such considerations support the existence of a proto-system of consular jurisdiction in ancient Greece, Rome and, in all likelihood, other medieval societies, the difficulty lies in trying to classify this system as extraterritorial in the sense of a community's *unilateral* and *non-consensual* exercise of prescriptive, adjudicatory or enforcement jurisdiction on the territory of another. Moreover, it is important to underline that extraterritoriality in the pre-nineteenth century world was conceptualized very differently than its more modern incarnation. Early instances of consular jurisdiction seem to have been the result of mutual concessions of hospitality – underscored by an idea of the immiscibility of the alien in one's religious and civic community – rather than the outcome of an explicit policy of legal imperialism. Because an orthodox doctrine of the strict territoriality of laws did not exist, the ancient and medieval societal attitude towards the coexistence of a multiplicity of legal systems on a single territory appears to have been broader and more tolerant than contemporary doctrines on the attribution of jurisdiction. The fact that consular relations were, in the past, largely the prerogative of *private parties* or trading companies is another considerable difference between prior conceptions and those of the present. It was only with the rise of state-sovereignty on the Continent, beginning in the eighteenth century, that the state began to assume the monopoly on international consular arrangements, rendering them a prerogative of *public* international law. Otherwise stated, consular institutions gradually became subject to the shifting of the authority to enter into

'international' relations away from private parties towards its constitutions as a public and exclusive competence of the State. The greatest change that subsequently affected consular jurisdictional arrangements was their codification in the form of public treaties, backed by a significantly heightened possibility of state coercion.[44]

NOTES

1. 'Much like ambassadors in ordinary sovereign nations, citizens of Western powers in Asia and the Middle East enjoyed a form of extraterritorial protection. Extraterritoriality provided a way for Western citizens to reside outside the West yet enjoy near-total immunity from local law, as extraterritoriality as it was colloquially known at the time, reached its apogee at the turn of the twentieth century.' Kal Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law*. (Oxford: Oxford University Press, 2009). 17.

2. In support of the increasingly territorial articulations of jurisdiction in the United States, see the Supreme Court's Chief Justice Marshall's statement on the matter: 'When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other; or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society and would subject the laws to continual infraction, and the Government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it.' In *The Exchange v. McFaddon* – 11 U.S. 116 (1812): 143. Similarly, Henry Wheaton asserts in his *Elements of International Law* that 'exclusive power of civil and criminal legislation ... is an essential right of every independent state.' See Henry Wheaton, *Elements of International Law: With a Sketch of the History of the Science*. (London: B. Fellowes, 1836). 98. For a general account of the contemporary scholarly debate on territorial jurisdiction in international law, see Frederick Alexander Mann, *The Doctrine of Jurisdiction in International Law*. Recueil des Cours (1964). Reproduced in *Studies in International Law* (Oxford: Clarendon Press,1973); Frederick Alexander Mann, *The Doctrine of International Jurisdiction Revised After 20 Years.* Recueil des Cours 186 (1984). Reproduced in *Further Studies in International Law* (Oxford: Clarendon Press, 1990); Cedric Ryngaert, *Jurisdiction in International Law*. (Oxford: Oxford University Press, 2008); Ralf Michaels, 'Territorial Jurisdiction After Territoriality', in *Globalisation and Jurisdiction* (The Hague: Kluwer Law International 2004); Hannah Buxbaum, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict', *American Journal of Comparative Law* 57, n. 3 (2009): 631–675; Jordan J. Paust, 'Non-Extraterritoriality of Special Territorial Jurisdiction of the United States: Forgotten History and the Errors of Erdos', *Yale Journal of International Law* 24 (1999): 305–328; Rosalyn Higgins, *Problems and Process: International Law and How We Use It*. (Oxford University Press, 1995). 56–77; Michael Akehurst, 'Jurisdiction in International Law' *British Year Book of International Law* 46 (1973): 145–258; D. W. Bowett, 'Jurisdiction: Changing Patterns of Authority over Active resources', *BritishYearbook of International Law* 53 (1982): 1–26; Berge Wendell, 'Criminal Jurisdiction and the Territorial Principle', *Michigan Law Review* 30 (1932): 238–269.

3. On 'Unequal Treaties' in International Law see generally Ingrid Detter, 'The Problem of Unequal Treaties', *The International and Comparative Law Quarterly* 15 (1966): 1069-1089; Stuart S.

Malawer, 'Imposed Treaties and International Law', *California Western International Law Journal* 7 (1977): 1–178; Fariborz Nozari, 'Unequal Treaties in International Law ' (PhD Thesis, Stockholms University, 1971); Matthew Craven, 'What Happened to Unequal Treaties? The Continuation of Informal Empire', *Nordic Journal of International Law* 74(2005): 335–380; Albert H. Putney, 'Termination of Unequal Treaties', *American Society of International Law Proceedings* 21 (1927): 87–100; Lung-Fong Chen, *State Succession Relating to Unequal Treaties*. (London: Archon Books, 1974); J. W. Garner, 'The Doctrine of Rebus Sic Stantibus and the Termination of Treaties', *The American Journal of International Law* 21, n. 3 (1927): 509 - 516. See also: Nico Krisch, 'International law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order', *European Journal of International Law* 16, n. 3 (2005): 369–408; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*. (Cambridge: Cambridge University Press, 2007); Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order.* (Cambridge: Cambridge University Press, 2004); Matthew Craven, *The Decolonization of International Law: State Succession and the Law of Treaties*. (Oxford: Oxford University Press, 2009). On Unequal Treaties in China, see Wang Dong, *China's Unequal Treaties: Narrating National History*. (Lexington books, 2005); William L. Tung, *China and the foreign powers: The impact of and reaction to unequal treaties*. (New York: Oceana Publications, 1970) L. H. Woolsey, 'China's termination of unequal treaties', *The American Journal of International Law* 21, n. 2 (1927): 289–294. On Unequal Treaties in the Ottoman Empire, see Eliana Augusti, 'From Capitulations to Unequal Treaties: The Matter of an Extraterritorial Jurisdiction in the Ottoman Empire', *Journal of Civil Law Studies* 4, n. 2 (2011): 285–307; Timur Kuran, 'The Beginnings of Economic Modernization in the Middle East: Legal Impact of Unequal Trade Treaties', *UC Berkeley: Berkeley Program in Law and Economics* (2006); Kémal Hilmy, 'Les capitulations ottomanes', *Revue politique internationale* (1915): 252–260; James B. Angell, 'The Turkish Capitulations', *The American Historical Review* 6, n. 2 (1901): 254–259. For a comparative account on Unequal Treaties in China *vis-à-vis* the Ottoman Empire, see Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*. (Cambridge : Cambridge University Press, 2010);Richard S. Horowitz, 'International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century', *Journal of World History* 15, n. 4 (2004): 445–486; George Williams Keeton, *Extraterritoriality in International and Comparative Law.* Recueil des Cours 072, (Hague: Librairie du Recueil Sirey 1948). 295.

4. See Ingrid Detter, 'The Problem of Unequal Treaties*', The International and Comparative Law Quarterly* 15 (1966):1070–1073.

5. Richard S Horowitz, 'International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century', *Journal of World History* 15, n. 4 (2004): 455.

6. As it will be discussed later, the violent genealogy of Unequal Treaties is particularly evident in the case of China.

7. Paradoxically, while Americans in China enjoyed massive legal privileges during the nineteenth and twentieth centuries, Chinese migrants to the United States were subject to both a number of substantial anti-immigration restrictions and a general attitude of racial discrimination. For a detailed illustration of past American policies towards Chinese migrants, see Stuart CreightonMiller, *The Unwelcome Immigrant: The American Image of the Chinese, 1785–1882.* (University of California Press, 1969); Neil Gotanda, 'Exclusion and Inclusion: Immigration and American Orientalism', *Across the Pacific: Asian Americans and Globalization* (1999): 129–51; Lisa Lowe. *Immigrant Acts: On Asian American Cultural Politics*. (Duke University Press, 1996).

8. In reference to the semi-colonial regime that European and American powers instituted in China, Siam and the Ottoman Empire, Horowitz emphasizes the apologetic role of international law in this process: 'In the semi-colonial environment, international law embodied in unequal treaties and the associated discourse about civilization provided powerful external incentives for indigenous political elites to comply with this standard European model.' In Richard S. Horowitz, 'International Law and State Transformation in China, Siam, and the Ottoman Empire During the

Nineteenth Century', *Journal of World History* 15, n. 4 (2004): 484. See also Kal Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law*. (Oxford: Oxford University Press, 2009). 17–18: 'Similarly, Western powers could not, or chose not to, subdue and rule China, Thailand, or Japan. Instead, they sought alternative ways to accommodate their growing desire for commerce with their need for order and security for their citizens abroad. "Unequal treaties," sometimes known as capitulations, were commonly negotiated in the nineteenth century to solve this problem. These agreements coupled open trade to extraterritorial rights for sojourning Westerners. Nations like China abhorred these coercive treaties, rightly seeing their extraterritorial provisions as a humiliation, but they lacked the power to resist.'

9. Capitulations were commercial and legal concessions used by the Sultan unilaterally granted to foreign traders on the basis of a long-lasting custom and as a consequence of the religious nature of law within his Empire. For a descriptive account of the capitulatory system in the Ottoman Empire, see Thomas Naff, 'Ottoman Diplomatic Relations with Europe: Patterns and Trends', In *Studies in Eighteenth Century Islamic History.* (Carbondale: Southern Illinois University Press, 1977). 97–103; Nasim Sousa, *Capitulatory Regime of Turkey*. (Baltimore: Johns Hopkins University Press, 1933). 68–88; Edhem Eldem, 'Capitulations and Western Trade', *The Cambridge History of Turkey* 3 (2006): 283–335; Gabriel Bie Ravndal, *The Origin of the Capitulations and of the Consular Institution*. No. 34. (US Government Printing Office, 1921); Philip Marshall Brown, 'The Capitulations', *Foreign Affairs* 1, no. 4 (1923): 71–81; Pierre Crabites, 'Islam, Personal Law and the Capitulations', *The Muslim World* 18, no. 2 (1928): 173–176; Maurits H. Van den Boogert and Kate Fleet eds. *The Ottoman Capitulations: Text and Context*. (Istituto per l'Oriente CA Nallino, 2004); Maurits H. Van den Boogert, *The Capitulations and the Ottoman Legal System: Qadis, Consuls, and Beraths in the 18th Century*. (Brill, 2005); Lucius Thayer Ellsworth, 'The Capitulations of the Ottoman Empire and the Question of their Abrogation as it Affects the United States', *The American Journal of International Law* 17, n. 2 (1923): 207–233; David P. Fidler, 'A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization', *Texas International Law Journal* 35 (2000), 387-413; Ahmad Feroz, 'Ottoman Perceptions of the Capitulations 1800–1914,' *Journal of Islamic studies* 11, n. 1 (2000): 1–20; Nasim Soosa, 'Historical Interpretation of the Origin of the Capitulations in the Ottoman Empire', *Temple Law Quarterly* 4 (1929): 358–372.

As it will be extensively illustrated later, the treaty port system implied the Chinese Emperor's concession of the right to conduct free trade in a limited number of specific city-ports, such as Shanghai, Canton, Hong Kong and Macao, to foreign powers. Such rights were mostly embedded in the form of bilateral treaties that also contained provisions on extraterritoriality. In addition to the maintenance of privileged legal and economical status within the treaty ports, at the turn of the twentieth century, foreigners were also to be allowed access to the Chinese inlands in their entirety. On the establishment of the treaty-port system in China, see Eileen P. Scully, *Bargaining with the State from Afar: American Citizenship in Treaty Port China, 1844-1942*. (Columbia University Press, 2001); Rhoads Murphey, *The Treaty Ports and China's Modernization: What Went Wrong?* (University of Michigan, Center for Chinese Studies, 1970); Chris Elder, *China's Treaty Ports: Half Love and Half Hate: An Anthology*. (Oxford: Oxford University Press, 1999); John K. Fairbank, 'The Creation of the Treaty System', *The Cambridge History of China* 10, no. Part 1 (1978): 214; Paul H. Ch'en, 'The Treaty System and European Law in China: A Study of the Exercise of British Jurisdiction in Late Imperial China', in *European Expansion and Law: The Encounter of European and Indigenous Law in 19th-and 20th-Century Africa and Asia.* (Oxford: Berg, 1992); Arnold Wright, *Twentieth Century Impressions of Hong Kong, Shanghai, and Other Treaty Ports of China: Their History, People, Commerce, Industries, and Resources*. Vol. 1. (London: Lloyds Greater Britain publishing Company, 1908); Tai En-Sai, *Treaty Ports in China: A Study in Diplomacy.* (University printing office,

Columbia University, 1918); Stephen D. Krasner, 'Organized Hypocrisy in NineteenthCentury East Asia', *International Relations of the Asia-Pacific* 1, n. 2 (2001): 173–197.

10. For scholars criticizing the role of the so-called 'standard of civilization' in the development of international law during the nineteenth century, and for the establishment of extraterritorial consular jurisdiction more specifically, compare Gerrit W. Gong, *The Standard of 'Civilization' in International Society*. (Oxford: Clarendon Press, 1984); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*. (Cambridge: Cambridge University Press, 2007); Brett Bowden, 'The Colonial Origins of International Law. European Expansion and the Classical Standard of Civilization', *Journal of the History of International Law* 7, no. 1 (2005): 1-23; Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-century International Law', *Harvard International Law Journal* 40 (1999): 1-80; Richard S. Horowitz, 'International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century', *Journal of World History* 15, n. 4 (2004): 448–455; Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*. (Cambridge : Cambridge University Press, 2010); Frank Michelman, 'Law's Republic', *Yale Law Journal* (1988): 1493-1537; Teemu Ruskola, 'Legal Orientalism', *Michigan Law Review* 101, no. 1 (2002): 179-234; Laura Nader, 'Law and the Theory of Lack', *Hastings International & Comparative Law Review* 28 (2004): 191- 204; Jean Allain, 'Orientalism and International Law: The Middle East as the Underclass of the International Legal Order', *Leiden Journal of International Law* 17, no. 2 (2004): 391-404; Jedidiah J. Kroncke, 'Substantive Irrationalities and Irrational Substantivities: The Flexible Orientalism of Islamic Law', UCLA Journal of Islamic and Near Eastern Law 4 n. 1 (2005): 41–73; Bryan S. Turner, Orientalism, Postmodernism and Globalism. (Routledge, 2002); Randall Peerenboom, 'What Have We Learned about Law and Development? Describing, Predicting and Assessing Legal Reforms in China,' *Michigan Journal of International Law* 27 (2006): 823-871; David P. Fidler, 'The Return of the Standard of Civilization', *Chicago Journal of International Law* 2 (2001): 137–157.

11. In Shalom Kassan, 'Extraterritorial Jurisdiction in the Ancient World', *American Journal of International Law* 29, No 1 (1935): 239. See also John Bassett Moore and Francis Wharton, *A Digest of International Law*. Vol. ii. (US Government Printing Office, 1906). 593**:** 'Owing to diversities in law, custom, and social habits, the citizens and subjects of nations possessing European civilization enjoy in countries of non-European civilization, chiefly in the East, an extensive exemption from the operation of the local law. This exemption is termed "extraterritoriality".' Keeton presents a similar argument when discussing the origins of extraterritoriality in the Levant: 'The core of the problem was the difference in civilization between the foreign merchants and the local inhabitants, and the close association of the Mohammedan religion with the laws which the local inhabitants followed. These reasons in themselves were sufficient for holding that the local Mohammedan law was not applicable to foreign merchants.' George Williams Keeton, *Extraterritoriality in International and Comparative Law.* Recueil des Cours 072. (Hague: Librairie du Recueil Sirey 1948). 295.

12. 'The unequal treaties generally had three elements: unilateral most-favoured-nation clauses, a lack of tariff autonomy for the non-Western partner, and what was known as consular jurisdiction for Westerners. Unilateral most-favoured-nation clauses ensured "equality in exploitation": whatever rights one Western power received had to be granted to all.' In Kal Raustiala, Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law. (Oxford: Oxford University Press, 2009).17. See also Georg Schwarzenberger, 'The Most-Favored-Nation Standard in British State Practice', British Year Book of International Law 22 (1945): 96–121. On the establishment of the most-favoured-nation clause in China, Cassel argues: 'Most-favored-nation treatment and extraterritoriality would first be formally enshrined in the "General Regulations of Trade," signed by representatives of the British Empire and the Qing Empire in July 1843 at Humen near Guangzhou and subsequently included in the Supplementary Treaty of the Bogue (Humen Tiaoyue) of October 8 the same year. Article 8 of the supplementary

treaty referred to the fact that all Western nations were allowed to trade in the five ports opened for trade "on the same terms as the British" and stated that if the Qing emperor granted other nations "additional immunities and privileges" (xi en shi ji ge guo), British subjects would be able to enjoy the same "immunities and privileges." The article also stated that most-favored-nation treatment should not be used a pretext for new demands being "unnecessarily brought forward.' In Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan.* (New York : Oxford University Press, 2012). 51. See also Earl H Pritchard, 'The Origins of the Most-Favored-Nation and the Open Door Policies in China', *The Journal of Asian Studies* 1, n. 02 (1942): 161–172; On the most-favored nation clause in the Ottoman Empire, see Hurewitz: 'As the nineteenth century unfolded, half a dozen of the Western powers, including the United States, opened legations in the Persian capital and, under most-favored-nation clauses, their respective nationals came also to enjoy extraterritoriality'. J. C. Hurewitz 'Ottoman Diplomacy and the European State System', *Middle East Journal* 15, n. 2 (1961). 145. Compare to Eliana Augusti, 'From Capitulations to Unequal Treaties: The Matter of an Extraterritorial Jurisdiction in the Ottoman Empire', *Journal of Civil Law Studies* 4, n. 2 (2011): 292 – 'Then, thanks to an extensive clause, the so called most-favourite-nation clause, not only France, but all European nations could enjoy contractual (and sanctioned) benefits of the imported capitulary text.' On the most-favored-nation clause in other polities subject to extraterritorial consular jurisdiction, see Shinya Murase, 'The Most-Favored-Nation Treatment in Japan's Treaty Practice During the Period 1854-1905', *The American Journal of International Law* 70, n. 2 (1976): 273–297; Francis Bowes Sayre, 'The Passing of Extraterritoriality in Siam', *The American Journal of International Law* 22, n. 1 (1928): 70–88; Kurt H. Nadelmann, 'American Consular Jurisdiction in Morocco and the Tangier International Jurisdiction', *The American Journal of International Law* 49, n. 4 (1955): 506–517.

13. 'The conception that the law of a state should automatically govern the relations of all persons within the territorial boundaries of that state is, however, of modern origin.'In George Williams Keeton, *Extraterritoriality in International and Comparative Law.* Recueil des Cours 072. (Hague: Librairie du Recueil Sirey 1948). 288.

14. See Richard T. Ford, 'Law's Territory (A History of Jurisdiction)', *Michigan Law Review* 97, no 4 (1999): 843 – 'A thesis of this Article is that territorial jurisdictions – the rigidly mapped territories within which formally defined legal powers are exercised by formally organized governmental institutions – are relatively new and intuitively surprising technological developments... Today jurisdiction seems inevitable, but, like death, it is a habit to which consciousness has not been long accustomed.' For a constructivist approach to sovereignty and its boundaries, see also Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900.* (Cambridge: Cambridge University Press, 2009); James C. Scott, *Seeing Like a State. How Certain Schemes to Improve the Human Condition Have Failed.* (Yale:Yale University Press, 1999). Stephen Oknonmina, 'States Without Borders: Westphalian Territoriality under Threat', *Journal of Social Sciences* 24 (2010): 177–182; John Gerard Ruggie, 'Territoriality and Beyond: Problemizing Modernity in International Relations', *International Organization* 47, no. 1 (1993): 139–174.

15. 'Again, in the early stages of human development, it was religion, race or the nationality of the people rather than the territory, which formed the basis of a community of law.' In Shalom Kassan, 'Extraterritorial Jurisdiction in the Ancient World', *American Journal of International Law* 29, No 1 (1935): 240. Perhaps 'ethnicity', rather than 'race' or 'nationality', would be a better term.

16. Onuma Yasuaki, 'When was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective', *Journal of the History of International Law,* II, no.2 (2000): 10.

17. According to what law are you living?

18. For present day advocates of legal pluralism transversal to the law of sovereign states, *see* Niklas Luhmann, *Law as a Social System*. (Oxford: Oxford University Press, 2004); Gunther Teubner e Andreas Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', *Michigan Journal of International Law* 25 (2004): 999–1046; Paul Berman, 'A Pluralist Approach to International Law', The Yale Journal of International Law 32 (2007): 301; Michel Coutu, ' Le Pluralisme Juridique Chez Gunther Teubner: La Nouvelle Guerre des Dieux', *Canadian Journal of Law and Society* 12 (1997): 93–114; Martti Koskenniemi 'Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought', *Presentation at Harvard Law School* (2005). David Kennedy, 'One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream', *New York University Law Review of Law and Social Change*, 31 (2007) 641–59. For an account on the debate on the 'neo-medieval-esque' fragmentation of international law, see *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law.* Adopted by the International Law Commission at its Fifty-eighth session, finalized by M. Koskenniemi, A/CN.4/L.682, 13 April 2006. At http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf.
See also Georges Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks', *New York University Journal of International Law and Politics* 31 (1999): 919–923; Martti Koskenniemi, and Leino Päivi, 'Fragmentation of International Law? Postmodern Anxieties', *Leiden Journal of International Law* 15, nº 03 (2002): 553–579; André Jean Arnaud, 'Du lien tribal dans le village planétaire', In *La quête anthropologique du droit*. (Paris: Karthala, 2003). 27–41; Pierre-Marie Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice', *New York University Journal of International Law and Politics* 31(1999): 791.

19. 'How many legal theorists and protagonists of international relations are still convinced of the alleged "newness" of international law! Few of them are fully aware that the law of inter-State relations is nearly as ancient as the internal law of State-like societies. Few of them seem to realize how superficial it is to imagine that international law is but the crowing pinnacle of a single evolutionary process whereby the phenomenon of law, after originating in restricted spheres, gradually spread to wider circles, with the community of States coming at last. It is too often overlooked, in flagrant contradiction to historical reality, that in fact the emergence and progressive development of law occurred in parallel within human groupings of quite different types, composition and dimensions. And no less disregard of history is implied by failure to gasp the fact that international law is a phenomenon which has always emerged and developed among a group of distinct and sovereign political entities whenever sustained and organized relations have come to exist between them.' InRoberto Ago, 'The First International Communities in the Mediterranean World', *British Yearbook of International Law* 53, n. 1 (1982): 213.

20. 'There is a tendency in some writers (especially such as are given to glorify the present civilization to the extreme disadvantage of the ancient), who have not sufficiently investigated their subject, to regard this or that exceptional case, particularly so if it happens to be a prominent one, as representative of the usual prevailing conditions; and there is a still more injurious tendency in others who have not even superficially examined many issues relevant to their subject to embrace such views blindly and unreservedly.' In Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome*. (London: MacMillan, 1911). 127.

21. Lasa Oppenheim, *International Law.* (London: Green and Co., 1904). 44.

22. 'The barbarian was outside the pale of religion, and therefore incapable of amenability to the same jurisdiction to which the natives were subject.' In Shih Shun Liu, *Extraterritoriality: Its Rise and Decline* (New York: AMS Press, 1969). 9. 'We find that in the ancient world foreigners were either subject to their own laws and customs or were placed under a special jurisdiction.' In ShalomKassan, 'Extraterritorial Jurisdiction in the Ancient World', *American Journal of International Law* 29, No 1 (1935): 240. Compare George Williams Keeton, *Extraterritoriality in International and Comparative Law.* (Hague: Librairie du Recueil Sirey 1948).290: 'The territorial law

was a law which was intimately connected with the religion and public conduct of the citizen, and it could not, therefore, be extended to foreigners who worshipped other gods, and who could not participate in the ritual practiced by citizens'.

23. The dispute is recorded in the Demosthenic speech against Callipus (speech n. 52). For an English translation of the oration, see Démosthène, *Demosthenes, Speeches: 50-59*. Translated by Victor Bers. (University of Texas Press, 2003). 46-55.

24. Probably corresponding to today's Turkish city of Karadeniz Ereğli, in the Zonguldak Province.

25. For a factual overview of the case, see Démosthène, *Demosthenes, Speeches: 50–59*, supra. See also Benjamin W. Wells, 'Banking in Old Athens', *The Sewanee Review* 25, no 2 (1917): 157–158; Edward Harris, 'The Liability of Business Partners in Athenian Law: The Dispute Between Lycon and Megacleides ([Dem.] 52.20–1)', *The Classical Quarterly* 39, no 02 (1989): 341–343; Alan H. Sommerstein, and Andrew J. Bayliss, *Oath and State in Ancient Greece*. (Berlin, Boston: Walter de Gruyter, 2012). 106 - 106; A reference to the dispute is present also in Rachel Zelnick-Abramovitz, 'The Proxenoi of Western Greece', *Zeitschrift für Papyrologie und Epigraphik* 147 (2004): 96.

26. As a matter of evidence, Apollodorus testified that Lycon had already collected part of the above-mentioned loan through litigation on a loan that he had previously made to a third party for the purpose of conducting business abroad. That case regarded a loan Lycon made to Megacleides of Eleusis and his brother Thrasyllus for a return voyage to Ace. The two merchants eventually changed their mind and decided not to sail, so the sum had to be given back to the original creditor. For the details of the dispute, see Edward Harris, 'The Liability of Business Partners in Athenian Law: The Dispute Between Lycon and Megacleides ([Dem.] 52.20–1)', The Classical Quarterly 39, no 02 (1989): 341–343.

27. The passage is cited in Benjamin W. Wells, 'Banking in Old Athens', *The Sewanee Review* 25, no 2 (1917): 157. Regrettably, the verdict of the dispute is not reported in the original speech, since it only contains an illustration of the oral pleadings of the plaintiff Apollodorus. Hence, we will probably never know whether Callipus managed to obtain the above-mentioned sum, if it was assigned to the banker's son, or if, alternatively, an equitable solution was reached.

28. See Rachel Zelnick-Abramovitz, 'The Proxenoi of Western Greece', *Zeitschrift für Papyrologie und Epigraphik* 147 (2004): 95.

29. See Luke T. Lee and John Quigley, *Consular Law and Practice.* (Oxford, New York: Oxford Univerity Press, 2008). 3–4; Coleman, Phillipson, *The International Law and Custom of Ancient Greece and Rome*. (London: MacMillan, 1911) 136–156; Douglas Macdowell, *The Law in Classical Athens.* (London: Cornell University Press,1986); David, J. Bederman, *International Law in Antiquity.* (Cambridge: Cambridge University Press, 2001). 130–134; PaulMonceaux, *Les proxénies greques*. (Paris: Ernest Thorin Editeur, 1886); S. Perlman, 'A Note on the Political Implications of Proxenia in the Fourth Century B. C.', *The Classical Quarterly* 8, no 3/4 (1958): 185–191; Benjamin W. Wells, 'Banking in Old Athens', *The Sewanee Review* 25, no 2 (1917): 144–163; M. B. Wallace, 'Early Greek "Proxenoi"', *Phoenix* 24, no 3 (1970): 189–208; Gabriel Herman, *Ritualised Friendship and the Greek City.* (Cambridge: CambridgeUniversity Press, 2002); A. W. Gomme, 'Two Problems of Athenian Citizenship Law', *Classical Philology* 29, no 2 (1934); Rachel Zelnick-Abramovitz, 'The Proxenoi of Western Greece', *Zeitschrift für Papyrologie und Epigraphik* 147 (2004): 93–106; Marie-Françoise Baslez, *L'étranger dans la Grèce antique.* (Paris: Belles Lettres, 1984); Andre Gerolymatos, 'The Proxenia and the Development of Diplomacy in Classical Greece', *Papers in Greek Archaeology and History in Memory of Colin D. Gordon* 1 (1987): 65.

30. 'A proxenos performed various services for the nationals of the sending State: giving them protection, obtaining security for their loans, promoting the sail of their cargos, and proving their wills if they died intestate. A proxenos also received diplomatic officials of the sending state and helped them with their official business and sometimes even with their personal affairs. A proxenos might be called upon to assist in negotiating treaties and arbitrating disputes between

the sending State and the Receiving State. On occasion a proxenos might be sent as ambassador of his own country to the country he previously represented....[T]he proxenoi, like our consuls, supplied information to the government that appointed them, and also furnished advice and assistance to the citizens who were subjects of that government whilst residing temporarily or more permanently in the territory of the other country.... If the foreign city which he represented was in any way involved in legal proceedings, he introduced to the court the advocates, who had been dispatched to plead its cause. He was present, as a witness, at certain civil transactions of his *proteges*, and particularly at the making of their wills. He determined the succession of deceased foreigners, who died without heirs. He obtained security for the loans of the strangers under his protection, and even acted as a broker as between the merchants of the two States in question...'In ColemanPhillipson, *The International Law and Custom of Ancient Greece and Rome*. (London: MacMillan, 1911: 149 – 153). On the functions of the *proxenos* see also Luke T. Lee and John Quigley, *Consular Law and Practice.* Oxford, New York: Oxford University Press, 2008: 4.

31. See Phillipson, Ibid : 154.

32. On the origins and subsequent developments of the *peregrine praetor* in Ancient Rome, compareDavid Daube, 'The Peregrine Praetor', *The Journal of Roman Studies* 41 (1951): 66–70; R. L. Gilbert, 'The Origin and History of the Peregrine Praetorship, 242-166 B.C.', *Res Judicatae* 2 (1941–1939): 50–58; Gordon E. Sherman, 'Jus Gentium and International Law', *American Journal of International Law* 12 (1918): 56–63; T. Corey Brennan, *The Praetorship in the Roman Republic Volume 1: Origins to 122 BC.* (Oxford: Oxford University Press, 2000); and T. Corey Brennan, *The Praetorship in the Roman Republic: Volume 2: 122 to 49 BC*. (Oxford: Oxford University Press, 2000); Henry C. Clark, 'Jus Gentium Its Origin and History', *Illinois Law Review* 14 (1920 - 1919): 243 - 265; Richard Wellington Husband, 'On the Expulsion of Foreigners from Rome', *Classical Philology* 11, n° 3 (1916): 315–333; Ando Clifford, 'Aliens, Ambassadors, and the Integrity of the Empire', *Law and History Review* 26, n. 03 (2008): 491–519; Ariel Lewin, *Gli Ebrei nell'Impero Romano: saggi vari*. (Firenze: Casa Editrice Giuntina, 2001); Gustav Ludwig Theodor Marezoll e Giuseppe Polignani, *Trattato delle istituzioni del dritto [sic] romano* (Stabilimento tipografico Perrotti, 1866). Francesco Trinchera, *Della genesi filosofica e storica del diritto internazionale e suoi fondamenti*. (Napoli: Stamperia della Regia Università, 1863); Randall Lesaffer, *European Legal History: A Cultural and Political Perspective: The Civil Law Tradition in Context*. 1st ed. (Cambridge: Cambridge University Press, 2009);Henry Sumner Maine, *Ancient Law* [1917]. (Memphis: General Books, 2010).

33. Shalom Kassan, 'Extraterritorial Jurisdiction in the Ancient World', *American Journal of International Law* 29, No 1 (1935): 237–247. For further support for this perspective, see E. A. Speiser, 'Cuneiform Law and the History of Civilization', *Proceedings of the American Philosophical Society* 107, n° 6 (1963): 536–541. Hassel E. Yntema, 'The Historic Bases of Private International Law', *The American Journal of Comparative Law* 2, n° 3 (1953): 297-317. Raymond Westbrook, *Studies in Biblical and Cuneiform Law*. (J. Gabalda et Cia., Editeurs, 1988). David J. Bederman, *International Law in Antiquity*. (Cambridge: Cambridge University Press, 2001). Christiana Van Houten, *The Alien in Israelite Law*. (Sheffield: Continuum International Publishing Group, 1991). Raymond Westbrook, 'Slave and Master in Ancient Near Eastern Law', *Chicago-Kent Law Review* 70 (1995): 1631–1676.

34. The Frankish capitulary act of 768, for instance, stated: 'All shall follow their own law, both Romans and Salians; and those who come from other regions shall live according to the law of their own country'. Quoted in Maurizio Lupoi, *The Origins of the European Legal Order*. (Cambridge University Press, 2007). 394-395. A detailed account of the different laws and institutions of the Middle Ages can be found in Simeon L. Guterman, *The Principle of the Personality of Law in the Germanic Kingdoms of Western Europe from the Fifth to the Eleventh Century*. (P. Lang, 1990); Robinson, Olivia F. T. David Fergus, and William M. Gordon, *European Legal History*. (Butterworths, 2000); Kim Keechang, *Aliens in Medieval Law: The Origins of Modern Citizenship*. (Cambridge University Press,

2000); Paul S. Barnwell, 'Emperors, Jurists and Kings: Law and Custom in the Late Roman and Early Medieval West', *Past & Present* 168 (2000): 6–29; Vernon Valentine, Palmer, 'Mixed Legal Systems...and the Myth of Pure Laws', *Louisiana Law Review* 67 (2006): 1205–1218; Walter Ullmann, *The Principles of Government and Politics in the Middle* (Taylor & Francis, 2010); Wendy Davies and Paul Fouracre, *The Settlement of Disputes in Early Medieval Europe*. (Cambridge: Cambridge University Press, 1986); James M. Blythe, *Ideal Government and the Mixed Constitution in the Middle Ages*. (Princeton: Princeton University Press, 1992). On legal pluralism in the Middle Ages and today, see Brian Z. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global', *Sydney L. Rev.* 30 (2008): 375 – 411; Hendrik Spruyt, *The Sovereign State and its Competitors*. (Princeton: Princeton University Press, 1994); Ralf Michaels, 'The Re-Statement of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism', *Wayne Law Rev.* 51 (2005): 1209–1260.

35. The statement appears in Friedrich Karl Von Savigny, *Geschichte des römischen Rechts im Mittelalter* vol.i (Heidelberg: JCB Mohr, 1834). 116. Agobard become Archbishop of Lyons in 816.

36. For an overview of competing jurisdictions during and following the Middle Ages, see Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments*. (The Lawbook Exchange, Ltd.,1841); Friedrich Karl Von Savigny, *Private International Law. A Treatise on the Conflict of Laws: And the Limits of Their Operation in Respect of Place and Time.* Vol. 8. (T. & T, 1869); Clark Ehrenzweig and Albert Armin, *A Treatise on the Conflict of Laws*. (West Pub. Co., 1962); Joseph H. Beale, *Bartolus on the Conflict of Laws* [1914]. (The Lawbook Exchange, Ltd. 2003); Hessel Yntema, 'The Historic Bases of Private International Law', *The American Journal of Comparative Law* 2, no. 3 (1953): 297–317; For a structural overview of the historical development of private international law with regard to public international law, see Alex Mills, 'The Private History of International Law', *International and Comparative Law Quarterly* 55 (2006): 1–50.

37. On the expansion of trade during the Middle Ages generally, see Roberto Sabatino Lopez, Raymond Irving Woodworth, and Olivia Remie Constable, *Medieval Trade in the Mediterranean World: Illustrative Documents*. (Columbia University Press, 2001).

38. George Williams Keeton, *Extraterritoriality in International and Comparative Law.* (Hague: Librairie du Recueil Sirey 1948). 292. For an outstanding treatise of the history of consular institutions, beginning with the Middle Ages, see Miltitz, Alexandre. *Manuel des consuls*. A. Asher, 1840. William Mitchell treats the development of the judge-consul within the wider framework of the *lex merchatoria* that, according to the writer, 'has been aptly called the private international law of the Middle Ages. It was regarded as a kind of *jus gentium* known to all the merchants throughout Christendom and the later writers who treated the subject laid stress upon its international character.' See William Mitchell, *An Essay on theEarly History of the Law Merchant*. (Cambridge, Univ. Press, 1904). 1. On the early developments of consular institutions between European traders, see Chapter III, *The Courts of the Law Merchant:* 39 - 78. See also Avner Greif, Paul Milgrom, and Barry R. Weingast, 'Coordination, Commitment, and Enforcement: The Case of the Merchant Guild', *Journal of political economy* (1994): 745 – "...Merchant guilds emerged during the late medieval period to allow rulers of trade centres to commit to the security of alien merchants. The merchant guild developed the theoretically required attributes, secured merchants' property rights, and evolved in response to crises to extend the range of its effectiveness, contributing to the expansion of trade during the late medieval period.' For further readings, see Paul R. Milgrom and Douglass C. North, 'The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs', *Economics & Politics* 2, no. 1 (1990): 1–23; Leon E. Trakman, *The Law Merchant: The Evolution of Commercial Law*. (Wm. S. Hein Publishing, 1983); Sheilagh C. Ogilvie, *Institutions and European trade: merchant guilds, 1000-1800*. (Cambridge University Press, 2011). Emily Kadens, 'Order Within Law, Variety Within Custom: The Character of the Medieval Merchant Law', *Chicago Journal of International Law* 5 (2004): 39–65;

Bruce L. Benson, 'The Spontaneous Evolution of Commercial Law', *Southern Economic Journal* (1989): 644–661. Charles Donahue, 'Medieval and Early Modern Lex mercatoria: An Attempt at the Probatio Diabolica', *Chicago Journal of International Law* 5 (2004): 21 – 38; Charles Gross and Hubert Hall, *Select Cases Concerning the Law Merchant*. Vol. 1. (B. Quaritch, 1908).

39. See Alexandre Miltitz, *Manuel des consuls*. Vol. ii. (A. Asher, 1840).

40. Shih Shun Liu. *Extraterritoriality: Its Rise and Decline.* (New York: AMS Press, 1969). 11.

41. On the development of 'quasi-sovereign' competences, including an autonomous system of autonomous adjudication, by the British East India Company, see Philip J. Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India*. (Oxford University Press, 2011); James D Tracy, *The Rise of Merchant Empires*. (Cambridge: Cambridge University Press, 1990). For substantial instances of the judicial administration process within the East India Companies, as well as their impact on the development of indigenous legal systems, see Bankey Bihari Misra, *The Judicial Administration of the East India Company in Bengal, 1765–1782*. (Montilal Banarsidass, 1961); Bhawan Ruangslip, *Dutch East India Company Merchants at the Court of Ayutthaya: Dutch Perceptions of the Thai Kingdom, Ca. 1604-1765*. Vol. 8. (Brill, 2007). Santhi Hejeebu, 'Contract Enforcement in the English East India Company', *Journal of Economic History* 65, no. 2 (2005): 496–523; Kirti N. Chaudhuri, 'The English East India Company and its Decision-Making', In *East India Company Studies: Papers Presented to Professor Sir Cyril Philips*, edited by Kenneth Ballhatchet and John Harrison, 97–121. (Hong Kong: Asian Research Service, 1986); E. B. Sainsbury, *Calendar of the Court Minutes of the East India Company, 1664–1667*. (Oxford: Oxford University Press, 1925); Huw V. Bowen, *The Business of Empire: The East India Company and Imperial Britain, 1756–1833*. (Cambridge University Press, 2006); Kirti N. Chaudhuri, *The Trading World of Asia and the English East India Company: 1660-1760*. (Cambridge University Press, 2006); John William Kaye, *The Administration of the East India Company: A History of Indian Progress*. (Rich. Bentley, 1853); Els M. Jacobs, *Merchant in Asia: The Trade of the Dutch East India Company during the Eighteenth Century*. (CNWS Publications, 2006).

42. On the genealogy of European trade in China see John Villiers, 'Silk and Silver: Macau, Manila and Trade in the China Seas in the Sixteenth Century', *A Lecture Delivered to the Hong Kong Branch of the Royal Asiatic Society at the Hong Kong Club* 10 (1980). D. Warres Smith, *European Settlements in the Far East: China, Japan, Corea, Indo-China, Straits Settlements, Malay States, Siam, Netherlands, India, Borneo, the Philippines, Etc...*(London: S. Low, Marston, 1900); Chaudhuri, Kirti N. *The Trading World of Asia and the English East India Company: 1660–1760*. Cambridge University. On the role that the East India Companies had in the establishment of extraterritoriality in China, see also Wellington Koo, *The Status of Aliens in China*. (Columbia University, 1912: 62–165). See also Earl H. Pritchard, 'The Origins of the Most-Favored-Nation and the Open Door Policies in China', *The Far Eastern Quarterly* 1, no. 2 (1942): 161–172.

43. By reference to the Ottoman Empire, Augusti calls it the *immiscibility of the alien doctrine*: 'Particularly in view of the Islamic doctrine of the immiscibility of Moslem and Christian communities and the radical divergence between the legal system of the Ottoman Empire and the Western Powers, it was considered to be the most natural and proper arrangement for foreigners in the Ottoman territories to be subject exclusively to the laws and jurisdiction of their own sovereigns, acting through their ministers and consuls.' See Eliana Augusti, 'From Capitulations to Unequal Treaties: The Matter of an Extraterritorial Jurisdiction in the Ottoman Empire', *Journal of Civil Law Studies* 4 (2011): 294.

44. On the development of the nation-state in Europe, see generally Jens Bartelson, *A Genealogy of Sovereignty*. (Cambridge University Press, 1995); Charles Tilly, *Coercion, Capital, and European States, AD 990–1992*. (Oxford: Blackwell, 1992); Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*. (Princeton, NJ: Princeton University Press, 2006); Perry Anderson, *Lineages of the Absolutist State*. (Verso Books, 2013); Jürgen Habermas and Ciaran Cronin, 'The European Nation-state: On the Past and Future of Sovereignty and Citizenship', *Public Culture* 10, no. 2

(1998): 397–416; Jean Gottmann, 'The Evolution of the Concept of Territory', *Social Science Information* 14, no. 3 (1975): 29–47; Christian Reus-Smit, 'The Constitutional Structure of International Society and the Nature of Fundamental Institutions', *International Organization* 51, no. 4 (1997): 555–589; Thomas J. Biersteker, 'State, Sovereignty and Territory' in *Handbook of international relations.* (Routledge, 2002). 157–176; James Crawford, *The Creation of States in International Law*. (Oxford University Press, 2006). For a critical approach to the process of state building, see James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition have Failed*. (Yale University Press, 1998); Stephen D. Krasner, *Sovereignty: Organized Hypocrisy*. (Princeton University Press, 1999); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*. (Cambridge University Press, 2007.) For a broad, theoretical perspective, see also Martti Koskenniemi, 'Les doctrines du droit international dans le temps', In *Société francaise pour le droit international, Colloque de Paris: Le Droit international et le temps*. (Paris, Pedone, 2001). 35–47.

Chapter II – 'No Law Behind the Great Wall'

The west is the best.
The west is the best.
Get here, and we'll do the rest.
The Doors, *The End.*

1 In 1999, a book entitled *China Joins the World* by Professors Elizabeth Economy and Michel Oksenberg was published by a 'non-profit, non-partisan organization' (as the Council on Foreign Relations defines itself in the preface to the work).[1]Through the provision of a number of case studies in the fields of arms control, human rights, international trade, international investment, and environmental and intellectual property law, the authors stated that their goal was to answer the question 'How do we advance U.S. priorities?' through an exploration of 'those strategies most likely to elicit cooperative behaviour on the part of the Chinese'.[2] After praising the increasing Chinese engagement in the implementation of international standards, the preface nevertheless highlights some of the perceived structural shortcomings in China's process of opening towards the international community. More specifically, not only do Chinese leaders continue to promote a sense of insecurity among their neighbours, but also 'claim to seek the rule of law while resisting establishment of the basic conditions for it'.[3] Furthermore, the monograph argues, because they are 'unconstrained by law at home', Chinese politicians are prone to domestic corruption and arbitrary action.[4] Hence, in order to avoid an apocalyptic China becoming 'an assertive and disruptive force', the piece suggests a number of practical prescriptions for U.S. foreign policy makers.[5] Starting with a general exhortation to proceed with caution and not to lose the sense of American priorities, the authors advocate the retention of a considerable military presence in Asia and the consolidation of unofficial relations with Taiwan. They conclude categorically that 'we cannot allow our national and analytical capabilities to become dependent on China and Taiwan'.[6]

2 Now, what is the discursive message that such a book may transmit to an average reader casually leafing through it? In other words, how does it contribute to shaping our perception of the political and territorial entity known as 'China'?

3 Firstly, the title, *China Joins the World,* raises a number of puzzling ontological questions. Was China not inthe world before? And if so, where was it? *Who* isthe world? Andwho is China? Is it the Chinese delegation at the UN? Is it the Chinese Premier? Civil society? And what about the Chinese expatriate community who have been living abroad for decades? What are the criteria for rendering China a global outsider/insider? And, most importantly, according to whoseperspective? That of the Chinese? Such questions are not intended to directly critique current or past U.S. foreign policy towards Asia, nor are they intended to send the reader into hermeneutic labyrinths without Ariadne's thread to mark the exit. Instead, they simply aim to demonstrate how a sentence that, at a first glance, appears to be deeply normalized may actually hide a number of *a priori* conceptual and political assumptions that contribute to shaping and perpetuating our understanding of a certain notion of geo-political reality.[7]

4 By presenting 'China' and 'The World' as a mutually exclusive *dichotomy*, the book reinforces the idea that they are ontologically independent, antithetical and irreconcilable categories. The general reference to 'China' implies the perception of an internally coherent and homogeneous political society suffering from some kind of overall value deficiency compared to the rest of the world it seeks to eventually enter. Moreover, since the book is written in English, one may fairly suppose that its intended audience is primarily Western readers. Given the implicit dichotomy in the title, reasoning by exclusion would arguably lead the average reader to conclude that, as she is not Chinese, she must belong to 'the world', thus reinforcing the conceptual overlap between 'the world' and 'the West', and corresponding marginalization of 'the Rest'. Lastly, the suggestion that China *joins* the world is founded upon the underlying assumption that, before this major shift, China was fluctuating in a sort of onto-normative *vacuum.* Such anassumption is further reinforced by later statements, such as 'they are unconstrained by law at home' and 'without the rule of law'. It is extremely unlikely that the average reader will realize that as far back as the Tang dynasty, China had developed a sophisticated system of legal codes. More likely, such allegations will confirm and strengthen the perception of a present and past 'lawless' China.

5 Considering the enormous power of graphics in the instant communication of messages, as well as empirical evidence that many readers actually *do* judge and buy a book by its cover, the monograph's frontispiece also bears an overview.[8] The abnormally large font of 'CHINA', written in capital letters and surrounded by a vivid red background, suggests that 'CHINA' is something threatening and incumbent. At the same time, 'CHINA' and 'THE WORLD' also constitute an ontological unity. Not only do the title's three lines form the shape of a single rectangle, but one can also see that the word 'CHINA' is slowly slipping down from the red zone to the yellow, where 'THE WORLD' belongs. This creates a contrast between a static and accomplished 'WORLD', on the one hand, and a dynamic, changing 'CHINA, on the other. Most importantly, the red zone is not simply a coloured half page, but represents the Chinese flag. Such graphic choice may actually suggest that, by joining the golden 'WORLD' underneath, communist 'CHINA' is gradually leaving behind its old identity in order to reach the West and its subtitled promise of 'PROGRESS AND PROSPECTS'.[9]

6 Again, these are scattered thoughts of a personal nature and they do not aim at contributing to the contemporary debate on American geo-political strategies in Asia, or at demonizing the recent trends towards the internationalization and institutionalization of the Chinese domestic legal system. Moreover, asserting that '*The intrinsically pluralistic*

political, social and geographical entity that English speakers usually refer to as "China" started implementing legal reforms that will bring it closer to the current Euro-American majoritarian ideal of a proper normative system. And that's good (don't question why)!', in 12 point Times New Romans font on a white cover page, would be slightly ridiculous. Surely, this quotation would not help market the publication.

7 The purpose of the following discussion is simply to underline how the communication of even the simplest messages – such as *China Joins the World* – may not be neutral, and may obscure, to a greater or lesser extent, discursive, cultural and/or value *pre*suppositions and desires. Admittedly, transmitting meanings from one actor to another always implies selecting a number of elements from an endlessly complex and chaotic reality, and rhetorically framing them in a more or less coherent and convincing discoursein orderto persuade the reader of their rationality, inherent truthfulness, and 'normality'. However, when backed by a sufficient degree of authority, this natural argumentative tendency has the dangerous potential to raise aparticular discourse to the status of a universalisticGrand-Narrative, which not only resists critique but renders the very exercise counter-intuitive and irrational.[10]

8 The narrative that must be considered before engaging in a substantial discussion of extraterritorial consular jurisdiction is an old, odd, but remarkably enduring story. It derives from the alleged intrinsic legality, rationality, justness and neutrality (i.e., superiority) of Western legal systems *vis-à-vis* a chronic lack of 'real' law in China and Asia and the Middle East more generally.[11] In other words, a considerable number of both historical and contemporary Western representations of Asian and Middle Eastern normative orders evince an *a priori* condemnation for their reliance on purportedly incomplete, corrupt or inadequate, if not entirely absent, internal legal orders, resulting in their marginalization as defective members of the international community.[12]

9 Whereas *China Joins the World* provides a recent example of the pejorative essentialization of China, similar trends can be identified in past political and philosophical discourses as well. If it is true that the 'Germans have done in thought what the British have done in fact',[13] Hegel refers to China as a 'dull half-conscious brooding spirit'.[14] He even goes so far as to state that 'it would have been better if Confucius had never been translated', as all he offers is 'a highly tasteless prescription of cult and manners'.[15] It may be relevant to recall that the basis ofHegelian philosophy is the idea of a universal Spirit, or *Geist,* that leads history and dialectically 'reveals' itself to the world through some necessarily rational and unavoidable steps. Accordingly, within the Hegelian dialectic reasoning, the Western (i.e. highest) degree of civilization constitutes the thesis, or 'steady state of the story', with the static inferiority of non-Western cultures cast as the antithesis, and the imperative of progress, under European supervision, as the final synthesis and ultimate expression of freedom. Otherwise stated, it was necessary, unavoidable and rational that Chinese society would one day reach, and thus be freed by, the political and prescriptive order of Hegel's Prussia.[16] Similarly, John Stuart Mills, often referred to as the founding father of Western liberalism, also roots his thought in an epistemology of hierarchical values, of the pinnacle of which are the European notions of progress and civilization as both the sceptre and the stick.[17] In a related vein, to account for China's failure to develop a capitalist economy, Weber asserted negatively that 'Chinese intellectual life remained completely static', as Confucianism bridled its society in a self-referential and bigoted veneration of the status quo.[18] Even Marx saw China as 'vegetating in the teeth of time' and, consequently, a poor candidate for the proletarian revolution.[19] In sum, it is striking

to reflect upon the ways in which the giants of Western philosophy have produced work deeply permeated by cultural prejudices, Darwinian evolutionary speculations and, ultimately, racism.

I. Orientalizing Normativity in the Rest

10 Even before one can legitimately analyse Chinese legal history, it seems that one is compelled to demonstrate that such history actually existed. Accordingly – and as a remarkable exception to the dominant view of his times – in 1899, Sir Ernest Alabaster, the son of the British Consul-General to China and subsequently barrister at The Honourable Society of the Inner Temple in London, expressed his astonishment at the idea shared by many Europeans with regard to Chinese law:

> 'To all intents and purposes foreigners are completely in the dark as to what and how law exists in China. Some persons whose reputation for scholarship stands high would deny the right of the Chinese to any law whatsoever – incredibly, but to my knowledge, a fact.'[20]

11 The astonishment felt by Sir Alabaster survived in strikingly similar terms almost a century later. At that time, when Professor William Alford was beginning his graduate programme in Chinese studies, a renowned scholar posed as his first question: 'Why I, as a young man of seeming intelligence, was intent on wasting my time on the study of Chinese legal history.'[21] However, China provides just *one* example among many of the dominant historical belief in the intrinsic 'non-legality' of the so-called 'Orient'[22] A coherent illustration of this process of the discursive essentialization (or 'Orientalizing') of different (legal) cultures is elaborated by Edward Said, in his well-known monograph *Orientalism*.[23] Said defines the concept as the set of discursive and rhetorical structures that Continental lawyers, novelists, statesmen, scientists and anthropologists, among others, have erected to frame an initially European but increasingly global understanding of the Orient. According to Said, for centuries European experts depicted the Orient as the dark land of exotic odalisques, sheiks, and wantonness, as well as a nest of brutality, corruption, irrationality and lawlessness. In other words, the Orient became a sort of relief valve for both romanticized Western fantasies and the cultural vilification of the 'Other'. Through this process of epistemic imperialism, the Orient has been gradually reduced to a passive object of observation, to be analysed, categorised and ultimately judged by the purportedly cognitively-superior Western subject:

> 'The Orient and Islam have a kind of extra-real, phenomenologically-reduced status that puts them out of reach of everyone except the Western expert. From the beginning of Western speculation about the Orient, the one thing the Orient could not do was to represent itself.'[24]

12 Continuing this reasoning, neither the West not the Orient have, nor have they ever had, in Said's opinion, a 'real' ontological foundation, as both are the result of collectively-constructed and widely-perpetuated cognitive categories. Nevertheless, Orientalist scholars greatly contributed to the fictitious establishment of two separate and antithetically opposed epistemic worlds: the West and the Rest, We and They, the Self and the Other, China and the World.[25] Most importantly, not only did Western academics share and propagate such meta-categorizations, but, through a gradual process of internationalization, those categorizations eventually became a constitutive part of the Oriental internal Self. Hence, particularly during the last century, Eastern societies began a sort of 'Self-Orientalization', whereby they came to perceive themselves as lustful,

brutal, corrupted, irrational and lawless, and began to aim at overcoming such self-conceptualizations by culturally and socially conforming to the West.[26]

13 But how, one may wonder, does this relate to extraterritorial consular jurisdiction? In other words, why engage in a discussion on legal and cultural Orientalism while in the context of extraterritoriality? Put simply, substituting 'Chinese or Ottoman law' for the 'Orient' and 'Islam' in Said's quotations presents a fairly accurate picture of how legality was Orientalised in Asia and the Middle East when extraterritorial consular jurisdiction was first established. Accordingly, in reference to the debate over whether the Ottoman Empire was 'ready' for the abolishment of capitulations, the Scottish lawyer and legal scholar James Lorimer stated: '[International lawyers] had bitter experience of the consequences of extending the rights of civilization to barbarians who have been incapable of performing their duties, and who possibly do not even belong to the progressive races of mankind.'[27] The direct reference to notions such as 'rights' and 'duties' aside, which, one should not forget, are notnatural institutions of every legal culture, the racial and culturally hegemonic assumptions behind Lorimer's statement are clear. Similarly, with regard to the Chinese normative order, Sir Edward Harper Parker, her Majesty's consul to Shanghai, argued that, 'with the Chinese law, we are carried back to a position whence we can survey, so to speak, a living past, and converse with fossil men'.[28]

14 The references discussed above provide direct evidence that when European consular officers and experts first came to study the Ottoman and the Chinese normative systems in significant numbers, they tended to dismiss such systems, comprehensively, for lacking 'real' law. Whatever structured the collective behaviour of those societies could perhaps have been qualified as religion, superstition or morality, but it certainly lacked the purity and inherent rationality of a positivist legal order. The diagnosis of such a fallacy usually involved symptoms such as: (1) : the lack of a sovereign state, properly speaking (1); (2) the lack of a constitution (2); (3) a chronic confusion between law and morality (3); (4) the alleged nonexistence of the individual subject *vis-à-vis* the overall society; (5) a pathologic conflation of law and religion; (6) the lack of a clear division between administrative and judicial powers; (7) the failure to distinguish between civil and penal law; (8) the vagueness or compete nonexistence of tort law; (9) the deficiency of reliable property and succession rights; (10) the nonexistence of positive procedural and substantial codes of law; (11) the absence or inappropriate functioning of a territorially-diffused and hierarchical court system charged with the impartial application of the law; (12) the lack of educated judges and proper legal educational institutions more generally; (13) widespread corruption and inefficiency of the local functionaries; (14) the inadequacy or total absence of the appropriate infrastructure for physical detention; and, last but not least, (15) the brutality of indigenous substantive law, particularly in criminal cases involving foreigners. In sum, the great majority of Asian and Arab societies lacked 'law', as well as internal and external legal subjectivity.[29]

15 It should be clear, however, that the purpose of the present chapter (and this thesis more generally) is not to persuade the reader of the existence of law in nineteenth-century China and Turkey. It is assumed that human societies always had one or more normative systems regulating and sanctioning social behaviour. Of course, such systems did not necessarily derive from a set of positive acts emanating from the will of a sovereign state, which is certainly a relatively recent political phenomenon. The Hobbesian assertion, however, that prior to the appearance of the Leviathan's sword, human beings lived in a

perpetual, lawless ‘state of nature’,is a discursive fiction, propagated by a theoretical branch ofContinental philosophy.[30] Overall, then, the primary purpose of this discussion is to illustrate the ways in which legality in the so-called ‘Orient’ has been sublimated through Western majoritarian discourses.

II. Constructing the Legal Ego in the West

16 The allegation that China and the Ottoman Empire comprehensively lacked a positive legal system ultimately contributed to the persistent ‘Othering’ of those societies as ‘lacking something’.[31] Such a conclusion affected the Western perceptions of normativity in the East, redoubling the white man’s burden of exporting redemption through (legal) civilization.[32] At the same time, it also helped to consolidate the Euro-American *self-perception* of the West as the ultimate ideal-type and referential standard of legal subjectivity. As ‘Orientalism as a discourse entails the projection onto the Oriental Other of various sorts of factors that “we” *are not*, at the same time it contributes to define structurally what “we” *are* by identifying those elements that ultimately render us a legal subject’.[33] Otherwise stated, we are what they are not, in a continuous, foundational relationship of absence and presence.

17 Hence, if the Chinese are irrational, we are rational; if the Ottomans are luxurious, we are sober and disciplined; if they are ‘backward’, we are modern; and if neither possesses a proper legal order, we do. On the dualistic nature of categories of the real, the Greek philosopher Anaximander wrote that the world is composed of an infinite number of reciprocally-constituting and mutually-exclusive cognitive categories, such as ‘ugly v. beautiful’, ‘cold v. hot’, ‘bad v. good’, ‘black v. white’. None of them, he claimed, could ever exist independently from its opposite.[34] Similarly, one could hardly talk about legality without the parallel existence of the epistemic category of ‘non-legality’.[35] Accordingly, in accusing the Asian and Arab societies of not only lacking sovereignty, but also legal subjectivity, positive codes of law and neutral judges reinforced the Western self-perception that we do possess such institutions, and that they are ultimately indispensable for making us ‘us’. Ascertaining the non-Western lack of legality and sovereignty was, arguably, like looking in a mirror to find one’s image reflected upside down.

18 Regarding international law more specifically, the process(es) surrounding its consolidation as a discipline and practice have followed a similar path. Sovereignty, statehood, the doctrine of territorial jurisdiction or the principle of non-intervention – to recall just a few examples – did not materialise out of thin air in Osnabrück and Münster in late 1648.[36] As with any other social institution, they developed out of a gradual and osmotic process of clashes and encounters, in which the ‘discovery’ and perception of non-European societies played a key role. According to Horowitz, for instance, ‘Europe's growing political engagement in Asia and Africa forced international lawyers to reconsider the intellectual underpinnings of their science’.[37] More specifically, the author argues that the colonial experience contributed to the emergence of an epistemic shift from the Vattelian theories of universalistic natural law towards the positivist conception of international law as jurisprudential, based on the formal consent of civilized, Christian states.[38] Consequently, the ‘standard of civilization’ began to play a primary role in the theoretical and substantial consolidation of international law.[39]

19 Another major theorist of the mutually-constitutive relationship between colonialism and international law is Antony Annghie. Beginning with the sixteenth century's epistemic confrontation between the Spanish and the American native populations, he argues that colonialism played an increasingly important role in the identification, as well as the global affirmation, of a considerable part of basic doctrines and principles of international law.[40] Similarly, with regard to the 'exportation' of state sovereignty to China, Japan and the Ottoman Empire, Kayaoglu underlines the role that the imperialist encounterbetween Western and non-Western normative cultures had in the doctrine's consolidation both in Europe and the 'Orient'.[41]

20 Hence, not only did 'Orientalism', as discursively applied to the majority of non-European societies, support the Western legal ego's self-perception of legality, neutrality and normative superiority with regard to its domestic legal orders, but it also greatly influenced the development of international law in broader terms. Sovereignty was not created *ex nihilo* at Westphalia, but rather it resulted from a long, intercultural joint venture. Assessing whether or not non-European societies originally possessed a legal order, however, clearly depends on one's general conception of what constitutes, or should constitute, a legal order. Whereas such a conception may seem to be intrinsically relative and subjective, the existence of dominant epistemic discourses that shape and are shaped by our notion of legality is hardly deniable today, as it was in the past. Therefore, rather than presumptuously wondering if China or Turkey had law before the Europeans arrived, we should instead attend to the question as to who sets the ultimate standards of what constitutes legality for the 'progressive races of mankind'.[42]

III. The Role of Legal Experts in Legitimizing Extraterritorial Consular Jurisdiction

21 Legal experts had, as they continue to have, enormous power in shaping our understanding of legality and of how the world works, or *should* work, more generally. After all, every barrister, lawyer and student of international law acquired a great amount of his or her knowledge from the 'expert', and the allegedly neutral and objective teachings of their professors and fellow practitioners.[43] Someone without a background in legal studies, moreover, wondering whether a certain factual situation may be referred to as 'legal', tends to deduce intuitively that an expert would have *the* answer. An enormous variety of technical experts do increasingly hold a monopoly on knowledge of the law. Most importantly, such epistemic communities are more than simple groups of scholars, or professionals who seek knowledge for the mere sake of knowing.[44] The apologetic and genealogic links that they often have to a dominant discursive and institutional apparatus should not be neglected.[45]

22 Whereas today one has, possibly, greater scope for engaging in alternative epistemic discourses, facilitated by greater access to a variety of sources of information and the relative ease of moving around the globe, the situation was quite different in the nineteenth century. A trip to Asia and the Middle East could take months, if not years. Consequently, statesmen and foreign ministers of European and American states – i.e. those who ultimately decided upon Western consular institutions abroad – rarely engaged in long-distance journeys to the territories upon whose jurisdictional competences they deliberated. Instead, they tended to delegate the task of representing and promoting the interests of their countries to their military, diplomatic and legal

functionaries, going so far as to rely, in some cases, upon the testimony of third parties.[46] An illustrative example occurred in 1833, when the House of Commons debated a bill establishing a new extraterritorial court in China, claiming exclusive jurisdiction over all cases involving a foreign element. Despite the fact that neither Lord Palmerstone nor the majority of his fellow parliamentarians had ever been to Asia, according to Shin Shun Liu, the arguments advanced in favour of the bill were mostly based upon 'the indictments made by the British merchants against the legal System of China'.[47] Although the bill was not passed during that particular parliamentary session, the example clearly illustrates the role that third parties, even merchants, had in filtering information and ultimately pushing statements towards concrete political decisions.[48]

23 Hence, Continental policy makers' initial perceptions of legality in Asia and the Levant were considerably influenced by the cognitive mediation of their compatriot merchants, diplomatic agents and legal experts. In a world where education and literacy were still primarily the purview of the upper class elite, the third-hand stereotyping of the "legality" and degree of civilization of the Far and Middle East was likely even more amplified when simplistically conveyed to the majority of the population. Most importantly, lawyers played an enormous role in the construction and further articulation of 'legal orientalism'. Kayaoğlu argues that legal specialists often occupied senior positions in the Colonial and Foreign offices, and that the majority of the consular and colonial personnel received intense legal training.[49] Consequently, the distinction between professional policy makers and legal experts was not always clear and, apparently, the competence of lawyers often shifted form the more indirect provision of technical expertise to active decision making.[50]

24 Some authoritative scholars of the calibre of John Austin, John Stuart Mill and Jeremy Bentham, on the other hand, at one time worked for the East India Company, for which they travelled to the Ottoman Empire, India and, sometimes, Asia.[51] Consequently, not only did the scholars' experiences abroad contribute to the development of their own generally Eurocentric and culturally-exclusive conceptions of civilization and progress, but, through their work, went on to shape the cognitive perceptions entire generations of lawyers, economists, and future colonial officers. Moreover, because the academic work of European experts was often subject to the scrutiny of their governmental or university authorities, jurists and scholars writing on foreign law were obliged to frame their writings accordingly, and pre-emptively consider the political and legislative milieu in their assessments. Therefore, awareness of their primary audience was also extremely important to Western scholars in the construction of 'Orientalizing' discourses at the time of the first establishment of extraterritorial consular jurisdiction.[52] Consequently, the theoretical framework they used to examine the Chinese and Ottoman normative systems was often a squarely positivist approach to law. John Austin stated this clearly in the opening of his essay on *The Uses of the Study of Jurisprudence*:

> 'The appropriate subject of Jurisprudence, in any of its different departments, is positive law: meaning by positive law (or law emphatically so called) law established or "positum", in an independent political community, by the express or tacit authority of its sovereign or supreme government.'[53]

25 When looking for *positum* codes of law, expressed by the authority of a sovereign, in the above-mentioned territories, the majority of Western lawyers could not find much, given that the sources of their legal orders were of a radically different, often unwritten, nature. Until proven otherwise, for instance, one can hardly understand Mohammed as a 'sovereign or supreme government' in the positivist sense of the term. Otherwise stated,

Western legal experts, in failing to realise the depth of the normative differences between non-Western cultures and their own,examined them for typically Western legal categories and logic systems. And, when, to their astonishment, they discovered their absence, they immediately concluded that those cultures 'lacked' something. Hence, such a 'lack' had to be addressed, gradually, through the establishment of extraterritorial consular jurisdiction and, subsequently, through the structural reform of the Chinese and Ottoman legal systems in their entirety. An excellent and recent illustration of this process of *a priori* cognitive framing of Chinese legality is provided by an anecdote of Janet Ainsworth. During a lecture on the Imperial China's 'contract law', a student suddenly raised his hand and asked Ainsworth whether the Chinese had also developed promissory estoppel:

> 'Apparently [the student] regarded the development of the concept of promissory estoppel as a natural evolutionary outgrowth of the law of contracts, such that any civilization possessed of a jurisprudence of contract doctrine would eventually produce the functional equivalent of Section 90 of the Restatement of Contracts.'[54]

26 Although relatively funny, the example illustrates what may be a natural temptation to categorize reality according to the epistemic categories that are directly familiar to the observer. Arguably, beliefs too often hold us, rather than the contrary.[55] Hence, it is hardly surprising that the general nineteenth-century belief in the *devoir-être* of a positivist legal order eventually led to the conclusion that the Chinese and Ottoman legal cultures represented a 'defective legality'. Legal experts played a primary role in this process, as they frequently acted as the first 'evaluators' of those standardizing orders, and constituted major channels of diffusion of such evaluations to the public.[56]And, once non-Western lawlessness had been demonstrated, extraterritoriality, together with the subsequent imperatives for massive internal legal reforms, emerged as a natural solution.[57]

IV. 'Tradurre è Tradire': On the Role of Language in the Establishment of Extraterritorial Consular Jurisdiction

27 A famous Italian aphorism states that translation is betrayal. Not only is language arguably thecentre of gravity around which legal studies turn but, most importantly, it also comprises a certain understanding of the world, a society's system of values, and its general perception of how reality works or should work.[58] Whereas, today, this is certainly still true, the enormous importance language assumed in the colonial encounter between Westerners and Asian and Arab societies is hardly imaginable in the contemporary context.[59] It is for this reason that, in partial apology to the alleged epistemic sin of Western legal experts, it is important to briefly discuss the role linguistic understanding (and, often, misunderstanding) had in the establishment and early articulations of extraterritorial consular jurisdiction.

28 In the case of the Ottoman Empire, linguistic, cultural and legal exchanges with the Continent were, comparatively, more frequent and intense within the Mediterranean basin. Beginning in the early Middle Ages, a considerable number of Arab scholars engaged in the translation of major Greek classics of philosophy, thereby becoming accustomed to the Ancient Greek language.[60] Moreover, for centuries, Europeans engaged in long-term commercial, diplomatic, military and other sorts of encounters with the Sublime Porte, gradually developing the basic tools for ensuring mutual communication.[61]

Hence, while certainly not absent, cognitive misunderstandings between Europeans and the rulers of the Ottoman Empire were arguably less evident than those in Asia at the time extraterritorial consular jurisdiction was established.[62]

29 However, the pictorial and descriptive nature of Chinese writing, the unfamiliar sound of its phonetics, as well as the different pantomimic expressions of its speakers transformed language into a nearly insurmountable barrier when Europeans first arrived in the Qing Empire. According to Kristoffer Cassel, in the mid-nineteenth century, very few Chinese officials in East Asia had even a rudimentary understanding of English or French, and most official and diplomatic correspondence had to be conduced either in Chinese or through an intermediary language, such as Dutch or Portuguese.[63] Similarly, in his 1810 pioneering translation of the Qing Code, Sir George Thomas Staunton emphasized how hard it was to study a legal system that was 'buried in a language by far the least accessible to a foreign student of any that was ever invented by man'.[64] Similarly, the American missionary Peter Parker began the logbook of a pioneering expedition to Japan and the Ryukyu Islands by telling the odd story of how they eventually acquired their misfortunate translators.[65]

30 Hence, translating Asian languages into French and English and *vice versa* during the nineteenth century was an arduous task. This was particularly true when trying to communicate conceptual constructions such as 'state', 'territoriality', 'sovereignty', 'nation', 'citizenship', and 'jurisdiction' that, for their intrinsically abstract and fictitious nature, could not be drawn, mimed or directly transmitted by any other form of immediate communication. With regard to 'nationality', for instance, Chinese contemporary historian Immanuel Hsu described how, shortly before the outbreak of the Opium War, the British superintendent of trade to China urged the Viceroy of Canton to settle the differences between the 'two nations' peacefully. The Chinese viceroy, according to Hsu, was puzzled by the term 'two nations', which he took to mean England and the United States.[66] Cassel provides an example more directly connected to the establishment of extraterritoriality. At the conclusion of the Opium war, the Chinese Emperor was forced to sign the 1843 General Regulations of Trade with the United Kingdom, prescribing the opening of five Chinese city-ports to foreign trade. A complementary protocol containing the so-called 'most favoured nation clause' was added just few months later. Article 8 of the latter instrument, known as The Supplementary Treaty of the Bogue, stated that all Western nations were allowed to conduct business in the new city-ports 'on the same terms as the British', adding that, if China granted any sort of additional 'immunities and privileges' to other foreign states, British subjects could enjoy the same immunities.[67] Interestingly, Cassel highlights that while the British talked about *immunities* and *privileges*, the Chinese version of the text used a translation corresponding rather to our ideas of *grace* or *kindness*.[68]

31 Admittedly, the present thesis is limited to the consideration of primary and secondary sources primarily, though not exclusively, in English. Regrettably, it would be far beyond my linguistic skills to engage in an in-depth examination of how the Chinese and Ottomans themselves perceived extraterritorial consular jurisdiction and, more broadly, Western legal systems.[69] Most likely, as the West 'Orientalised' the Orient, so did the societies of the Far and Middle East 'Westernalize', or 'barbarize', the West. Be that as it may, while readers consider the following chapters, they should keep in mind that language and its translation had an enormous impact on colonial (mis)perceptions and,

consequently, on the development of extraterritorial consular jurisdiction in China and the Ottoman Empire.

NOTES

1. Elizabeth C. Economy e Michel C. Oksenberg, *China Joins the World: Progress and Prospects*. (Council on Foreign Relations, 1999).

2. Ibid: viii.

3. Ibid: vii. For a peculiar reference to the promotion of the rule of law as overlapping with American interests in China, followed by an immediate and quasi-apologetic invocation of human rights, see p. 155: 'Rule of law is essential to protect American and other foreign interests (business and otherwise) in China. If law is a system of rules that are known in advance and enforceable by appeal to independent arbiters, then China's legal system will become a rule of law only if it incorporates respect for human rights.' For critical assessments of the 'exportation' by the U.S. of the rule of law, see William P. Alford, 'Exporting the Pursuit of Happiness', *Harvard Law Review*, 113 (2000): 1677–1715; Jacques DeLisle, 'Lex Americana: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond', *University of Pennsylvania Journal of International and Economic Law*, 20 (1999): 179–308; Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve*. (Carnegie Endowment, 2011).

4. 'Without the rule of law, China's commerce will continue to rest on poorly regulated and insecure ground; corruption will flourish; and human rights abuses will continue. Moreover, unconstrained by law at home, rulers are more able to behave arbitrarily abroad.' Ibid: vii.

5. 'Finally, we stress that a forthcoming posture towards China cannot be a guaranteed success. China could emerge as an assertive and disruptive force or it could disintegrate.' Ibid: viii.

6. 'The United States must therefore take precautionary measures. First and foremost, as we have outlined above, we must ensure that our policies flow from a sense of American priorities; each American initiative must stand on its own merits. China will seize generous offers of cooperation that only serve Chinese interests, but it will give little in return. In addition, the United States must retain a robust military presence in Asia and maintain strong relations with other nations in the Asia-Pacific region. This includes a full range of unofficial relations with Taiwan. We must also ensure that China enters international regimes on terms that protect the core purpose of the regime – this is particularly true for China's current negotiations to join the World Trade Organization. Finally, the United States must retain an independent capacity to understand Chinese domestic and foreign affairs by cultivating and rewarding its foreign service officers, commercial counsellors, military officers, and intelligence analysts who have expertise on China. We can not allow our national and analytical capabilities to become dependent from China and Taiwan.' Ibid: viii.

7. For further instances of academic semantic choices antithetically opposing China to the World, see Samuel S. Kim, *China and the World: Chinese Foreign Policy Faces the New Millennium*. (Westview Press, 1998); Allen Carlson, *Unifying China, Integrating with the World: Securing Chinese Sovereignty in the Reform Era*. (NUS Press, 2008); Thomas G Otte, *The China Question: Great Power Rivalry and British Isolation, 1894-1905*. (Oxford: Oxford University Press, 2007) suggests that China became a *question* to be answered by the cognitively superior West, i.e. Britain and the other European Great Powers. For illustrations of the recent discursive shift from China conceived as a

global outsider in favour of a conception of China as an uncomfortable world leader, see Jack Belden and Owen Lattimore. *China Shakes the World*. (NY: Monthly Review Press, 1970); Martin Jacques, *When China Rules the World: The End of the Western World and the Birth of a New Global Order*. (Penguin, 2009); James Kynge, *China Shakes the World: A Titan's Rise and Troubled Future-and the Challenge for America*. (Houghton Mifflin Harcourt, 2007). For yet another perspective opposing China to the developing world, see Joshua Eisenman, Eric Heginbotham, and Derek Mitchell. *China and the Developing World: Beijing's Strategy for the Twenty-First Century*. (ME Sharpe, 2007). Although all these scholars present different perspectives on China's role within contemporary international relations, interestingly, they all share the common feature of ontologically opposing 'China' with 'the World'. China may be a un-institutionalized actor gradually joining the international community, a threatening superpower struggling for its hegemony over the twenty-first century, or an economically powerful actor intervening and shaping development policies within Africa. However, it remains discursively presented as separate, distinct and almost ontologically independent from the rest of the world.

8. For an excellent treatise on the ethical responsibility of graphic designers with reference to the promotion of commodities, including books, within the market economy, see Stéphane Vial, *Court traité du design*. (Paris: Presses Universitaires de France, 2010). See also Matthew A. Soar, 'Graphic Design/Graphic Dissent: Towards a Cultural Economy of an Insular Profession'. (PhD diss., University of Massachusetts Amherst, 2002); M. Keedy, 'Greasing the Wheels of Capitalism with Style and Taste, or, the "Professionalization" of American Graphic Design', in *Looking Closer: Bk. 4: Critical Writings on Graphic Design.* (Allworth Press, 2002): 199-206.

9. I thank Melina Wilson and Manon Roland, graphic design specialists (and friends) working in the field of illustration and editorial publishing for sharing their ideas and discussing Oksenberg and Economy's work. Needless to say, the above-discussed graphic arrangements are best paired with a close, first-hand examination of the book's cover.

10. It may result striking in this sense how the structure of the argument in international (and national) law may remind that of a 'common' *story*: '[A]lmost all stories in international law develop a storyline. Narratives commonly do this by defining a steady state – the ordinary way of how things are set out to be. This ordinary state can be taken as the starting point of a story." See Julia Otten, 'Narratives in International Law'. (Master Thesis, Graduate Institute of International and Development Studies, 2012) 25. On the construction of narratives and the process of the attributing meanings in international law, see also Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*. (Cambridge: Cambridge University Press, 2005); Andrea Bianchi, 'Textual Interpretation and (International) Law Reading: The Myth of (In)Determinacy and the Genealogy of Meaning', in*Making Transnational Law Work in the Global Economy:Essays in Honour of Detlev Vagt*. (Cambridge: Cambridge University Press, 2010). 34–55;Andrea Bianchi, 'Terrorism and Armed Conflict: Insights from a Law & LiteraturePerspective', *Leiden Journal of International Law*, 24 (2011): 1–21; David Kennedy, **'**Theses about International Law Discourse'**,** *German Yearbook of International Law*, 23(1980): 353-391; Greta Olson, 'De-Americanizing Law and Literature Narratives: Opening Up the Story', *Law and Literature* 22 (2010): 338–364; Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies, Post-Contemporary interventions*. (London: Duke University Press, 1989); Peter Brooks, 'Narrativity of the Law', *Law and Literature*, 14 (2002): 1–10; Robert M. Cover, 'Foreword: Nomos and Narrative, '*Harvard Law Review* 97 (1983): 4–68; Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative', *Michigan Law Review* 87 (1989), 2411–2441.

11. This statement, however, clearly does not aim at generalizing 'the West' as a homogeneous entity, as it is admittedly constituted by a pluralist and complex set of political and legal entities. Expressions such as 'the West' or 'Europe' will be used for the purposes of the present thesis to reference the *majoritarian* legal culture developed over the course of the nineteenth century, i.e.

legal positivism. Nevertheless, this shall not be interpreted as prejudicial towards the intrinsic normative variety parallel and transversal to legal positivism both on the Continent and in the United States.

12. In support of this argument, see generally Gerrit W. Gong, *The Standard of Civilization in International Society*. (Oxford: Clarendon Press, 1984); EdwardSaid, *Orientalism*. (New York: Vintage 1994); Teemu Ruskola, 'Legal Orientalism', *Michigan Law Review* 101, no. 1 (2002): 179-234; Laura, Nader 'Law and the Theory of Lack', *Hastings Int'l & Comp. L. Rev.* 28 (2004): 191- 204; Bryan S. Turner, *Orientalism, postmodernism and globalism*. (Routledge, 2002); David P. Fidler, 'The Return of the Standard of Civilization', *Chicago Journal of International Law* 2 (2001): 137–157. For a more anthropological perspective on postcolonial polities and positivist legality, see Jean and John L. Comaroff, *Law and Disorder in the Postcolony*. (University Of Chicago Press, 2008).

13. See Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought.* (University of Chicago Press, 1999): 90. This is without prejudice to the plurality and worth of German philosophical thought as such and only refers to some few proponents of the Idealist current, in recognition of their undeniable influence on Western Imperialism.

14. See Georg Wilhelm Friedrich Hegel, *The Philosophy of History.*Englishtranslation by Sibree, (New York: Dover, 1956). 142.

15. See Young Kun Kim, 'Hegel's Criticism of Chinese Philosophy', *Philosophy East and West* 28, no. 2 (1978): 174.

16. Prussia, for Hegel, constituted the highest historical manifestation of the Universal *Geist.* For an account of the Hegelian conception of history and civilization, see Georg Wilhelm Friedrich Hegel, *The Philosophy of History.*Englishtranslation by Sibree. (New York: Dover, 1956: 142); Georg Wilhelm Friedrich Hegel, *Reason in History: A General Introduction to the Philosophy of History*. (New York: Liberal Arts Press 1953); Stephen Houlgate, *Freedom, Truth and History: An Introduction to Hegel's Philosophy*. (London: Routledge, 1991).

17. For an extensive discussion of John Stuart Mill's implication in legitimizing British imperialism, see Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought.* (University of Chicago Press, 1999). 77–114.

18. See Max Weber, *The Religion of China*. English translation by Hans Heinrich Gerth. (New York: Free Press, 1951). 55.

19. Karl Marx, *Karl Marx on Colonialism and Modernization*. Edited by Shlomo Avineri. (Doubleday, 1968). 323. See also Karl Marx, *Marx on China, 1853-1860: Articles from the New York Daily Tribune*. (Lawrence & Wishart, 1951).

20. Ernest Alabaster, *Notes And Commentaries On Chinese Criminal Law And Cognate Topics With Special Relation To Ruling Cases With A Brief Excursus On The Law Of Property*. (London: Luzac & Co. Publishers to the India Office, 1899). v.

21. 'The first substantive question posed to me as I commenced my graduate work in Chinese studies during the autumn of 1972 was by the late Professor Arthur Wright, who inquired why I, as a young man of seeming intelligence, was intent on wasting my time on the study of Chinese legal history. While reasonable people may differ as to the accuracy of the kindly Professor Wright's personal assessment, there was no mistaking his query. The question posed was a revealing one, mirroring a view, long prevalent in American scholarship, as to the relative unimportance of law in Chinese civilization." In William P. Alford, 'Law, Law, What Law?: Why Western Scholars of Chinese History and Society Have Not Had More to Say about Its Law', *Modern China* 23, no. 4 (1997): 398.

22. For a critique on the allegedly 'lawless' character of the Chinese normative order see also Teemu Ruskola, 'Law Without Law, or is Chinese Law an Oxymoron?',*William & Mary Bill of Rights Journal* 11 (2002): 655–669; William P. Alford, *The More Law, the More-?: Measuring Legal Reform in the People's Republic of China*. (Stanford University, 2000); Chen Li, 'Law, Empire, and Historiography of Modern Sino-Western Relations: A Case Study of the Lady Hughes Controversy in 1784', *Law and*

History Review 27, no. 1 (2009): 1–53; John H. Matheson, 'Convergence, Culture and Contract Law in China', *Minnesota Journal of International Law* 15 (2006): 329–382; Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*. (Cambridge University Press, 2010). For a similar perspective with regard to the 'Orienrtalization' of legality in the Middle East, see Jean Allain, 'Orientalism and International Law: The Middle East as the Underclass of the International Legal Order', *Leiden Journal of International Law* 17, no. 2 (2004): 391–404; Jedidiah J. Kroncke,'Substantive Irrationalities and Irrational Substantivities*:* The Flexible Orientalism of Islamic Law',*UCLA Journal of Islamic and Near Eastern Law* 4(1): 41–73; Faiz Ahmed, 'Shari'a, Custom, and Statutory Law: Comparing State Approaches to Islamic Jurisprudence, Tribal Autonomy, and Legal Development in Afghanistan and Pakistan', *Global Jurist* 7, no. 1 (2007); On the process of 'Orientalization' of the Burmese law, see Hilary McGeachy, 'The Invention of Burmese Buddhist Law: A Case Study in Legal Orientalism', *Australian Journal of Asian Law* 4, no. 1 (2002): 30–52; Andrew Huxley, 'Is Burmese Law Burmese? John Jardine, Em Forchhammer and Legal Orientalism', *Australian Journal of Asian Law* 10, no. 2 (2008): 184–201; Andrew Huxley, 'Positivists and Buddhists: The Rise and Fall of Anglo-Burmese Ecclesiastical Law', *Law & Social Inquiry* 26, no. 1 (2001): 113–141.

23. See Edward Said, *Orientalism: Western Representations of the Orient* [1978]. (Penguin Books; 25th Anniversary Edition, 2003).

24. See Said, Ibid: 283.

25. '...[B]y Orientalism I mean several things, all of them, in my opinion, interdependent. The most readily accepted designation for Orientalism is an academic one, and indeed the label still serves in a number of academic institutions. Anyone who teaches, writes about, or researches the Orient - and this applies whether the person is an anthropologist, sociologist, historian, or philologist – either in its specific or its general aspects, is an Orientalist, and what he or she says or does is Orientalism... Related to this academic tradition, whose fortunes, transmigrations, specializations, and transmissions are in part the subject of this study, is a more general meaning for Orientalism. Orientalism is a style of thought based upon ontological and epistemological distinction made between "the Orient" and (most of the time) "the Occident." Thus a very large mass of writers, among who are poet, novelists, philosophers, political theorists, economists, and imperial administrators, have accepted the basic distinction between East and West as the starting point for elaborate accounts concerning the Orient, its people, customs, "mind," destiny, and so on...the phenomenon of Orientalism as I study it here deals principally, not with a correspondence between Orientalism and Orient, but with the internal consistency of Orientalism and its ideas about the Orient...despite or beyond any correspondence, or lack thereof, with a "real" Orient.' See Said, Ibid: 1–3.

26. This argument is better illustrated in Said's later work on cultural imperialism. See Edward Said, *Culture and Imperialism*. (Random House Digital, Inc., 1993). For further reading, see Mike Featherstone, *Undoing Culture: Globalization, Postmodernism and Identity*. (Sage, 1955). Rosa Ehrenreich Brooks, 'The New Imperialism: Violence, Norms, and the "Rule of Law"', *Michigan Law Review* 101, no. 7 (2003): 2275-2340.

27. In James Lorimer, *The Institutes Of The Law Of Nations: A Treatise Of The Jural Relations Of Separate Political Communities.* Vol. 1. (Edinburg and London: W. Blackwood and sons, 1883). 101.

28. In Edward Harper Parker, 'Comparative Chinese Family Law,' *China Review* 8 (1879): 67.

29. The points illustrated above summarize the arguments on the alleged 'deficiency' of the Chinese and Ottoman legal systems, referred to in a variety of primary and secondary sources. For a detailed account of the 'deficiencies' of the Chinese legal system, see *Report of the Commission on Extraterritoriality in China, Peking, September 16, 1926: Being the Report to the Governments of the Commission Appointed in Pursuance to Resolution V of the Conference on the Limitation of Armaments*. Govt. Print. Off., 1926. See also George Williams Keeton, *Extraterritoriality in International and Comparative Law.* (Hague: Librairie du Recueil Sirey 1948). 304; Li Zhaojie, 'Traditional Chinese

World Order', *Chinese Journal of International law,* 1 (2002): at 41 – 'Relying on legal orientalist knowledge, Western states discredited Chinese laws on a categorical basis. China lacked positive law, the only type of law acceptable to Western states. Chinese laws did not fulfil the positive standards of law for three main reasons. First, until 1911, the Chinese codes were not publicly accessible. Without knowing the legal codes, the public, particularly foreigners, had little idea of their legal and property rights. Second, the traditional Chinese Codes were not provisions to clarify the legal and property rights of individuals, but were administrative regulations sent by the central government to provincial authorities to solve disputes. Chinese codes covered criminal issues extensively, but remained notably incomplete on issues about commercial and civil interactions. Third, China did not have a judicial system separate from its administrative structure. Magistrates who were both administrators and judges in their districts conflated their judicial and administrative roles. With the dual role of magistrates and the lack of appeal mechanisms, it was impossible for the public to gain reliable knowledge about their legal and property rights. For these three reasons, the traditional Chinese codes, as a prominent American legal scholar observed, were "not a code of law in a modern sense but rather a compilation of ethical precepts as to the relations of individuals to the family and to the government." In this modern understanding and discourse of law, in large part shaped by nineteenth-century legal positivism, law cannot provide the utilitarian benefits that are a hallmark of positivist law if law is not clearly specified.'

30. Namely *Jus naturalism*. For a summary of the contemporary scholarly debate over the fictitious genealogy of the Hobbesian state of nature, see HelenThornton*, State Of Nature Or Eden?: Thomas Hobbes And His Contemporaries On The Natural Condition Of Human Beings.* (Boydell & Brewer, 2005). 75–86.

31. 'What the West had that China did not, what in the end seduced China into passive acquiescence (made it Other) was Law. Or, to put it slightly differently, the universalist Law of treaty, human rights, science, and so on clarified the difference between China and the West as *a relation of absence and presence*, by pointing out the anarchic, ever multiplying, seething differences within China; China, alas, stood to Western Law as the particular stands to Universal.' (Emphasis added). In Tani Barlow, 'Colonialism's Career in China Studies,' in *Formations of Colonial Modernity in East Asia,* ed. Tani Barlow. (Durham: Duke University Press, 1997). 389–930.

32. 'Take up the White Man's burden. The savage wars of peace. Fill full the mouth of Famine. And bid the sickness cease;And when your goal is nearestThe end for others sought,Watch sloth and heathen Folly.Bring all your hopes to nought...' Rudyard Kipling and Thomas James Wise. *The White Man's Burden*. (London, 1899).

33. Teemu Ruskola, 'Legal Orientalism,'*Michigan Law Review* 101, no. 1 (2002): 209.

34. See generally Charles H. Kahn, *Anaximander and the Origins of Greek Cosmology*. (Hackett Publishing, 1994).

35. 'Claims of the putative absence of law in China have become part of the observer's cultural identity and, in turn, contribute to the content of the observations themselves'. Teemu Ruskola, 'Legal Orientalism,' *supra:* 185.

36. I am hereby referring to the 1648 treaties of Osnabrück and Münster, formally establishing the peace of Westphalia. Available at: http://fletcher.archive.tusm-oit.org/multilaterals/texts/historical/westphalia.txt.

37.

See Richard S. Horowitz, 'International Law and State Transformation in China, Siam, and the Ottoman Empire During the Nineteenth Century, ' *Journal of World History* 15, n. 4 (2004): 449.

38. On the Vattelian conception of natural law see Emerich De Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*. (Carnegie Institution of Washington, 1916). For an example of the epistemic shift towards international law considered as a positive body of rules regulating the relations between Christian, civilized states

see Henry Wheaton, *Elements of International Law*. (Philadelphia, 1836. Reprint New York: De Capo Press, 1972). 35–46 : 'The law of nations or international law, as understood *among civilized, Christian nations*, may be defined of consisting of those *rules* of conduct which reason deduces, as consonant to justice, from the nature of the society existing *among independent nations*; with such definitions and modifications as may be established by general *consent*'.(Emphasis added).

39. On the increasing role that the standard of civilization had in the consolidation of international law, see Gerrit W. Gong, *The Standard of Civilization in International Society*. (Oxford: Oxford University Press, 1984). 14: 'A standard of "civilization" had emerged as an explicit legal principle and an integral part of the doctrines of international law, and a non-Christian state needed to meet that standard to be considered a full participant in international society and fully subject to the rights granted under international law. The standard for a civilized state included guarantees of basic rights of property and person, an organized political system with a capacity for self-defense, adherence to international law, maintenance of a system for diplomatic interchange, and a state conforming to the accepted norms and practices of the "civilized" international society.'

40. 'My broad argument is that colonialism was central to the constitution of international law in that many of the basic doctrines of international law – including, most importantly, sovereignty doctrine – were forged out of the attempt to create a legal system that could account for relations between the European and non-European worlds in the colonial confrontation.' Antony Anghie, *Imperialism, sovereignty and the making of international law*. (Cambridge: Cambridge University Press, 2007). 3.

41. 'In these encounters, Western state practices and judicial discourses clarified, crystallized and consolidated the elements of sovereignty doctrine. In particular, jurists defined, identified, and categorized sovereign and non-sovereign entities.'. Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*. (Cambridge University Press, 2010). 17.

42. James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities.* Vol. 1. (W. Blackwood and sons, 1883). 101.

43. On the perpetuation of *political* hierarchies through legal education from a Critical Legal Studies perspective, see Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System: A Critical Edition*. (NYU Press, 2004). See also Roger C. Cramton, 'The Ordinary Religion of the Law School Classroom,' *J. Legal Educ.* 29 (1977): 274–263; Carrie Menkel-Meadow, 'Feminist Legal Theory, Critical Legal Studies, and Legal Education or the Fem-Crits Go to Law School'. *J. Legal Educ.* 38 (1988): 61- 86; Toni Pickard, 'Experience as Teacher: Discovering the Politics of Law Teaching'. *The University of Toronto Law Journal* 33, no. 3 (1983): 279–314.

44. David Kennedy, whose scholarly work is considerably focused on legal experts and the production of knowledge in international law, states: 'I have become convinced the role of experts is drastically understudied. We focus on statesmen and public opinion and not enough on the ways in which their choices, their beliefs, are shaped by background players e often overestimate their capacity and influence. We imagine that development economists know how to bring about development or that lawyers know how to build an institution or draft a statute to bring about a desired result. What holds them back is the friction and resistance of context—or incompetence. At the same time, we rarely have a good picture of the blind spots and biases introduced by expertise, along the lines of the old adage that to a man with a hammer, everything looks like a nail. Indeed, experts rarely know what they don't know and know a great deal that is fashion, that is borrowed, misunderstood, reduced to a slogan, or simply too contradictory to be "applied" or "implemented" straightforwardly.' In David Kennedy, 'The Mystery of Global Governance', *Ohio Northern University Law Review,* 34 (2008): 846–847.

On the relationship between experts and power in legal studies see also David Kennedy, 'Challenging Expert Rule: The Politics of Global Governance. ' *Sydney Law Review* 27 (2005): 5 – 28;

David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism*. (Princeton University Press, 2011); David Kennedy, *Of war and Law*. (Princeton University Press, 2009). For further readings see Paul A. Teschner, 'Specialists, Experts, and Lawyers: On the Integrity of the Legal Profession'. *University of Detroit Law Journal* 41 (1963): 483 – 506. On epistemic communities more generally see Stanley Fish, *Is There a Text in this Class?: The Authority of Interpretive Communitites*. (Harvard University Press, 1980).

45. On the mutually constitutive relationship between knowledge and power, Michel Foucault stated: 'The apparatus [i.e. established discursive and social order]is thus always inscribed in a play of power, but it is also always linked to certain co-ordinates of knowledge... This is what the apparatus consists in: strategies of forces supporting and supported by types of knowledge.; See Michel Foucault, *Power/knowledge: Selected Interviews and Other Writings, 1972–1977*. (Random House Digital, Inc., 1980). 194–196.

46. On the appointment of governmental experts to China and to the Ottoman Empire, see generally Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*. (Cambridge University Press, 2010).

47. Shih Shun Liu. *Extraterritoriality: Its Rise and Decline*. (New York: AMS Press, 1969). 40.

48. On the reasons why the bill failed to pass, Mr. Hawes of the House of Commons asserted that he had '...[C]arefully looked over the papers, the noble Lord [Palmerston] had laid before the House, and he could not discover in them the smallest trace of the smallest consent on the part of the authorities of China to the jurisdiction proposed to be given by the noble Lord. He wished to ask the noble Lord, whether the authorities of China recognized this interference with their laws?' See Hansard, Thomas Carson. *The parliamentary debates*. 3rd ser., Vol. xviii. London: Cornelius Buck & Son, 1834: 744.

49. See Kayaoğlu (2010), supra: 30–31.

50. 'Legal scholars and jurists acted as professional norm developers, propagating their ideas and ideals about law, justice and sovereignty. With their claims to legal expertise, lawyers, jurists and legal advisers often moved from the production and maintenance of the legal episteme to political decision making.' Kayaoğlu (2010), ibid: 31.

51. See Kayaoğlu, Ibid: 33. See also Richard S. Horowitz, 'International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century', *Journal of World History* 15, n. 4 (2004): 450; Abram L. Harris, 'John Stuart Mill: Servant of the East India Company', *The Canadian Journal of Economics and Political Science* 30, no. 2 (1964): 185-202; Lynn Zastoupil, *John Stuart Mill and India*. (Stanford University Press, 1994).

52. For a similar argument with regard to international lawyers today, see Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*. (Cambridge University Press, 2005). For a critical approach to the development of legal professionalism in the People's Republic of China and its gradual epistemic convergence with the Western culture of professional managerialism, see William P. Alford, 'Of Lawyers Lost and Found: Searching for Legal Professionalism in the People's Republic of China', *East Asian Law: Universal Norms and Local Cultures* (2002): 182 – 'American scholars and policy makers concerned with legal development in the People's Republic of China share a deep faith in the value of China developing a legal profession that operates as we would like to think our own does. Indeed, this idea is so deeply ingrained that it is rarely broken out for critical examination, but instead is treated as an obvious good, the attainment of which is essentially a matter of time. Virtually all such observers seem to assume that lawyers, whether out of idealism or self-interest or some blend thereof, will prove to be a principal force leading the PRC toward the rule of law and a market economy, while some go so far as to treat the development of an indigenous legal profession as crucial to the promotion in China of a more liberal polity. The hidden assumptions regarding the Chinese legal profession found in both US academic writing and policy papers warrant a scrutiny they have yet to receive here or abroad. Lurking not too far underneath the surface of such portrayals are further

assumptions about the inexorability of convergence along a common path, remarkably (surprise) similar to our own.'

53. William Loutit Morison, *John Austin*. (Stanford University Press, 1982). 19.

54. The author continues: 'Instead of answering the question directly, I asked the student why he assumed that the imperial Chinese legal system at some point would have developed a doctrine similar to promissory estoppel. Upon reflection, the student recognized he had erroneously assumed that any legal order with a law of obligations would inevitably face the question of whether to give legal effect to promises that induce detrimental reliance. As we talked, however, he began to appreciate the extent to which promissory estoppel in our own legal system was inextricably connected to problems created by the requirement in classical Anglo-American law that enforceable contracts be predicated upon consideration. What had seemed at first to him a natural and obvious question common to any system of jurisprudence now began to look more like a parochial concern of one particular legal system that had chosen to predicate its law of obligation upon the doctrine of consideration' In See Janet E. Ainsworth, 'Categories and Culture: On the Rectification of Names in Comparative Law', *Cornell L. Rev.* 82 (1996): 19–42.

55. As Professor Andrea Bianchi once told his students during a class in International Law Theories (IHEID: 2012–2013).

56. As will be extensively discussed, the 1926 Commission on Extraterritorial Jurisdiction in China arguably provides the best example in this sense. See *Report of the Commission on Extraterritoriality in China, Peking, September 16, 1926: Being the Report to the Governments of the Commission Appointed in Pursuance to Resolution V of the Conference on the Limitation of Armaments*. Govt. Print. Off., 1926.

57. Koskenniemi argues that the 'lack' of international law in European colonies was first compensated by the expansion of *natural law*: "'For early nineteenth-century lawyers, native communities remained outside international law in the technical sense that the *Droit public de l'Europe* did not regulate their relations wit Europeans. It sufficed that the individuals – Europeans and natives – would receive the protection of a natural law that would treat them as equal traders or travellers, equally obliged to show courtesy and to remain from violence against each other. For the situation in the colonies, this was for a long time quite sufficient. The extension of natural law – in particular that concerning property – explained why the natives were bound to honour the lives and possessions of Europeans moving beyond the reach of European legal principles and on what basis the commercial relations between Europeans and natives would be conducted.' In Martti Koskenniemi, *The Gentle Civilizer of Nations*. (Cambridge University Press, 2002). 115. More specifically on extraterritoriality see Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*. (Cambridge University Press), 34.

58. On the relationship between law and language, see generally Andrea Bianchi, 'Textual Interpretation and (international) Law Reading: The Myth of (in)determinacy and the Genealogy of Meaning', In*Making Transnational Law Work in the Global Economy:Essays in Honour of Detlev Vagts*, (Cambridge: Cambridge University Press, 2010). 34–55; Peter Goodrich, 'Law and Language: An Historical and Critical Introduction', *Journal of Law and Society* 11, no. 2 (1984): 173-206; Peter Goodrich, ' Rhetoric as Jurisprudence: An Introduction to the Politics of Legal Language', *Oxford Journal of Legal Studies* 4, no. 1 (1984): 88-122; Peter Goodrich, 'The Role of Linguistics in Legal Analysis', *The Modern Law Review* 47, no. 5 (1984): 523-534. Julia Otten, 'Narratives in International Law'. (Master Thesis, Graduate Institute of International and Development Studies, 2012); James Boyd White, 'Law as Language: Reading Law and Reading Literature', *Tex. L. Rev.* 60 (1981): 415; Veda Charrow, *Linguistic Theory and the Study of Legal and Bureaucratic Language*. (American Institutes for Research, 1981); James Boyd White, '"Our Meanings can Never be the Same": Reflections on Language and Law', *Rhetoric Society Quarterly* 21, no. 3 (1991): 68- 77; Maria

Aristodemou, *Law and Literature: Journeys from Here to Eternity*. (Oxford University Press, USA, 2000); Ruth Macrides, 'The Law Outside the Law Books: Law and Literature', in *Fontes Minores* (2005): 133 – 145; Peter Fitzpatrick, 'Juris-fiction: Literature and the Law of the Law', *ARIEL: A Review of International English Literature* 35, no. 1–2 (2004): 215–229; James Boyle, 'Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialism', *University of Pennsylvania Law Review* 135, no. 2 (1987): 383–426; Stanley Fish, 'Working on the Chain Gang: Interpretation in Law and Literature', *Texas Law Review* 60 (1981): 551- 568; Stanley Fish, *The Law Wishes to Have a Formal Existence*. (University of Toronto, Faculty of Law, 1992); Stanley Fish, 'Don't Know Much About the Middle Ages: Posner on Law and Literature', *The Yale Law Journal* 97, no. 5 (1988): 777–793.

59. For an excellent account of language and postcolonialism, see Bill Ashcroft, Gareth Griffiths and Helen Tiffin, *The Empire Writes Back: Theory and Practice in Post-Colonial Literatures*. (Routledge, 2002).

60. See generally Dimitri Gutas, *Greek Wisdom Literature in Arabic Translation: A Study of the Graeco-Arabic Gnomologia*. (American Oriental Society, 1975); Eugene Myers, *Arabic Thought and the Western World in the Golden Age of Islam.* (Ungar, 1964).

61. For further readings, see Bernard Lewis, *Islam and the West*. (Oxford University Press, 1993); Bernard Lewis, 'The West and the Middle East', *Foreign Affairs* (1997): 114–130; see also Donald Edgar Pitcher, *An Historical Geography of the Ottoman Empire: From Earliest Times to the End of the Sixteenth Century*. (Brill Archive, 1972).

62. With reference to the Italian version of the Prussian capitulatory treaty of 1761, an example of the difficulty of translating capitulatory treaties into Western languages is provided by Noradounghian in a comment on his Ottoman Empire's Treaties Collection: 'La traduction de ces capitulations, ainsi que de beaucoup d'autres, n'est pas littéralement conforme au texte turc. L'Epilogue, en particulier, qui constitue les ratifications, est tout à fait différent dans l'original turc.' See Gabriel Noradounghian, *Recueil d'actes internationaux de l'Empire ottoman: 1300–1789*. Vol. 1 (Paris : F. Pichon, 1897). 308, N. 34.

63. See Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan*. (Oxford University Press, 2012). 7.

64. George Thomas, Staunton, 'Translator's Preface' in *Being the Fundamental Laws, and a Selection from the Supplementary Statutes, of the Penal Code of China*. (Cambridge University Press, 2012).

65. 'Three Japanese, the only survivors of a junk's crew of fourteen men, landed on Queen Charlotte's Island, and were captured by Indians, and afterwards redeemed by an English gentleman at the Columbia River settlement, and by him sent to England, and thence to Macao, where they were under the direction of H. M. chief Superintendent, who placed them in the family of the Rev. C. Gutzlaf F. Here they were employed in teaching him their language...' In Peter Parker, *Journal of an Expedition from Singapore to Japan: With a Visit to Loo-Choo, Descriptive of These Islands and Their Inhabitants, in an Attempt with the Aid of Natives Educated in England to Create an Opening for Missionary Labours in Japan.* (London: Smith & Elder, 183). 1.

66. See Immanuel Chung-yueh Hsü, *China's Entrance into the Family of Nations: The Diplomatic Phase, 1858-1880*. Vol. 5. (Harvard University Press, 1960). 13.

67. The text of the instrument is available at: Inspector General of Customs, ed. *Treaties, Conventions, etc., between China and Foreign States.* 2nd ed. Vol. 1. Shanghai: Statistical Department of the Inspectorate General of Customs, 1917: 388.

68. See Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan*. (New York: Oxford University Press, 2012). 51. The episode seems to confirm the modern Sinologists' allegation of the predominantly Sino-centric way that the Middle Kingdom had of perceiving its relations with foreign communities. See Li Zhaojie, 'Traditional Chinese World Order', *Chinese J. Int'l L.* 1 (2002): 20–58.

69. For an overview of the linguistic process of adapting the theories of international law to the Chinese context, see Rune Svarverud, *International Law as World Order in Late Imperial China: Translation, Reception and Discourse*, 1847–1911. (Brill, 2007). On China, see also Teemu Ruskola, 'Stories about Corporations and Families: A Look at Corporation Law Jurisprudence from a Chinese Perspective', *Stanford Law Review* (2000): 1599–1729. On the Ottoman Empire, see Ahmad Feroz, 'Ottoman Perceptions of the Capitulations 1800–1914', *Journal of Islamic studies* 11, n. 1 (2000): 1–20.

Chapter III – Extraterritorial Consular Jurisdiction in the Ottoman Empire

I. On the Ottoman Traditional Normative System

a) Political Structure

1 The Ottoman Empire was a vast, complex and extraordinarily pluralist polity, with large non-Turkish and non-Muslim populations inhabiting its territories. The origins of the Ottoman Empire date back to the 13th century A.C., when Osman I, the leader of a tribe of Turkish ethnicity defeated the Abbasid caliphate in the Anatolian peninsula.[1] The territories under its influence ranged from North Africa, to the Balkans, to the Arab peninsula and to modern Turkey. However, its immense territorial expanse lacked the precise boundaries that were increasingly becoming the norm in Europe. This situation, preceding the 19th century, was most likely due to the absence of a theoretical and practical doctrine akin to that of territorial state sovereignty and modern citizenship. In contrast, the Ottoman conception of a polity and community of law was based on the broader concept of the *Umma*, the totality ofMuslim believers protected by the Sultan. Consequently, rather than aiming at reaching comprehensive territorial control, the Ottomans presented a conception of rulership that presupposed a vaguer and more osmotic idea of influence and authority.[2]

2 At the core of its political structure stood the Sultan, considered to be the direct descendent of Mohammed and, therefore, the delegate of God on Earth.[3] His prime minister was the *Visir*, assisted by a number of executive bureaucrats composing the political body of the *Divan.* Great importance was placed upon military troops, particularly the so-called Janissaries, historically considered to be the main propulsive force of the Empire's expansion. Mediating between the Empire's political summit and the *reaya*,or the common subjects inhabiting its lands, a number of local nobles and religious functionaries were charged with managing administrative issues such as the collection of taxes and the administration of justice. The further one travelled from Istanbul, the seat of government, the greater the level of decentralization. Such decentralization was due to the Empire's intrinsically pluralistic composition, allowing an astonishing number of

religions and ethnicities to coexist while enjoying relative autonomy from the central power.[4]

b) Law

3 As a consequence of the religious nature of its foundations, the Ottoman world order traditionally assigned the administration of justice to the *Ulema*, literally 'the wise men' who were learned in the Holy Scriptures.[5] The body of laws the Ulema applied was based on the *Shariah*, the combination of principles directly deduced from the primary sources of Muslim normativity: the Hadith, the Sunna and the Koran.[6] Such principles, however, were not directly applicable to quotidian life, as their purpose was to provide general guidance and show the 'path' for future legislation. In fact, the Ulemas had to 'convert' those principles into a historically-contingent body of legislation adapted to the 'spirit of the times, in order to implement them concretely.[7] This practice provided greater flexibility in the Prophet's rulings, and aimed at rendering the principles compatible with the processes of the *lex ferenda,* indispensable in both adapting to and guiding an ever-changing society.[8] According to Horowitz, in addition to Islamic law, the Ottoman Empire also greatly relied on local customary law and on the Sultan's decrees. 'Customary law in particular', he argues, 'was extremely diverse, as the Ottoman rulers did not try to impose Turkish law on non-Turkish Muslim communities, and they allowed religious minorities to continue to use their own legal systems when Muslims were not involved.'[9]

c) The Treatment of Aliens

4 As previously stated, the Ottoman Empire was a pluralistic and multi-ethnic society. Consequently, given the osmotic nature of the Ottoman boundaries, the identification of the category of 'foreigner' proved problematic. Before continental travellers 'exported' Western ideas in the eighteenth century, the notions of nationality and citizenship did not exist within the Ottoman conception of legal subjectivity. Again, religion and family ties constituted the primary basis of affinity to – or exclusion from – the Turkish community of law. Hence, the Ottomans practiced particular tolerance towards the so-called 'People of the Book', namely the Christians and the Israelites, who were allowed to live in self-governing, autonomous communities known as *millet*.[10] In addition to the freedom to practice their religion, both Christians and Israelites enjoyed the autonomy to live in accordance with their customs and to apply their own laws.[11] This freedom was likely due to the exclusiveness of the Muslim notion of legality, wherein the unbelievers were considered unworthy of being governed by the principles of the Shariah.[12]

5 With respect to foreign traders, commercial legations, known as capitulations, regulated their economic and jurisdictional status.[13] Initially, the capitulations were voluntary and unilateral concessions the Sultan granted to non-Muslim persons conducting business within his territories. Most importantly, these 'capitulations' usually included provisions granting jurisdictional privileges and immunities to foreign citizens involved in litigation amongst themselves. Foreign representatives, often elected among the inhabitants of the millet, could judge both criminal and civil cases among foreigners. Initially, however, *'private' entities,* such as communities of merchants (e.g. the Hanseatic League), city-states (e.g. Venice) or individuals received capitulatory rights.[14] The 1535 unilateral grant issued by Suleiman the Magnificent to Francis I of France is one of the first examples of

capitulatory privileges, conceded directly to a *sovereign.* Article 2 of the Treaty contained the embryo of what would later become extraterritorial consular jurisdiction under publicinternational law, providing the basis for all later European claims to capitulatory treaties.[15]

II.Establishing Extraterritorial Consular Jurisdiction

a) Codifying 'Unequal Treaties'

6 Unlike the case of China, extraterritorial consular jurisdiction in the Ottoman Empire was not a novel invention of nineteenth-century imperialistic expansion, but rather the result of the gradual development of the system of capitulations described above.[16] However, whereas capitulations were initially understood as unilateral and non-reciprocal privileges the Sultan graciously granted to foreign communities of merchants inhabiting the territories of the Ottoman Empire, a shift towards inter-state bilateral treaties as the main tool of international negotiations occurred in the eighteenth century. Hence, with the consolidation of the principle of territorial sovereignty on the Continent, capitulatory benefits that had once been assigned directly to individuals, cities or commercial entities increasingly became the exclusive competences of their states of origin. Stated differently, the original administration of jurisdictional relations that today would arguably be considered private international law was transferred to the regulatory domain of inter-state, consent-based, public international law.[17] One of the first examples of this is the 1740 treaty between France and the Ottoman Sultan Mahmoud, which attempted to comprehensively regulate the status of French nationals and their goods within the territories of the Sublime Porte. More specifically, Article 12 of the instrument states:

> 'S'il arrivait quelque meurtre ou quelque autre désordre entre les Français, leurs ambassadeurs et les consuls en décideront selon leurs us et coutumes, sans qu'aucun de nos officiers puisse les inquiéter à cet égard.'[18]

7 The notion of extraterritorial consular jurisdiction clearly emerges from this provision: if any dispute between French citizens arose within the jurisdiction of the Ottoman Empire, the exclusive competence for its adjudication was granted to their consular representatives, to be decided according to French law.[19] A second, distinct typology of litigation regulated by the treaty included mixed cases between Ottoman subjects, on the one hand, and foreigners on the other. Such disputes had to be presented to the local authorities, but the presence of a French dragoman or/and a consular authority was obligatory.[20] In terms of the applicable law, the defendant usually had to be placed under the jurisdiction and, hence, the laws of the plaintiff, in the presence of an official translator, in instances where the victim was an Ottoman subject.[21]Article 26 of the 1740 Treaty provides supporting evidence:

> 'Si quelqu'un avait un différend avec un marchand français, et qu'ils se portassent chez le cadi, ce juge n'écoutera point leur procès, si le drogman français ne se trouve présent, et si cet interprète est occupé pour lors à quelque affaire pressante, on différera jusqu'à ce qu'il vienne; mais aussi les Français s'empresseront de le représenter, sans abuser du prétexte de l'absence de leur drogman. Et s'il arrive quelque contestation entre les Français, les ambassadeurs et les consuls en prendront connaissance et en décideront, selon leurs us et coutumes, sans que personne puisse s'y opposer.'[22]

8 A third category of cases concerned disputes existing exclusively between foreigners of different nationalities. As a general principle, the Ottoman justice system refrained from intervening, and allowed the foreign representatives to adjudicate jointly and directly unless the foreigners voluntarily decided to submit the case to the Ottoman officials. Again, the above-mentioned instrument between France and Sultan Mahmoud clearly illustrates the point:

> Article 52 – 'S'il arrive que les consuls et les négociants français aient quelques contestations avec les consuls et les négociants d'une autre nation chrétienne, il leur sera permis, du consentement et à la réquisition des parties, de se pourvoir par-devant leurs ambassadeurs qui résident à ma Sublime Porte (Note XXIII), et tant que le demandeur et le défendeur ne consentiront pas à porter ces sortes de procès par-devant les pacha, cadi, officiers ou douaniers, ceux-ci ne pourront pas les y forcer ni prétendre en prendre connaissance.'[23]

9 The 1740 treaty between France and the Ottoman Sultan had a pioneering function in so far as it provided the general framework and legal guide for other European and American states conducting business within the Sublime Porte's domains interested in securing the rights of their nationals therein. As a matter of fact, shortly afterward, Denmark concluded its capitulatory treaty with Turkey, Article 10 of which stated:

> 'Les procès et différends qui pourraient naître entre les Danois et les gens dépendant d'eux, seront examinés et décidés par devant le Ministre ou consul danois selon les lois et constitutions du Danemark, et il ne sera pas permis aux juges ou cours de justice du Sublime Empire de s'en mêler.'[24]

10 Similarly, Prussian nationals received immunity from local jurisdiction in 1761, under Article 5 of the Capitulations ou Traité d'Amitié et de Commerce avec la Prusse, which prescribed:

> 'S'il arrivait quelque dispute entre les Prussiens et leurs sujets, le ministre ou les consuls prussiens décideront l'affaire d'après leurs lois; et tant que les Prussiens ne demandent pas eux-mêmes à être jugés par la justice ottomane, les juges et gouverneurs de la Sublime Porte ne pourront s'ingérer par force à vouloir les juger.'[25]

11 Following the example of France, Denmark and Prussia, a considerable number of other states, including Great Britain, the Netherlands, Austria-Hungary, Sweden, Italy, Russia, Spain, Persia, Belgium, Portugal, Greece and, a few decades later, the United States, Brazil, and Mexico, rapidly negotiated capitulatory rights with the Ottoman Empire.[26] The number and diffusion of instruments granting extraterritorial privileges to foreigners within the Ottoman Empire was sufficiently consistent that it arguably rose to the level of constituting a sort of regional customary international law.[27] Whereas the range of state practice is clear from the examples provided above, the considerable duration of this institution, as well as the strong opposition to its abolishment from the majority of European and American states, provide convincing *opinio juris* as to its status as customary law. [28]

12 It is, however, important to note that, originally, the capitulatory treaties did not constitute direct instances of Western legal interference in the Empire's domestic normative order although such concessions and jurisdictional immunities were of a non-reciprocal nature. Rather, they were perceived as direct continuations of the gracious capitulations deriving from the Sultan's magnanimity, and aimed at strengthening friendly relations with foreign powers. In fact, it is hardly believable that a weak or subjugated party to a treaty could be described therein as: 'Moi, qui par l'excellence des

faveurs infinies du Très-Haut, et par l'éminence des miracles remplis de bénédictions du chef des prophètes, suis le sultan des glorieux sultans; l'empereur des puissants empereurs; le distributeur des couronnes aux Khosroés qui sont assis sur les trônes; l'ombre de Dieu sur la terre',as Sultan Mahmoud refers to himself in the preface to the 1740 Capitulatory Treaty with France.[29]

13 Furthermore, a major guarantee against foreign abuses, in the Turkish mind, consisted, initially, of the opinion that treaties could not last longer than the lifetime of a single sultan.[30] The modern principle of a sovereign's duty to continue the international obligations of its predecessor was alien to the traditional Ottoman conception of international relations. Each sultan in succession had to renew capitulations, generally with minor modifications.[31] Consequently, if the successor believed that foreigners of a certain nation had exploited their capitulatory rights, he could ultimately decline to renew the treaty in retaliation.[32] It was only by the end of the eighteenth century that Euro-American powers first began to directly oppose this practice, claiming that as it was contained in instruments of a bilateral nature extraterritorial consular jurisdiction could not be abolished unless the explicit consent of both parties was granted.[33] Hence, foreign extraterritorial rights gradually crystallized as an intrinsic, almost natural prerogative of Western states, and treaties granting their concession were renewed independently of successive sultans.

b) Proliferation of Foreign and Mixed Courts

14 The nineteenth-century growth of imperialism on the Continent, the post-Industrial Revolution surplus of products on European markets and the corresponding increase of foreign business in the Levant led to a parallel proliferation of foreign and mixed courts within the territories of the Ottoman Empire. Their legitimacy to adjudicate foreign and mixed cases derived from the capitulatory treaties. When discussing the web of often overlapping jurisdictions the Western presence added to the already highly pluralistic Ottoman internal legal order, Kayaoğlu referred to five different typologies of tribunals.[34] First of all were the *Islam Courts*, which held jurisdiction over Muslims in civil, commercial and criminal cases and were generally administered by the *Ulema*. Next came the so-called *Communal* Courts, which adjudicated civil, criminal and commercial cases within the autonomous foreign minorities of the old *millets*. Thirdly, in accordance with the capitulatory treaties, *Consular Courts* obtained exclusive jurisdiction over their nationals. *Mixed Courts,* on the other hand, claimed jurisdiction over mixed cases of a mostly commercial and civil nature, and where presided over by foreign consuls and the Ottoman Ministry of Commerce . Finally, *Secular Courts*, also known as *Nizamiye Mahkemeleri*, had competence over Muslims in commercial and criminal matters; they reported directly to the Ministry of Justice.

15 Consequently, it was possible that several local and foreign courts, referring to an even greater number of competing legal orders, would adjudicate the same dispute. An example of such an overlap was the 1820 establishment, in Istanbul, of a Mixed Judicial Committee to try foreigners of different nationalities.[35] A decision of the Court of Appeal of Aix-en-Provence, pronouncing in favour of consular tribunals as the exclusive holders of jurisdiction over disputes involving French nationals, reversed the practice.[36] Similarly, in 1848, an Act of the U.S. Congress introduced provisions for the exercise of extraterritorial jurisdiction by the United States Consular Courts.[37] At approximately the

same time in 1857, the British Supreme Court in Istanbul was established, and subsequently, complemented by His British Majesty's Supreme Court for the Dominions of the Sublime Ottoman Porte in Alexandria.[38] Overall, the majority of states that negotiated capitulatory rights with Turkish sultans quickly established their own courts and tribunals, or transferred the protection of their nationals to other Western consular missions. In doing so, they added additional pieces to the already complex legal and jurisdictional puzzle of the Ottoman Empire.

16 For the first half of the nineteenth century, the Sublime Port assumed a relatively tolerant attitude towards the mushrooming of foreign courts, since allowing their institution was consistent with the general Turkish attitude of tolerance towards internal legal pluralism. However, the gradual assimilation of foreign legal notions – such as the territorial nature of jurisdiction – that Western legal experts exported to the Ottoman Empire along with their courts, sharpened the perception of a multiplicity of jurisdictions as offensive to the newly-discovered Ottoman territorial sovereignty. As early as 1856, during the Paris Conference negotiations, the Ottoman representative Ali Pasha argued that extraterritorial consular jurisdiction was becoming an increasingly abusive system, as it contributed to the creation of 'a multiplicity of governments in the Government', thus significantly complicating the implementation of judicial reforms.[39]

17 Such considerations were exacerbated by the factual assessment that foreign courts had progressively extended their jurisdiction over mixed cases involving an Ottoman defendant. Thus, in this manner, the foreign courts directly contradicted the general capitulatory principle, according to which the defendant had to follow the forum of the plaintiff.[40] A good example of this is the case known as *Rex v. Lawson,* in which a British consular court was asked to adjudicate a criminal case involving a Turkish plaintiff and an English defendant. In asserting that His British Majesty's Supreme Court for the Dominions of the Sublime Ottoman Porte did, indeed, have jurisdiction to hear the case, Judge Grain ruled that although customary practice suggested Turkish tribunals should hear mixed cases brought by Ottoman plaintiffs, he saw no reason 'to assume that privileges acquired by treaties have been annulled by reason of this custom being carried on'.[41]

c) Legitimizing Extraterritoriality, Barbarizing Ottoman Legality

18 In retrospect, considering the history of the capitulatory system in the Ottoman Empire, the English adage 'give someone an inch, and he'll take a mile' appears to be unfortunately proven true. The subjects of Western powers increasingly abused the generous jurisdictional concessions the Turkish sultans granted to foreign traders. Moreover, as Western powers insisted that jurisdictional concessions were an integral part of the Empire's binding obligations under public international law, Turkey could not appeal for their abrogation with any hope of success.[42] A natural, though certainly complex, question is *why* the Sublime Port agreed to embed capitulatory rights in the form of bilateral, positive treaties in the first place. Perhaps the Sultan hoped to satisfy the French desire to codify long-lasting customs, developed over the course of the eighteenth century, into positivist legal instruments.[43] Or perhaps, the historical experience of capitulations and the acceptance of legal pluralism as benign to the Empire led the sultans to believe that the transfer of jurisdictional concessions into positive treaties was a relatively innocuous step. Long-standing custom favouring the concession

of capitulations also certainly played a major role in the materialization of unequal treaties.[44]

19 However, only in the nineteenth century did the discourse surrounding the raison d'être of extraterritorial consular jurisdiction begin to shift towards the alleged lawlessness and uncivilized nature of Ottoman law. The 'Orientalization' of indigenous notions of justice and legality was of primary importance in furthering the notion that the trial of foreign nationals in accordance with local law would lead to disastrous results. Hence, in contrast to its original status as a gracious concession, extraterritoriality was increasingly understood as a necessary safeguard to protect the 'civilized part of mankind' from the barbarity of Ottoman customs. In support of this view, the British special reporter on extraterritoriality in the Levant, Sir Edmund Hornby, asserted that, within the Ottoman legal system 'nobody knows the law, which is about to be applied; it is to be found nowhere, because, indeed, it exists nowhere, until the judge twists a sentence in the Koran, or a clause in the Code de Commerce, or dovetails the one into the other.'[45] Half a century later, not much had changed in European legal 'experts'' perception of normativity in the Levant:

> 'The rigidity of the Sacred Law has been at times slightly tempered by well-meaning and learned Moslems who have tortured their brain in devising sophisms to show that the legal principles and social system of the seventh century can, by some strained and intricate process of reasoning, be consistently and logically made to conform with the civilized practices of the twentieth century.'[46]

20 The 'civilized practices' referred to by Lord Cromer consisted of the adoption of a legal order similar to that of Western legal systems. It included the adoption of positivist codes of law, the exorcism of the Muslim legal system from religion, a clear separation between the judicial and the administrative powers, well- (and possibly Western-) educated judges, and guaranties on foreign property and investment rights.[47] In response to the increasing Turkish insistence that extraterritorial consular jurisdiction be abolished, Western powers repeatedly claimed that the Ottoman domestic legal order had not yet reached the necessary degree of 'modernity' and 'progressivity'. When describing the situation in Constantinople at the time of an early and unsuccessful attempt to abolish capitulatory rights, the U.S. Ambassador to Turkey, Henry Morgenthau, stated that the feeling amongst the foreign communities 'was the panic which the mere suggestion of abrogation produced on the foreign population. The idea of becoming subject to Turkish laws and perhaps being thrown into Turkish prisons made their flesh creep, and with good reason!'[48]

21 The above-mentioned examples clearly reveal an evolutionary, civilization-based notion of legality, wherein Western positivist legal norms constituted both the final goal and the meter of judgment. Accordingly, a purportedly objective scale of civilizational and legal development served to justify the differential treatment of foreigners in the course of the nineteenth and early twentieth centuries. For the majority of Western lawyers, the idea of allowing their co-nationals be tried in accordance with the 'barbarian' customs of the Ottomans was simply inconceivable. Therefore, an increasingly vehement discourse regarding the ostensibly lawless and inferior nature of law in the Levant was created and diffused. Such a narrative deeply influenced the American and Continental perceptions of law in the Middle and Far East. At the same time, not only did the feeling of an intrinsic necessity to maintain capitulatory immunities consolidate but it also shaped the self-perception that the Orient, and its leaders, had of themselves. Unsurprisingly, then, the emergence of nationalist elites agitating for rapid modernization and westernization

coincided with the decades in which the debates on extraterritoriality and the alleged deficiency of Ottoman law reached their peak.[49] The perception of *inferiority*, however, to emerge from the broader cognitive notion of *difference*, always requires a term of comparison. The question thus becomes *who* sets the standards of whatmay be considered (legal) progress and civilization?

III. Abolishing Extraterritoriality, Exporting Positivist Legality

a) Internal Opposition to Extraterritorial Consular Jurisdiction

22 With the gradual assimilation of the notion of territorial jurisdiction as a necessary and constitutive element of modern state sovereignty, on the one hand, and foreigners' increasing abuse of the original capitulatory treaties, on the other, the Ottoman rulers developed an aversion to extraterritorial consular jurisdiction. This distaste was exacerbated by the 1856 Treaty of Paris, which regulated the conclusion of the Crimean War between the Ottoman Empire and Russia.[50] It is often asserted that the Treaty of Paris represented the formal entry of the Ottoman Empire into the Concert of Europe specifically, and the system of public international law previously reserved to the relatively narrow club of Christian, civilized nations, more generally.[51] Notwithstanding the European governments' solemn promise of non-intervention in Turkish domestic affairs and a general statement of commitment to consider the Sublime Porte as a formally equal subject in international law, Ottoman sovereignty indeed appeared to be a form of 'organized hypocrisy' when it came to the issue of the abolition of extraterritoriality.[52]

23 The Turkish representative to the conference vehemently argued that foreign nationals and their consular representatives were abusing the capitulatory privileges, thus considerably obstructing the regular administration of Ottoman justice. In support of the abolishment of extraterritorial consular jurisdiction, Ali Pasha of the Turkish delegation substantively argued that: (1) it led to an unmanageable multiplicity of laws and jurisdictions; (2) a considerable number of Western judges were partial, and tended to sympathize with their co-nationals; (3) such judges deliberately and excessively delayed verdicts; (4) lacking adequate enforcement measures, such verdicts often went unexecuted; (5) the general prohibition on search foreigners' persons and domiciles for evidence compounded the situation; (6) foreign witnesses often refused to appear; (7) an increasing number of Ottoman subjects engaged in 'jurisdiction shopping' by claiming foreign nationality; (8) foreign courts often tried mixed criminal cases, contrary to the original provisions of the capitulations; (9) foreigners often went unpunished; and, finally, (10) that capitulatory privileges were unilateral concessions and, as such, subject to the Ottoman abrogation.[53]

24 Clearly, the admission of the Ottoman Empire to the Concert of Europe greatly reinforced its rulers' perception that foreign jurisdictional immunities were unjust and contradicted the modern notions of territorial sovereignty under public international law. At that time, capitulations were not abolished on the grounds that the Empire's internal legal system was not 'ready'. Further judicial reforms were urged, and a multilateral conference on extraterritorial consular jurisdiction – i.e. the Istanbul Conference on Extraterritoriality – was promised, but never held.[54] A second major – and unsuccessful –

attempt to abolish the capitulatory system occurred in October 1881, when the Turkish Ministry of Foreign Affairs issued a circular to European and American foreign embassies. All embassies rejected the circular on the basis that the Sultan did not have the authority to annul the existing treaties unilaterally without the consent of all parties concerned.[55]

25 On the eve of the outbreak of WWI, however, the Ottoman Empire saw a concrete opportunity to terminate Unequal Treaties, attempting to negotiate their abolition in exchange for its support for, or neutrality towards, the side of the Allies.[56] At that time, the Empire issued another official declaration condemning the abuses of foreign legal privileges and asking for their complete abolishment.[57]Nevertheless, similar to 1881, the Anglo-American response was once again negative, asserting that the basis of the Ottoman declaration constituted a unilateral act and was, as such, null and void. [58] One month later Turkey joined the Austro-German coalition, and officially declared war on the Allies.

b) Negotiating the End of Extraterritoriality: Turkey and the Lausanne Conference

26 In 1917, shortly before its final defeat, Germany repaid Turkey for its alliance during the war when it signed a treaty putting a definitive end to its extraterritorial privileges in the Levant. The instrument provided that Germans in Turkey and Turks in Germany should enjoy the same treatment as the natives with respect to the legal and judicial protection of their persons and property.[59] Shortly thereafter, following the German example, Austria renounced its capitulatory rights through a similar instrument. [60] In 1921, post-revolutionary Russia also abrogated its historical jurisdictional immunities, on the basis that 'the Government of the U.S.S.R. considers the capitulatory regime to be incompatible with the free national development and with the sovereignty of any country; and it regards all the rights and acts relating in any way to this regime as annulled and abrogated.'[61]

27 The final abolishment of extraterritorial consular jurisdiction in Turkey, however, occurred in 1923, as one of many results of a multilateral peace conference following the conclusion of WWI. The Lausanne Conference, held between November 22, 1922 and February 4, 1923, and presided over by the Italian Marquis Garroni, created a Special Commission on the Regime of Foreigners in Turkey.[62] The most important question to be addressed within the Special Commission was the ultimate compatibility of Turkish sovereignty and extraterritoriality. Western powers were extremely reluctant to renounce their citizens' immunities in what had been the Ottoman Empire.[63] Nevertheless, the Turkish representative to the Conference, Ismet Pasha, repeatedly insisted on the necessity of abolishing the capitulations, 'because of their incompatibility with modern conceptions of law, and because of the manner in which they infringed on the sovereignty of the State'.[64]

28 While partially supporting the Turkish position, the president of the Commission, quite pragmatically, recognized that further guarantees on the security of aliens in the Middle East, as well as on their property and investment, were needed in order to terminate the capitulatory regimes. Consequently, he stated:

29 'It must be recognized that even under the new regime, Turkish justice has not yet been able to give proof of its worth, and also that Turkey is still subject to laws, some of which are based on religious laws, while others are admitted by Turkey herself to be capable of

reform, since they do not harmonize with the requirements of modern international relations'[65]

30 In sum, the conditions required by the Commission were: (1) the provision of convincing guarantees on the judicial treatment of foreigners in Turkey; (2) the implementation of further legal reforms based on the European model of justice and legality; (3) the employment of foreign judges and, possibly, allowing them to try first instance cases involving aliens; (4) the participation of foreign legal experts in Turkish legal reforms; and, finally, (5) reserving the executive jurisdiction on cases involving foreigners exclusively to foreign judges (6).[66]

31 Understandably, the Turkish delegation perceived such requirements as a *de facto* continuation of extraterritorial consular jurisdiction and a direct encroachment on the sovereignty and independence of its government. Consequently, in February 1923, Ismet Pasha left Lausanne in protest, leading to a temporary collapse of the negotiations.[67] A few months before the conclusion of the treaty, however, a compromise was reached, and Turkey agreed to employ Western legal advisers, nominated by the Permanent Court of International Justice, to assist its jurists in the drafting and implementation of further legal reforms.[68] Such experts had no judicial function, and were appointed only for a limited number of years. The Sublime Porte's successors also conceded that determinations relating to the personal status of foreigners in issues of marriage, divorce, judicial separation, etc., may be regulated by foreign laws in their national tribunals.[69]

32 The Treaty of Lausanne was signed on July 24, 1923 and, after a long and controversial history, the capitulatory system and attendant jurisdictional privileges granted to foreign nationals in the Ottoman Empire finally came to an end. Article 28 of the Treaty expressed the acceptance by the High Contracting Parties of 'the complete abolition of the Capitulations in Turkey in every respect'.[70] On the same day, a special convention regulating the conditions of residence, business and jurisdiction of European nationals in Turkey was signed between the British Empire, France, Italy, Japan, Greece, Romania and the Serb-Croat-Slovene State, and the newborn Turkish Republic.[71] Article 15 of the instrument prescribed that 'subject to the provisions of Article 16, all questions of jurisdiction shall, as between Turkey and the other contracting Powers, be decided in accordance with the principles of international law', whereas Article 17 of the same document reflected the Turkish commitment to ensure foreigners and their property 'protection in accordance with international law and the principles and methods generally adopted in other countries'.[72]

33 But why did the Euro-American governments ultimately accept the abolition of extraterritoriality? How were they able to overcome their historically sceptical, and often disdainful, attitude towards legal norms in the Middle East? And why at that time, in Lausanne in 1923? Although such questions are still open to debate, the growth of Turkish military power has been convincingly put forward as a possible answer. In fact, just a few years before the negotiations at Lausanne, the young official Mustafa Kemal Atatürk led the Turks to a clear victory in the war against Greece – supported by Great Britain – thereby demonstrating the considerable prowess of the Turkish conventional forces.[73] Furthermore, the majority of continental armies had been demobilized at the conclusion of WWI. As a result, the Allies may have concluded that initiating another war for the maintenance of extraterritoriality was 'not worth the candle'.[74] Ismet Pasha's resolute stance during the negotiations, and his categorical refusal to exceed a certain threshold of concessions, certainly also played an important role. Finally, the general shift within

Western governments, following the institution of the League of Nations and the promulgation of Wilson's 'Fourteen Points', towards a policy of non-intervention also contributed to the termination of Unequal Treaties.[75]

34 That said, it is most likely the alleged improvement in Turkish 'legal civilization', as well as its direct commitment to implement further legal reforms based on the European model, that tipped the scale in favour of the abolition of extraterritorial consular jurisdiction. In other words, once Turkey adapted its internal legal order to Western models of positivist, secularized legality, the European and American governments saw no problem in abolishing extraterritoriality – whose primary justification had been the alleged barbarity of the Ottoman laws and practices. This point is further developed in the ensuing paragraphs.

c) Abolishing Extraterritoriality, Exporting Legality: The Positivist Legacy of Extraterritorial Consular Jurisdiction

35 The theory that the rise and fall of extraterritorial consular jurisdiction in the Ottoman Empire, as well as China, played an enormous role in pushing those polities towards a gradual 'positivization' of their legal systems is the central argument of this thesis. All the pronouncements made by Western governments and legal experts as to the alleged inferiority and backwardness of Turkish law did not fall into a vacuum but, on the contrary, pushed and shaped massive legal reforms within Turkey.[76] Ironically, at the very moment of the abolishment of the increasingly abusive system of capitulations – aimed at freeing Turkish sovereignty from Western legal interference – Turkey initiated a massive process of 'Westernization', entering the club of 'civilized' nations.[77] In other words, 'fighting' extraterritoriality acted as the catalyst for Ottoman legal reforms, pushing it towards the 'modernization' of its internal legal order as a means of proving to the West it was capable of protecting foreigners without the resort to controversial judicial immunities.

36 Each time the Sublime Porte attempted to abolish the capitulatory system and to claim its right, as did its European counterparts, to exclusive jurisdiction over conduct occurring within its territory, European governments denied their consent on the basis that its legal system was 'not ready'. As in the case of China, extraterritorial jurisdiction clearly was not the *only* cause of legal reforms; without a doubt, other, historically-contingent factors also played an important role in this process.[78] Nevertheless, Western diplomatic pressures, as well as the gradual assimilation of foreign legal ideas *through* the presence of extraterritorial communities and legal experts in those countries, certainly had an enormous effect on their normative shift towards a positivist conception of legality. According to Liebesny, capitulations gradually became 'one avenue through which Western legal thought and legal procedure were introduced'.[79] The influence that capitulatory jurisdictional privileges, and the desire to terminate them, had on this process of re-structuring Turkish indigenous law is illustrated by the speech that Ismet Pasha made at the Lausanne negotiations. Having stressed the failure to abolish capitulations sixty-six years before, during the 1856 Paris Conference, Pasha vehemently emphasized the legal 'modernization' accomplishments of the Turkish Republic:

> 'During the period subsequent to the conclusion of the Treaty of Paris, Turkey has worked feverishly at the perfection of her judicial system, which she had already taken in hand. The commercial code, the penal code, the codes of civil and penal procedure, as well as the laws regarding the "Tribunaux de Paix," and also all the

> administrative laws and regulations, have been established on the model of codes and laws in force in European countries. Above all, it has quite recently been possible to carry out a very important reform in the civil law, by which our judicial institutions have been completely secularized...'[80]

37 Ismet Pasha's statement reveals how the West's insistence upon the maintenance of extraterritoriality recurrently invoked the alleged inefficiency of the Ottoman legal system as compared to an ideal-typical positivist legal order. Consequently, a discourse regarding the necessity of comprehensive legal reforms, based on European legal categories, was gradually created and reinforced.[81] A first wave of legal 'modernization' corresponded with the 1830s apex of extraterritorial concessions in the Ottoman Empire, and culminated with the 1839 Imperial Edict known as The *Hatt-i Sharif of the Gülhane*.[82] The Edict launched the so-called *Tanzimat* period, wherein the Sublime Port enacted its first legal codes and first attempted to construct an extended courts system based on European models of justice administration.[83] Hence, in 1840, a partial criminal code was published, followed ten years later by the enactment of a partial commercial code. At the same time, a parallel modernization of Turkish detention infrastructures and the police system was attempted.[84] Subsequently, a review of those first instruments, in reference to French legal codes, was undertaken.[85] Perhaps unsurprisingly, after the 1856 Congress of Paris failed to fulfil its promise to revisit negotiations on the subject of capitulation, a Second Imperial Edict was issued to promote legal reforms. A decade later, the Ottoman Land Code was promulgated, allowing the commercialization of land in the Empire and prescribing guarantees on foreign ownership and succession.[86] The first appellate court was established in 1874, in an attempt to introduce a legal hierarchy of tribunals and promote uniformity in legal interpretation. 1876 saw the publication of the first Turkish constitution.[87]

38 The purpose of these massive projects of codification was primarily to consolidate Turkish territorial jurisdiction, eliminate – or at least minimize – the role of religious and customary laws, unify the domestic legal system to guarantee more coherent interpretation of the law and, more generally, construct a modern, European-style nation-state. It was, however, in the aftermath of the Lausanne Conference that the most impressive wave of legal reforms began. The Turkish desire to fulfil its promises to further promote the 'positivization' of its legal system and prove that it was a 'civilized state', coupled with the new government of progressive nationalists led by Mustafa Kemal Atatürk, had a major role in this process. Accordingly, in 1923, the old and increasingly intrusive consular courts were abolished. In 1924, the communal and religious courts were similarly shuttered and, in the course of the same year, a new constitution was promulgated. 1926 saw the adoption of a revised, Swiss-inspired civil code, which was shortly thereafter complemented by revised penal and commercial statutes. Finally, in 1927, a new civil procedure code was adopted, followed by a reformed code on criminal procedure.[88] It appears, therefore, that, in less then one century, the Ottoman Empire experienced an enormous shift towards a typically Continental tradition of codification and legal positivism. Extraterritorial consular jurisdiction and the attempts to abolish it should be understood as, at least to some extent, informing this process. The increasing attempts to modernize its domestic legal order reflected the belief that, by positivizing its laws, Turkey could rid itself of both Western judicial interference and European insinuations as to the 'lack of real law' in the Levant. At the same time, the institutionalization of domestic law, and the corresponding promises to intensify the reformist process, help account for the ultimate willingness of Euro-American

governments to accept the abolition of extraterritoriality during the Lausanne negotiations.

39 Like the notion of superiority, however, the ontological category of 'modernization' owes its existence to its binary counterpart – i.e. 'backwardness' and/or 'stagnation'. For centuries the Ottoman Empire had not perceived itself as 'backward' or 'retrograde' and, especially with regard to the treatment of foreigners, its traditional regulatory order demonstrated an enormous degree of tolerance and flexibility. It was only when Western jurists gradually assumed the interpretative monopoly of what constitutes law that legal systems, and societies, came to be measured in terms of their conformity to the positivist conception of legality. Hence, when a society passed the test by, for lack of a better term, simply coping and pasting Continental legal ideas and practices, it was admitted to the restricted club of 'civilized nations'. When, to the contrary, its traditional order significantly diverged from positivist ideas of legality, it was depicted as stagnating in the 'Third World'. Yet, as Ruskola has pointed out, cultures, including the legal ones, do not come labelled with ordinal numbers.[89] There is no universal principle prescribing that every normative system must be dissected, judged, and eventually, dismissed, with reference to Euro-centric analytical legal categories – although this is exactly what happened in the cases of the Ottoman Empire and China.

NOTES

1. See generally Stanford Jay Shaw, and Ezel Kural, *History of the Ottoman Empire and modern Turkey*. Vol. 2. (Cambridge University Press, 1977); Halil Inalcik, *The Ottoman Empire: the classical age, 1300–1600*. (Weidenfeld and Nicolson, 1973); Halil İnalcık and Donald Quataert, *An economic and social history of the Ottoman Empire: 1300–1914*. (Cambridge University Press, 1994).

2. 'A striking exception was the Ottoman Empire. Rather than the area of land within the Ottoman Empire being considered uniform or homogeneous, it was in fact quite heterogeneous and was accepted as such. It was divided up into different communities, usually religious – the millet system – each with its own laws. As a matter of fact, it is precisely this heterogeneity, which is implied by our very use of the term "empire". This heterogeneity is one of the essential characteristics which distinguish an empire from a national state.' See Steven Grosby, 'Territoriality: The Transcendental, Primordial Feature of Modern Societies', *Nations and Nationalism* 1, no. 2 (1995): 145. For a theoretical overview of the Muslim 'commonwealth' of the believers, or *Umma,* see Amira K. Bennison, 'Muslim Universalism and Western Globalization', In *Globalization in World History*. (New York: WW Norton, 2002). 75–90; Selim Deringil, 'Legitimacy Structures in the Ottoman State: The Reign of Abdulhamid II (1876-1909)', *International Journal of Middle East Studies* 23, no. 3 (1991): 345–359 – discussing the increasing use of the idea of the caliphate in the late nineteenth century.

3. For an institutional survey of the Ottoman government during the golden age of Suleiman the Magnificent, see Norman Itzkowitz, *Ottoman Empire and Islamic Tradition*. (Chicago: University of Chicago Press, 1972).

4. 'Powerful multi-ethnic empires, such as the Ottoman, were quite willing to accord a level of extraterritorial law to minority communities, but with ultimate jurisdiction remaining in the

hands of the sovereign." In Richard S. Horowitz, 'International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century', *Journal of World History* 15, n. 4 (2004): 460. See also Lauren Benton, 'Historical Perspectives on Legal Pluralism', *Hague Journal on the Rule of Law* 3, no. 01 (2011): 57–69.

5. Etymologically, the meaning of the word 'Ulama' derives from the term 'Ulm', or knowledge.

6. On the traditional Islamic normative order, see Joseph Schacht, *An Introduction to Islamic Law*. (Oxford: Clarendon Press, 1964); Abdur Rahman I. Doi, *Sharåiah: The Islamic law*. (London: Ta Ha Publishers, 1984); Wael B. Hallaq, *The Origins and Evolution of Islamic Law.* Vol. 1. (Cambridge University Press, 2005); Albert Hourani, *Arabic Thought in the Liberal Age 1798–1939*. (Cambridge University Press, 1962).

7. See Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh*. (Cambridge University Press, 1999).

8. Arguably, this helps explain why today Sharia law may coexist with novel legal disciplines, such as business and investment law. See for instance Almas Khan, 'The Interaction between Shariah and International Law in Arbitration', *Chicago Journal of International Law* 6 (2005): 791.M. Kabir Hassan and Mervyn K. Lewis, 'Product Development and Shariah Issues in Islamic Finance', *Thunderbird International Business Review* 49, n. 3 (2007): 281–284. Abdul Rahim, Abdul Wahab and M. Kabir Hassan, 'Islamic Takaful: Business Models, Shariah Concerns, and Proposed Solutions', *Thunderbird International Business Review* 49, n. 3 (2007): 371–396.

9. Richard S. Horowitz, 'International Law and State Transformation in China, Siam, and the Ottoman Empire During the Nineteenth Century', *Journal of World History* 15, n. 4 (2004): 463.

10. On the millet system, see Benjamin Braude and Bernard Lewis, *Christians and Jews in the Ottoman Empire: The central lands. v. 2. The Arabic-speaking lands*. Vol. 1. (Holmes & Meier Publishers, 1982); Richard Clogg, 'The Greek Millet in the Ottoman Empire', In *Christians and Jews in the Ottoman Empire: The Functions of a Pluralist Society* 1 (1982): 185-208; Kamel S. Abu Jaber, 'The Millet System In The Nineteenth-Century Ottoman Empire', *The Muslim World* 57, no. 3 (1967): 212–223.

11. 'Tolerance in a millet system meant the dominant cultural group, the Muslims of the Ottoman Empire, "tolerated" the different religious groups within its empire as long as they did not question its authority. Neither within the Muslim territory nor within other, Jewish or Christian ones under Ottoman rule, did there exist anything like religious liberty and freedom of conscience, yet the system itself was one of mutual toleration in the sense of religious-political co-existence.' In Rainer Forst, 'Foundations of a Theory of Multicultural Justice'. *Constellations* 4, no. 1 (1997): 69.

12. A passage of Koran prescribes:
'Say: O ye Unbelievers!
I worship not what ye worship,
And ye are not worshippers of what I worship;
And I am not a worshipper of what ye have worshipped,
And ye are not worshippers of what I worship.
To you your religion; and to me my religion."
Liu. Look for reference.'
Quoted from Shih Shun Liu. *Extraterritoriality: Its Rise and Decline*.
(New York: AMS Press, 1969). 25.

13. On the system of capitulations, see Thomas Naff, 'Ottoman Diplomatic Relations with Europe in the Eighteenth Century: Patterns and Trends', *Studies in Eighteenth Century Islamic History* (1977): 97–103; Nasim Sousa, *Capitulatory Regime of Turkey* (Baltimore: Johns Hopkins University Press, 1933). 68-88; Nasim Sousa, *The Capitulatory Régime of Turkey: Its History, Origin, and Nature*. No. 18. (Baltimore: Johns Hopkins Press, 1933); Maurits Van den Boogert, *The Capitulations and the Ottoman Legal System: Qadis, Consuls, and Beraths in the 18th Century*. Volume 21 of Studies in Islamic Law and Society. (Brill, 2005). For further reading, see footnote 11.

14. See, generally, Alexander Von Miltitz, *Manuel des Consules* (1840). See also Shih Shun Liu, *Extraterritoriality: Its Rise and Decline*. (New York: AMS Press, 1969). 22–35; George Williams Keeton, *Extraterritoriality in International and Comparative Law.* (Hague: Librairie du Recueil Sirey 1948). 294–299.

15. Article 2 of the 1535 Treaty stated that the King of France was also 'Given the right to send to Constantinople or Pera or other places of this Empire a bailiff -just as at present he has a consul at Alexandria. The said bailiff and consul shall be received and maintained in proper authority so that each one of them may in his locality, and without being hindered by any judge, qadi, soubashi, or other according to his faith and law, hear, judge, and determine all causes, suits and differences, both civil and criminal, which might arise between merchants and other subjects of the King (of France)...The qadi or other officers of the Grand Signior may not try any difference between the merchants and subjects of the King, even if the said merchants should request it, and if per-chance the said qadis should hear a case their judgment shall be null and void'. For the complete text of the treaty, see Baron I. De Testa, *Recueil des Traités de la Porte Ottomane,* Vol. I. (Paris, 1864). 15–21; and Gabriel Noradounghian, *Recueil d 'Actes Internationaux de 1'Empire Ottoman,* Vol. I. (Paris, 1897). 83–87. For an English translation, see Nasīm Susa, *The Capitulatory Régime of Turkey: Its History, Origin, and Nature*. No. 18. (Baltimore: Johns Hopkins Press, 1933). 314–320.

16. 'Extraterritoriality as a semi-colonial institution was in important respects an adaptation of the system of capitulations in the Ottoman Empire.' In Richard S. Horowitz, 'International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century', *Journal of World History* 15, n. 4 (2004): 460.

17. By 'private international law', I mean the law that a sovereign authority establishes to administer relations between aliens inhabiting its territory and disputes involving a foreign element. In support of the normative shift of capitulations towards a public international law dimension, see Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*. (Cambridge: Cambridge University Press, 2010). 104 footnote 4 – 'I use extraterritoriality rather than "capitulations," a term preferred by Middle East scholars. One reason for this choice is to differentiate the legal authority of foreign merchant communities and mercantile companies (a form of legal self-rule) from a state's jurisdiction over their citizens beyond state boundaries (a form of extraterritorial jurisdiction).' For a similar approach see also Thomas Naff, 'The Ottoman Empire and the European States System', In *The Expansion of International Society*, ed. Hedley Bull and Adam Watson. (Oxford: Clarendon Press, 1984). 162–169.

18. *Capitulations avec la France*. En date du 28 mai 1740 (4 Rébi-ul-Eicel 1153). L'Empereur Sultan Mahmoud; fils du du Sultan Moustapha toujours victorieux. In Gabriel Noradounghian, *Recueil d'actes internationaux de l'Empire Ottoman: 1300–1789*. Vol. 1 (Paris: F. Pichon, 1897). 277, N. 32.

19. While, with respect to this point, the reference to criminal cases is clear from the words 'qualque meurtre', the provision is more ambiguous with regard to civil and commercial litigation. It is not clear whether the expression 'qualque autre désordre' aimed at including such a typology of cases, although it is highly probable.

20. The dragomans were the official translators of the Ottoman Empire. See generally Bernard Lewis, *From Babel to Dragomans: Interpreting the Middle East*. (Oxford University Press, 1953).

21. Liu presents the opposite view, asserting that the general principle regulating the choice of law procedure in criminal and civil cases – and also applied to extraterritorial arrangements in Asia and in other countries – was that of *actor sequitur forum rei*: 'Mixed cases between natives and foreigners were assigned by the earlier treaties, as by the Turkish, to the competence of the local authorities, who should, however, try them in the presence of the foreign diplomatic or consular officer concerned; but it was expressly provided that the pretext of the absence of the foreign representative should not be abused. In general, the principle *actor sequitur forum rei* was adhered to, and in a number of the treaties mentioned, it was laid down that in all mixed cases, civil or criminal, the plaintiff should be brought under the jurisdiction and laws of the

defendant's courts, an officer of the plaintiff's nationality being deputed to attend the proceedings in the interests of justice.' In Shih Shun Liu, *Extraterritoriality: Its Rise and Decline*. (New York: AMS Press, 1969). 32.

22. Article 26, *Capitulations avec la France*. En date du 28 mai 1740 (4 Rébi-ul-Eicel 1153). L'Empereur Sultan Mahmoud; fils du Sultan Moustapha toujours victorieux. In Gabriel Noradounghian, *Recueil d'actes internationaux de l'Empire ottoman: 1300–1789*. Vol. 1. Paris: F. Pichon, 1897: 277, N. 32.

23. Article 52, Ibid.

24. *Capitulations commerciales avec le Danemark*. Fait à Constantinople le 14 octobre 1740 (15 Zilkadè 1l70). In Noradounghian, Gabriel. *Recueil d'actes internationaux de l'Empire ottoman: 1300–1789*. Vol. 1 Paris F. Pichon, 1897: 308, N. 34.

25. *Capitulations ou traité d'amitié et de commerce avec la Prusse*. Fait à Constantinople le 23 Mars 1761 (24 Zilhidjê 1174). Le texte original est en Italien pour la Prusse. In Ibid: 315. N. 35.

26. For the exact references to every single treaty, see Shih Shun Liu, *Extraterritoriality: Its Rise and Decline*. (New York: AMS Press, 1969). 32. See also Maurits H. Van den Boogert, and Kate Fleet, eds. *The Ottoman Capitulations: Text and Context*. (Istituto per l'Oriente CA Nallino, 2004); Nasim Sousa, *Capitulatory Regime of Turkey*. (Baltimore: Johns Hopkins University Press, 1933). 68–88; Edhem Eldem, 'Capitulations and Western Trade', *The Cambridge History of Turkey* 3 (2006): 283–335; Gabriel Bie Ravndal, *The Origin of the Capitulations and of the Consular Institution*. No. 34. (US Government Printing Office, 1921); Philip Marshall Brown, 'The Capitulations', *Foreign Affairs* 1, no. 4 (1923): 71–81; Pierre Crabites, 'Islam, Personal Law and the Capitulations', *The Muslim World* 18, no. 2 (1928): 173–176.

27. Accordingly, Liu emphasizes how, in addition to the Ottoman Empire, extraterritorial consular jurisdiction has also existed in other states of the Levant and Africa, such as Algiers, Morocco, Tripoli, Tunis, Persia, Muscat, Zanzibar, Senna, Egypt, Congo, Ethiopia and Madagascar. See Liu, Ibid: 31–33. For an interpretation of the status of extraterritorial consular jurisdiction in international law, see George Williams Keeton, *Extraterritoriality in International and Comparative Law*. (Hague: Librairie du Recueil Sirey 1948). 349–368.

28. See the discussion below on the internal opposition to extraterritorial consular jurisdiction.

29. See *Capitulations avec la France*. En date du 28 mai 1740 (4 Rébi-ul-Eicel 1153). L'Empereur Sultan Mahmoud; fils du Sultan Moustapha toujours victorieux. In Gabriel Noradounghian, *Recueil d'actes internationaux de l'Empire ottoman: 1300–1789*. Vol. 1. (Paris: F. Pichon, 1897). 277 N. 32.

30. 'At the same time, capitulations were limited to reign of a given sultan and had to be renewed with the accession of a new sultan. This system, which apparently functioned reasonably well for centuries, was part of the strategy of legal pluralism.' In Richard S Horowitz, 'International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century', *Journal of World History* 15, n. 4 (2004): 460. See also Thomas Naff, 'Ottoman Diplomatic Relations with Europe: Patterns and Trends', In *Studies in Eighteenth Century Islamic History,* ed. Thomas Naff and Roger Owen. (Carbondale: Southern Illinois University Press, 1977). 97–103; Nasim Sousa, *Capitulatory Regime of Turkey*. (Baltimore: Johns Hopkins University Press, 1933). 68-88.

31. 'As it was the Turkish theory that treaties should not last longer than the lifetime of a single sultan, this document was renewed by each sultan in succession, with occasional modifications, until, in 1740, the treaties were given their final form, to constitute the principal basis of the European claim to extraterritorial privileges in Turkey.' In Shih Shun Liu, *Extraterritoriality: Its Rise and Decline*. (New York: AMS Press, 1969). 31.

32. As it will be discussed later, this was one of the major arguments employed by the Ottoman Empire to successively ask for the abolishment of extraterritoriality.

33. When, for instance, in 1881 the Ottoman Empire edited a circular informing all foreign embassies on its territory of its intentions to abolish the capitulatory privileges, in reply, the European powers declared by their joint notes of December 25, 1881 and February 25, 1882 that the sultan had no authority to do so without their previous consent. See Alphonse Rivier, *Principes du droit des gens*. Vol. 1. (Paris: A. Rousseau, 1896). 544.

34. See Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*. (Cambridge University Press). 117–118.

35. See Eliana Augusti, 'From Capitulations to Unequal Treaties: The Matter of an Extraterritorial Jurisdiction in the Ottoman Empire', *Journal of Civil Law Studies* 4 (2011): 302.

36. Ibid.

37. See Lucius Ellsworth Thayer, 'The Capitulations of the Ottoman Empire and the Question of their Abrogation as it Affects the United States, ' *The American Journal of International Law* 17, no. 2 (1923): 217.

38. Ibid: 223.

39. Quoted in Shih Shun Liu, *Extraterritoriality: Its Rise and Decline*. (New York: AMS Press, 1969). 31.

40. 'Initially, the ability to use these consular courts was limited to cases involving no Muslims. Eventually, as the balance of military power between the Middle East and the West shifted in favour of the latter, west European diplomats managed to loosen the age-old ban against trying Muslims in non-Islamic courts.' In Timur Kuran, 'Why the Middle East is Economically Underdeveloped: Historical Mechanisms of Institutional Stagnation, ' *The Journal of Economic Perspectives* 18, no. 3 (2004): 85.

41. 'The sole question, therefore, before this court is, has His British Majesty's Supreme Court in the Ottoman Dominions jurisdiction to hear and determine a criminal case in which the accused is a British subject and the complainant an Ottoman subject? There is no doubt that in recent years the custom usually followed in cases where an Ottoman subject is proceeding criminally against a British subject is for the accused to be tried before a Turkish tribunal. But although this had been the custom in recent years and will undoubtedly continue to be the course of procedure, I see no reason to assume that privileges acquired by treaties have been annulled by reason of this custom being carried on.' In *Rex v. Lawson* decided on appeal in His British Majesty's Supreme Court for the Dominions of the Sublime Ottoman Porte, February 19, 1912. Quoted from Lucius Ellsworth Thayer, 'The Capitulations of the Ottoman Empire and the Question of their Abrogation as it Affects the United States', *The American Journal of International Law* 17, no. 2 (1923): 223.

42. When, by diplomatic note in 1914, Turkey asked for the end of extraterritorial consular jurisdiction, the joint circular issued by European governments in response read as follows: 'That the Capitulatory regime is not an autonomous institution of the Empire but a resultant of international treaties, diplomatic agreements, and contractual acts of divers kinds.' See *Collected Diplomatic Documents relating to the Outbreak of the European War*. Great Britain. Foreign Office. London: H.M. Stationery Office, Harrison and Sons Printers: No. 43.

43. As a matter of fact, during the same decades the first capitulations were instituted, France was experiencing a massive process of positivist codification of its domestic laws and customs. Possibly, this contributed to reinforcing the French rulers' willingness to stipulate clear, formal treaties with foreign powers. On the codification of French laws during the eighteenth and nineteenth centuries, see generally John P. Dawson, 'The Codification of the French Customs.' *Michigan Law Review* 38, no. 6 (1940): 765–800. See also Rodolfo Batiza, 'Origins of Modern Codification of the Civil Law: The French Experience and Its Implications for Louisiana Law', *Tulane Law Review* 56 (1981): 477–601.

44. Supporting the allegation that the 1940 Treaty between France and the Ottoman Empire primarily aimed at restating long-lasting custom between the two polities, see Sultan Mahmoud's

statement in the preface to the treaty: 'Porte de félicité (Louis XV), aurait demandé la 1740 permission de présenter et de remettre ladite lettre, ce qui lui aurait été accordé par notre consentement impérial, *conformément à l'ancien usage de notre cour*; et conséquemment ledit ambassadeur ayant été admis jusque devant notre trône impérial, environné de lumière et de gloire, il y aurait remis la susdite lettre et aurait été témoin de notre majesté en participante *notre faveur* et *grâce impériale*;.... Et comme les expressions de cette lettre amicale font connaître le désir et l'empressement de Sa Majesté à faire comme par ci-devant, tous honneurs et *ancienne amitié* jusqu'à présent maintenus, *depuis un tems immémorial*, entre nos glorieux ancêtres (sur qui soit la lumière de Dieu), et les très magnifiques empereurs de France, et que dans ladite lettre il est question, en considération de la *sincère amitié* et de rattachement particulier que la France a toujours témoigné à notre maison impériale, de renouveler encore, pendant l'heureux temps de notre glorieux règne, et de fortifier et éclaircir, par l'addition de quelques articles, les capitulations impériales, déjà renouvelées l'an de l'hégire 1084, sous le règne de feu sultan Mohammed, notre auguste aïeul, noble et généreux pendant sa vie, et bienheureux à sa mort.' Emphasis added. See *Capitulations avec la France*. En date du 28 mai 1740 (4 Rébi-ul-Eicel 1153). L'Empereur Sultan Mahmoud; fils du du Sultan Moustapha toujours victorieux. In Gabriel Noradounghian, *Recueil d'Actes Internationaux de l'Empire Ottoman: 1300–1789*. Vol. 1. (Paris F. Pichon, 1897). 277 N. 32.

45. See Report from Hornby to Earl of Malmesbury. London: National Archives FO 881/981 (1858: 27).

46. 'But, as a rule, custom based on the religious law, coupled with exaggerated reverence for the original lawgiver, holds all those who cling to the faith of Islam with a grip of iron from which there is no escape. During the Middle Ages, it has been truly said, man lived enveloped in a cowl. The true Muslim of the present day is even more tightly enveloped in the Sheriat.' In Evelyn Baring Cromer, *Modern Egypt*. Vol. 2. (London: Macmillan, 1908). 136.

47. See Turan Kayaoglu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*. (Cambridge University Press, 2010). 126.

48. See Henry Morgenthau, *Ambassador Morgenthau's Story*. (Gomidas Institute, 2000). 114–117.

49. On the birth of nineteenth-century Ottoman nationalism, see Şerif Mardin, *The Genesis of Young Ottoman Thought: A Study in the Modernization of Turkish Political Ideas*. Vol. 21.(Princeton University Press, 1962); Şerif Mardin, *Continuity and Change in the Ideas of the Young Turks*. (School of Business Administration and Economics, Robert College, 1969); Hasan Kayali, *Arabs and Young Turks: Ottomanism, Arabism, and Islamism in the Ottoman Empire, 1908-1918*. (University of California Press, 1997); Ayşe Kadioğlu, 'The Paradox of Turkish Nationalism and the Construction of Official Identity', *Middle Eastern Studies* 32, no. 2 (1996): 177–193; Walter F. Weiker, 'The Ottoman Bureaucracy, Modernization and Reform', *Administrative Science Quarterly* (1968): 451–470; Bernard Lewis, 'The Ottoman Empire in the Mid-Nineteenth Century: A Review', *Middle Eastern Studies* 1, no. 3 (1965): 283–295; Nikki R. Keddie, 'Pan-Islam as Proto-Nationalism', *The Journal of Modern History* 41, no. 1 (1969): 17–28.

50. Curiously, the *causus belli* of the Crimean War was the Russian pretention to accord stronger jurisdictional protection to Orthodox Christians residing in the Ottoman Empire. See generally Trevor Royle, *Crimea: The Great Crimean War, 1854–1856*. (St.Martin's Press, 2000).

51. Article 7 – 'Sa Majesté le roi de Sardaigne, Sa Majesté l'Empereur d'Autriche, Sa Majesté l'Empereur des Frangais, Sa Majesté la Reine du Royaume-Uni de la Grande Bretagne et l'Irlande, Sa Majesté le Roi de Prusse et Sa Majesté l'Empereur de toutes les Russies déclarent la Sublime Porte admise a participer aux avantages du droit public et du concert européens. Leurs Majestés s'engagent, chacune de son côte, à respecter l'indépendance et l'intégrité territoriale de l'Empire Ottoman, garantissent, en commun, la stricte observation de cet engagement, et considéreront, en conséquence, tout acte de nature à y porter atteinte, comme une question d'intérêt général'. In *Traité de Paix Signé à Paris le 30 Mars 1856 entre la Sardaigne, l'Autriche, la France, le Royaume Uni de*

*la Grande Bretagne et d'Irlande, la Prusse, la Russie et la Turquie avec les Conventions qui en Font Partie, les Protocoles de la Conférence et la Déclaration sur les Droits Maritimes en Temps de Guerre.*Turin: Imprimerie Royale, 1856.

52. Stephen D. Krasner, *Sovereignty: Organized Hypocrisy*. (Princeton University Press, 1999).

53. 'During the session of March 25 [of the Paris Congress], the question of abolition was brought up for discussion. Ali Pasha argued that the Capitulations were disadvantageous alike to the foreigner and to the Ottoman Government; that they created "a multiplicity of governments in the Government;" and that they were an insuperable obstacle to all reform. Count Clarendon, Count Walewski and Count Cavour expressed themselves very sympathetically and were favourably inclined to the Turkish point of view. On the other hand, Count de Buol and Baron de Burquency hesitated to grant to Turkey her judicial autonomy at once. While agreeing that the Capitulations needed modification, Baron de Burquency deemed it important that the modification should be proportionate to the judicial reforms inaugurated by the Ottoman Empire. A protocol was drawn up and signed, embodying the wish (vœu) that a conference should be assembled at Constantinople, after the conclusion of peace, to deliberate upon the matter. The promised conference was, however, never held.' In Shih Shun Liu, *Extraterritoriality: Its Rise and Decline.* (New York: AMS Press, 1969). 90.

54. Ibid. See also Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*. (Cambridge University Press, 2010). 121–123.

55. See Liu, Ibid: 86.

56. 'In Turkey, after the Ottoman regime took advantage of World War I to abrogate the capitulations, the victorious allies did not accept the new state of affairs.' In Richard S. Horowitz, 'International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century', *Journal of World History* 15, n. 4 (2004): 466.

57. 'The Imperial Ottoman government, animated by a spirit of hospitality and sympathy toward the subjects of friendly Powers, formerly determined in a special manner the rules to which foreigners should be subject on coming to the Orient to engage in business here and communicated these rules to the Powers. In the course of time these rules, which the Sublime Porte had promulgated upon its exclusive initiative came to be interpreted as privileges, strengthened and extended by certain practices, and maintained to the present under the name of old treaties or Capitulations.' See *Collected Diplomatic Documents Relating to the Outbreak of the European War.* Great Britain. Foreign Office. London: H.M. Stationery Office, Harrison and Sons Printers, 1915: 1092, No. 43.

58. The response to the Turkish communication insisted 'that the Capitulatory regime is not an autonomous institution of the Empire but a resultant of international treaties, diplomatic agreements, and contractual acts of divers kinds'. See *Collected Diplomatic Documents*: Ibid. See also the instructions received by the U.S. Ambassador to Constantinople following the Ottoman declaration: 'You are instructed to notify the Ottoman Government that this Government does not acquiesce in the attempt of the Ottoman Government to abrogate the Capitulations, and does not recognize that it has a right to do so or that its action, being unilateral, has any effect upon the rights and privileges enjoyed under those conventions. You will further state that this Government reserves for the present the consideration of the grounds for its refusal to acquiesce in the action of the Ottoman Government and the right to make further representations later.' *Collected Diplomatic Documents*: Ibid, 1093.

59. 'At the beginning of the European War, Germany and Austria-Hungary offered as the price of Turkish assistance in the conflict their consent to abrogate the Capitulations. This was later confirmed by Germany in a treaty of January 11, 1917, which provided that Germans in Turkey and Turks in Germany should enjoy the same treatment as the natives in respect of the legal and judicial protection of their persons and property and that to this end they should have free

access to the courts and be subjected to the same conditions as the natives.' In Shih Shun Liu. *Extraterritoriality: Its Rise and Decline.* (New York: AMS Press, 1969). 91.

60. Ibid.

61. For the text of the treaty, see Jacob Coleman Hurewitz, *Diplomacy in the Near and Middle East: 1914–1956*. Vol. 2. (Van Nostrand, 1956). 96–97.

62. For a detailed account of the Lausanne Conference's negotiations with regard to the termination of extraterritoriality in Turkey, see Turan Kayaoğlu, *Legal imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*. (Cambridge University Press, 2010). 134–147.

63. On the collapse of the Ottoman Empire and on the birth of modern Turkey, see generally Stanford Jay Shaw and Ezel Kural, *History of the Ottoman Empire and Modern Turkey*. Vol. 2. (Cambridge University Press, 1977). See also David Fromkin, *A Peace to End All Peace: The Fall of the Ottoman Empire and the Creation of the Modern Middle East*. (Macmillan, 2001).

64. See *Documents Diplomatiques, Conférence de Lausanne*. Vol. 1. (Paris : Imprimerie nationale, 1923). 446–451.

65. In *Lausanne Conference on Near Eastern Affairs, 1922–1923: Records of Proceedings and Draft Terms of Peace*. London: H.M.S.O. – Turkey; no. 1 (1923): 483.

66. Ibid: 467–503.

67. See Shih Shun Liu, *Extraterritoriality: Its Rise and Decline*. (New York: AMS Press, 1969): 95.

68. 'The much-debated declaration was also signed in the form accepted on June 4 by the Turkish delegation. By this declaration, the Turkish Government proposed to engage for a period of not less than five years a number of European legal counsellors, to be selected from a list prepared by the Permanent Court of International Justice front among jurists nationals of countries which did not take part in the World War. These legal counsellors were to serve as Turkish officials under the Minister of Justice, some of them being posted in Constantinople and others in Smyrna.' Liu, Ibid: 96.

69. Ibid.

70. Article 28 – 'Each of the High Contracting Parties hereby accepts, in so far as it is concerned, the complete abolition of the Capitulations in Turkey in every respect.' In: *Treaty Of Peace With Turkey Signed At Lausanne July 24, 1923; The Convention Respecting The Regime Of The Straits And Other Instruments Signed At Lausanne.* The British Empire, France, Italy, Japan, Greece, Roumania And The Serb-Croat-Slovene State, of the one Part, and Turkey, of the other part. Done at Lausanne, the 24th July, 1923. Available at: http://www.atour.com/government/un/20040205e.html.

71. See *Convention (IV) Respecting Conditions of Residence and Business and Jurisdiction.* The British Empire, France, Italy, Japan, Greece, Roumania and the Serb-Croat-Slovène State, of the one part, And Turkey, of the other part. Done at Lausanne, the 24th July, 1923. Available at: http://www.mfa.gov.tr/chapter-i_-conditions-of-residence-and-business.en.mfa.

72. See Article 15, Ibid. Article 16 of the instrument specified that, as promised by the Turkish delegation during the Lausanne negotiations, all questions related to the personal status of foreigners had to be subject to the exclusive jurisdiction of their state of nationality: 'In matters of personal status, i.e., all questions relating to marriage, conjugal rights, divorce, judicial separation, dower, paternity affiliation, adoption, capacity, majority, guardianship, trusteeship and interdiction; in matters relating to succession to personality, whether by will or on intestacy, and the distribution and winding up of estates; and family law in general, it is agreed between Turkey and the other contracting Powers that, as regards non-Moslem nationals of such Powers in Turkey, the national tribunals or other competent national authorities established in the country of which the party whose personal status is in question will alone have jurisdiction.'
Article 17 provided: 'The Turkish Government declares that the Turkish courts will ensure to foreigners in Turkey, both as regards person and property, protection in accordance with international law and the principles and methods generally adopted in other countries.' Ibid.

73. 'Turkish historiography argues that the nationalist victory under Mustafa Kemal (later Mustafa Kemal Ataturk) in 1922 against British-sponsored Greek forces caused the Allies to acquiesce to numerous Turkish demands, including the abolition of extraterritoriality.' In Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*. (Cambridge University Press, 2010). 129. See also Hamza Eroglu, *Turk Devrim Tarihi* [History of Turkish Revolution]. (Ankara: Karde § Matbaasi, 1967): 170–176.

74. According to Kayaoğlu, Churchill wrote to Prime Minister Lloyd George on the possibility of war with Turkey that 'with military resources which the Cabinet have cut to the most weak and slender proportions, we are leading the Allies in an attempt to enforce a peace on Turkey which would require a great deal and powerful armies and long, costly operations and occupations'. Ibid: 129.

75. On the rise of the Wilsonist ideology see generally George W Egerton, 'Ideology, Diplomacy, and International Organisation: Wilsonism and the League of Nations in Anglo-American Relations, 1918-1920', In *Anglo-American Relations in the 1920s: The Struggle for Supremacy,* ed. Mc Kercher. (Edmonton: University of Alberta Press, 1990).

76. For major advocates of this view see Esin Örücü, 'The Impact of European Law on the Ottoman Empire and Turkey', In *European Expansion and Law: the Encounter of European and Indigenous Law in 19th and 20th Century Africa and Asia*. (New York: BERG, 1992). 39–58; Richard S. Horowitz, 'International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century', *Journal of World History* 15, n. 4 (2004): 445–486; Gerrit W. Gong, *The Standard of Civilization in International Society*. (Oxford: Oxford University Press, 1986); Brett Bowden, 'The Colonial Origins of International Law. European Expansion and the Classical Standard of Civilization,' *Journal of the History of International Law* 7, no. 1 (2005): 1–23.

77. 'According to cultural arguments, the Ottoman Empire was not a member of the international society. Turkey, however, as a consequence of its westernization and thus fulfilment of the standard of civilization, was.' In Kayaoğlu, supra: 146. Similarly, Gong argues that 'the Turks had passed a turning-point' when Western powers agreed to abolish extraterritoriality. See Gong, Ibid: 119.

78. Kayaoglu emphasizes the importance of local nationalist elites in China, Japan and in the Ottoman Empire – and their willingness to cut with the previous social order – as major actors in promoting the enormous legal changes of those years.

79. 'Historically, however, the capitulations have been an important factor in the legal development of the region once included in the Ottoman Empire. They were one avenue through which Western legal thought and legal procedure were introduced. Also, since the capitulatory rights came to be felt in the nineteenth century as an infringement of sovereignty, they felt a stimulant for judicial reform, since modernization and reform of the judicial system were one way to prove that the capitulations were no longer needed to protect the European merchant from the possible abuses of local courts. The capitulations can thus be regarded as one of the factors which induced the Ottoman Empire and Egypt to adopt continental European codes and procedure and to endeavour to follow European standards in the administration of justice.' In Herbert I. Liebesny, 'The Development of Western Judicial Privileges', In *Law in the Middle East.* M. (Washington, DC: The Middle East Institute, 1955): 332.

80. Ismet Pasha further asserts: 'The free will of the parties in the matter of contracts and agreements has been recognized as paramount, and the principle of the freedom of the will has been accorded the same place as in Europe. Further, while these laws were being elaborated and promulgated, a faculty of law was instituted at Constantinople, whose programme is more or less identical with that of the corresponding faculties in Europe. This situation has produced during forty years a body of distinguished judges and advocates who possess all the necessary qualifications, and it is to them that at the present time the important task of administering justice is assigned. A considerable number of young men have since the change of régime in 1908

studied in the various faculties of law of the Empire, and are now appointed to various posts in the magistracy.' Cited in Shih Shun Liu, *Extraterritoriality: Its Rise and Decline*. (New York: AMS Press, 1969). 91–92.

81. See Esin Örücü, 'The Impact of European Law on the Ottoman Empire and Turkey', In *European Expansion and Law: The Encounter ofEuropean and Indigenous Law in 19th and 20th Century Africa and Asia*. (New York: BERG, 1992): 44; Herbert I. Liebesny, 'The Development of Western Judicial Privileges', In *Law in the Middle East.* (Washington, DC: The Middle East Institute, 1955). 328.

82. Literally 'Imperial Edict of the Rose House'.

83. On the *Tanzimat* legal and administrative reforms, see Gülnihal Bozkurt, 'The Reception of Western European Law in Turkey. From the Tanzimat to the Turkish Republic, 1839-1939', *Der Islam* 75, no. 2 (1998): 283–295; Ruth Miller, 'The Legal History of the Ottoman Empire', *History Compass* 6, no. 1 (2008): 286–296; Gabriel Baer, 'The Transition from Traditional to Western Criminal Law in Turkey and Egypt', *Studia Islamica* 45 (1977): 139–158; Ma'oz Moshe, *Ottoman Reform in Syria and Palestine, 1840-1861: The Impact of the Tanzimat on Politics and Society*. (Oxford University Press, 1968).

84. See Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*. (Cambridge University Press, 2010): 115.

85. 'The choices were eclectic: the Ottomans modelled their legal system on the French and employed Prussian military advisors.' In Richard S. Horowitz, 'International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century', *Journal of World History* 15, n. 4 (2004): 456.

86. Kayaoğlu, Supra: 127–128.

87. Ibid: 117.

88. All the data mentioned above are taken from the outstanding research of Kayaoğlu, Ibid: 135–136. See also Gülnihal Bozkurt, 'The Reception of Western European Law in Turkey. From the Tanzimat to the Turkish Republic, 1839-1939,' *Der Islam* 75, no. 2 (1998): 283–295.

89. See Teemu Ruskola, 'Legal Orientalism', *Michigan Law Review* 101, no. 1 (2002): 185.

Chapter IV – Extraterritorial Consular Jurisdiction in China

I. On the Traditional Chinese Normative System

a) Political Structure

1 At the time when Western traders first arrived in its territory, China was a vast, complex and intrinsically-pluralistic imperial polity, governed by a dynastic monarchy based in Beijing. The Qing Empire was ruled by an ethnic minority from Manchuria that rose to power in the seventeenth century, establishing its political pre-eminence over the majority, the Han ethnic population. Its structure of governance was highly hierarchical and bureaucratic, headed by the *Tianzi* – the Chinese Emperor, referred to by the honorific 'Son of Heaven'.[1] The Grand Council, composed of a highly educated elite selected through an examination system,assisted him in the administration of political, military, judicial and other issues.[2] During the late imperial period, China was divided into twenty-two provinces, each of which was composed of a varying number of prefectures, in turn divided into several districts. In each district a local magistrate and his staff carried out the administrative and judicial functions for – approximately 200,000 people.[3] Thus, at a local level, the *hsien* magistrates were in charge of the daily management of general administrative, economic, judicial and religious matters. No separation of powers, in the Continental sense of the term, existed.

2 Religion also played a major political role, since Confucianism 'became integrated into the practical aspects of social and political life, where it formed the most dominant political and cultural force in shaping the traditional Chinese view of world order.'[4] More specifically, it contributed to shaping the hierarchical organization of Chinese society, encouraging the community of the believers to internalize appropriate patterns of behaviour while simultaneously establishing the guidelines for forbidden conduct and generally maintaining the *status quo*.[5] In addition, it also attempted to promote the creation of a sort of religious welfare state, in which provisions were made for the benefit of the most vulnerable members of the society.[6] The most consistent epistemic difference as compared to European cosmology conceptions is, perhaps, that the world was

conceived as *'being'* rather then '*becoming'*, and 'process, change, competition and progress were, therefore, all concepts unnatural to Confucianism.'[7]Although, in practice, changes and political turmoil indeed affected China, as they did all human societies throughout history, the maintenance of order and stability was central to the Chinese cosmology. Accordingly, reality was perceived as a continuous whole reflecting a universal harmony, such that 'a disturbance of the social order really meant, in Chinese thinking, a violation of the total cosmic order because...the spheres of man and nature were inextricably interwoven to form an unbroken continuum.'[8]

3 Externally, the Manchu empire was a state largely without boundaries, at least in the sense of precisely defined linear borders set out in the international agreements in vogue in Europe at that time. Only the Russian border with Manchuria and Mongolia had been formally demarcated, as a result of the treaties of Nerchinsk and Kiakhta.[9] In fact, and remarkably similarly to the Ottoman Empire, the notion of territorial delimitation in China was rather vague. Just as in that case, this was likely due to the highly pluralistic, multi-ethnic and multi-lingual composition of the Empire, which counted more than 50 different ethnic groups among its subjects. [10] Hence, notwithstanding the centralized and hierarchical nature of the Imperial bureaucracy, for the great majority of its history, China has been characterized by a considerable degree of political and legal pluralism.[11]

b) Law

4 Over the centuries, the Chinese developed a complex, expanding legal system that – until the intensification of the Imperial relations with European traders in the nineteenth century – remained mostly insulated from the influence of Western legal thought. According to Bodde and Morris, the first Chinese legal code was promulgated in the third century B.C., and apparently drew on even more ancient Chinese customs.[12] Each successive Chinese imperial dynasty promulgated a new code, revising, elaborating or even radically changing the code of its predecessor. The last of these was the Qing code, which assumed its definitive form in 1740.[13] Such codes contained an incredible number of extremely detailed provisions. Rather than actively prescribing positive norms of behaviour, however, their primary aim was to provide the appropriate punishment for every foreseeable type of offence, in accordance with the social and family status of the perpetuator.

5 A good example is provided by a case of 1834, involving the district magistrate Chang Lei, who attempted to visit the Temple of Confucius on a particularly rainy day. According to Chinese custom, an official participating in sacrifices in a Confucian temple was obliged to dismount from his sedan chair when approaching its outer gates. Unhappily for Chang Lei, however, on that particular day the curtain of his chair was closed due to the heavy rain outside, and the chair-bearers accidentally crossed the gates before the official had abandoned his 'vehicle'. The Board of Punishment, the highest Imperial body of adjudication, subsequently ruled: '[illegible]is failure to dismount from the chair in time, though occasioned by the great accumulation of rainwater on the ground and the error of the chair-bearers, nevertheless constitutes a violation of the established regulations. Accordingly, he should be sentenced to 100 blows of the heavy bamboo under the statute on violation of imperial decrees.'[14]

6 Apart from the ironic – for our standards – nature of the incident, the case is interesting in its illustration of a number of practices that characterized the Chinese normative

order. First of all, the allegation that China 'lacked law' was clearly false, as Chang Lei's story shows that the Chinese did have a variety of substantial rules sanctioning and regulating patterns of social behaviour, although they may have differed considerably from Continental notions of justice, rationality and legality. While the sedan chair example may seem humorous, offences such as armed robbery, plundering, public bribery, kidnapping, human trafficking, adultery, verbal insults, pressuring a person into suicide, sacrilege, the accidental murder of a patient by a doctor and the possession of prohibited books were also foreseen and punishable by the Imperial codes.[15] Furthermore, the incident shows that an adjudicatory process, coupled with a system of judicial bodies culminating in the Board of Punishment, existed in the Qing Empire. The case also highlights the major role religious customs and moral obligations played in shaping Chinese normativity. Finally, the case confirms that punishment in *official* Chinese litigation was mostly corporal, the light or heavy bamboo being its softest form, while life exile or capital punishment were the gravest sentences for the most heinous crimes.[16]

7 That said, the Imperial legal codes were not the sole, nor even the primary source of Chinese law. Many disputes were not adjudicated through official channels, but rather through family laws, moral prescriptions, customs, mediation or unofficial authorities, such as village elders, clan leaders, or guild heads.[17] Apparently, the avoidance of official litigation was deeply embedded into the Confucian ideals of harmony and morality, and 'the Chinese traditional society was by no means a legally-oriented society despite the fact that it produced a large and intellectually impressive body of codified law'.[18] Similarly, Li Zhaojie argues that '[positive] law in the eye of Confucianism was not deemed a major social achievement and a symbol of rectitude; instead, it was regarded as a rather regrettable necessity, principally employed by the state as the last resort to maintain social order.'[19] Perhaps one of the main distinctions with a positivist legal order lay in the fact that a codified body of rules, backed by active mechanisms of coercion *external* to the individual was, arguably, perceived as less important than the *internalization* of acceptable patterns of behaviour through education, persuasion and moral example.[20] Nor did the Chinese possess an equivalent of the Western notion of individual rights, positively enforceable against the state, as, in China, 'to surround individual interests with an aura of sanctity and to call them rights, to elevate the defence of these individual interests to the plane of a moral virtue, to "insist on one's rights" – is to run entirely counter to the spirit of li.'[21] Hence, law and normativity in nineteenth-century China were perceived in radically different terms than those found in the Continental tradition of legal positivism.

c) The Treatment of Aliens

8 As in the case of the Sublime Porte, the category of 'foreigner' under Imperial rule was quite ambiguous, as China lacked the Western notions of 'citizenship' or 'nationality', and lacked precise boundaries.[22] Due to the geographic barriers that surrounded its inlands, the Empire's exposure to Western travellers was relatively limited, until, in ever-increasing numbers, Continental traders began to arrive under the flags of the several East India Companies.[23] However, the Qing Empire possessed a remarkably structured and well-organized system of tributary relations with Korea, Annam (Vietnam), Siam (Thailand) Burma and the small kingdom of Liuqui (Ryukyu Islands), whereby the representatives of these communities would periodically pay tribute to the Emperor.[24] In

fact, in the centuries preceding its encounter with the West, China gradually became the hegemonic culture of East Asia, leading it to perceive itself as the centre of a superior civilization.[25]

9 The Sino-centrism of its rulers, however, did not derive from a direct relationship of dependence with the above-mentioned polities, as the tributary system also involved the development of a tiny web of diplomatic relations aimed at maintaining political stability in the region. In other words, the tributary system was not merely an economic institution aimed at collecting taxes from its subjects, but was also a highly ritualized political organization whose purpose was to construct relationships of alliance and protection in the region.[26] Other early interactions with foreign polities involved commercial contacts with the Russians in the North, and the conduct of more-or-less-consistent trade with the Arabic populations along its Western boundaries. It was, however, only over the course of the nineteenth century that circumstances compelled the Empire to consistently interact with, and open towards, Western citizens.

II. Establishing Extraterritorial Consular Jurisdiction

a) Codifying 'Unequal Treaties'

10 Contrary to events in the Ottoman Empire, no coherent custom of unilateral extension of capitulatory privileges to foreigners existed in China preceding the arrival of Europeans.[27] When Continental merchants extended their commercial activities to the Far East, however, they also sought to export the system of jurisdictional immunity. Once again, the issue of cultural incompatibility became apparent and, as in the case of Turkey, the expansion of trade caused the encounter and subsequent clashes between two opposing normative systems. Hence, the establishment of an order resembling, and inspired by, the capitulatory privileges granted by the Sublime Porte in the Levant seemed like an almost natural solution.[28]

11 The Qing Emperor signed the 'Unequal Treaties' – establishing jurisdictional privileges for Western citizens – between 1842 and 1860, thereby instituting the legal framework of consular jurisdiction that would last until the mid-twentieth century. However, the first *de facto* extraterritorial arrangements in China appear to date back to the end of the eighteenth century, when aliens trading in Canton under the flags of the English, Dutch and Portuguese East India Companies began to exempt themselves from the operation of local law.[29] The European disdain for Chinese customs, as well as their obstinate refusal to submit their nationals to the Qing jurisdiction, is often linked to a case known as the *Lady Hughes.*[30]On November 24, 1784, a gun fired from the English ship *Lady Hughes* wounded three Chinese subjects, one of whom died the following day. Informed of the incident shortly afterward, Chinese functionaries demanded that the Select Committee of the British East India Company give up the man who fired the gun for public examination, in accordance with the laws of the Empire. After an initial, unsuccessful attempt to convince the local authorities the defendant had absconded, the Select Committee eventually dispatched the Lady Hughes' supercargo to Canton for the purpose of clarifying the circumstances of the case. Intimidated by the Cantonese resolution to see their laws enforced, the Committee eventually ordered that the gunner be given up to the Chinese officials, with a recommendation in his favour. Following the delivery of the offender, the supercargo of the ship was immediately liberated, and the gunner was tried, convicted

and imprisoned pending a final decision from the Throne. On January 8, 1785, the Emperor sentenced the gunner, who was subsequently executed, to death.[31]

12 The gunner's case greatly exacerbated European feelings of apprehension towards the prospect of submitting their nationals to Chinese adjudicatory and executive jurisdiction. This was particularly true in the case of the British, 'for thereafter they pursued an unvaried course of lasting opposition to the surrender of any English criminal for trial before a Chinese court of justice.'[32] In fact, in nearly all subsequent cases of murder or wounding of Chinese subjects involving an English national, the East India Company and, later, British governmental officials, categorically refused to submit their citizens to the local judicial authorities.[33] The Qing authorities perceived such refusals to be highly offensive, as the Chinese conception of justice – while relatively fluid regarding jurisdiction over civil litigation – was highly territorial in penal cases involving Chinese subjects.[34]

13 Therefore, *de facto* jurisdictional immunities within Canton had already been claimed *before* their formal embedding in the 'Unequal Treaties'. In 1833, the British Government had passed a bill known as 'An Act to Regulate the Trade to China and India'.[35] Article VI of the instrument unilaterally authorized the creation of a British Court with criminal and admiralty jurisdiction for the trial of offenses committed by British subjects in China. No attempt to seek the Imperial consent on the matter was made.[36] In the words of Wellington Koo:

> 'What Great Britain succeeded in wringing from China, at the end of the expensive and ignoble war in 1842, in respect to the question of jurisdiction over British subjects in China, was merely an official recognition of what had already been brought into being and engrafted on her, in practice, without her consent or countenance.'[37]

14 The situation was further exacerbated by the decline of the British East India Company during the 1830s, when the Crown first began to send official governmental authorities and legal experts to China.[38] Until that time, the Company had been able to monopolize trade in Canton to the extent that local authorities regarded its representatives as the 'headmen' of the British community.[39] Although conflicts were not absent, the company's traders had developed some minimal skills in Chinese language and, in the interests of trade, were more likely to assume a compromising and submissive attitude towards the Chinese authorities.[40] This practice changed, however, when the Company lost its commercial monopoly, and the British government, for the first time, sent a superintendent of trade to represent the Crown in Canton.[41] Unfortunately, the choice fell on William John, the 8th Baron Napier,[42] who having little substantive knowledge of China and its culture, reportedly began his first meeting with the local authorities by severely reproaching them for their unpunctuality.[43] In 1833, in a subsequent letter to Palmerstone, the Baron described the Chinese as displaying 'an extreme degree of mental imbecility and moral degradation, dreaming themselves to be the only people on earth, and being entirely ignorant of the theory and practice of international law'.[44] Clearly, this highly prejudicial view of Chinese society, as well as his heavy-handed attitude towards the Imperial authorities, did not help to ease Sino-British relations and jurisdictional conflicts. On the contrary, they contributed considerably to an increase in the tensions that, a few years later, led to the outbreak of the infamous Opium War.

15 It was only following the conclusion of the first Opium War in 1842 that the notion of extraterritorial consular jurisdiction, based on the Ottoman capitulations, was first embedded in positive treaties.[45] In China, in 1729, an Imperial Decree outlawed opium on

the basis that it degraded the morality of the Chinese and its use was contrary to the Confucian prescriptions of appropriate behaviour. With the arrival of foreign traders, however, the consumption of the drug increased notably, such that the Daoguang Emperor was compelled to reaffirm the existing ban on opium in 1836.[46] In 1838, the imperial officer Lin Zexu was appointed to suppress opium trade in Guangdong province.[47] English traders, in particular, used to export the drug from India and illicitly smuggle it into China, thus directly violating its internal legislation. After several, unsuccessful appeals to foreign powers to cease their smuggling business, the Commissioner even wrote to Queen Victoria herself, expressing the Chinese dissatisfaction with the scarce regard British nationals demonstrated for its law.[48] When foreign opium stocks were eventually surrendered to the Imperial authorities and Lin Zexu ordered their destruction, Lin was accused of destroying Great Britain's 'governmental property', and the first sparks of the Opium War ignited.[49] The conflict lasted for three years, and its conclusion resulted in the Treaty of Nanjing, which reaffirmed the British victory and compelled the Qing Empire to open four new ports to trade.[50]

16 Professor Xinbao Zhang refers to the first Opium War as a conflict over jurisdiction.[51] In fact, not only did the conflict derive from the Chinese allegation of European non-compliance with its territorial laws, but the war's conclusion also led to a number of legal concessions granting jurisdictional privileges to foreign nationals. The first explicit statement of extraterritorial consular jurisdiction was contained in *The General Regulation of Trade*, signed by representatives of the British and the Qing Empires in July, 1843, which aimed at supplementing the peace Treaty of Nanjing.[52] More precisely, Article XIII of the instrument focused on disputes between British subjects and Chinese, prescribing that:

17 'Whenever a British subject has to complain of a Chinese he must first proceed to the Consulate and state his grievance. The Consul will thereupon enquire into the merits of the case and do his utmost to arrange it amicably. In like manner, if a Chinese have reason to complain of a British subject, he shall no less listen to his complaint, and endeavour to settle it in a friendly manner...Regarding the punishment of English criminals, the English Government will enact the laws necessary to attain that end, and the Consul will be empowered to put them into force; and regarding the punishment of Chinese criminals, these will be tried and punished by their own laws, in the way provided for by correspondence which took place at Nanking, after the concluding of the peace.'[53]

18 The provision clearly emphasized the role the British consul was to have in the 'amicable' resolution of mixed cases involving English and Chinese subjects, while affirming his exclusive prescriptive and enforcement jurisdiction with regard to criminal cases in which the offender was an English national. Nevertheless, the article remained ambiguous in its failure to specify under *whose* laws a certain conduct could be considered as criminal. While in the case of intentional murder or physical injury, this did not pose a major problem, as both Chinese and English legal orders condemned them as heinous crimes, the classification of other types of offences was more controversial. Cassel points out that the decision was particularly complicated with respect to political crimes, or crimes against public order: 'Could a foreigner be charged for violating traffic regulations, even if those regulations did not exist in his native country? Or could a Briton be indicted for publicizing disparaging remarks about Qing officials?'[54] The vagueness of the provision in this respect, as well as its failure to elucidate the distinction

between civil and criminal jurisdiction, was only (partially) clarified fifteen years later, in the Sino-British *Treaty of Tianjin*.[55]

19 Another relevant institution, contained in the 1843 *Supplementary Treaty of the Bogue*, was the introduction of the so-called 'most-favoured-nation treatment'. The clause prescribed that all Western nations were allowed to trade in the five ports opened for trade 'on the same terms as the British' and, in addition, it stressed that if the Emperor granted other nations 'additional immunities and privileges', British subjects would be able to enjoy the same.[56] Hence, as in the case of the Ottoman-French treaty codifying capitulatory concessions, after the conclusion of the first 'Unequal Treaties' with Britain, several other Western countries sought to obtain similar written guarantees from the Qing Emperor. The following year, the *Treaty of Wangxia* was concluded between China and the United States, Article XXI of which provided that 'citizens of the United States who may commit any crime in China shall be subject to be tried and punished only by the Consul or other public functionary of the United States thereto authorized according to the laws of the United States.'[57] And, shortly after, the French representative Théodore de Lagrené concluded the Sino-French *Treaty of Whampoa*, described by Cassel as 'the most carefully drawn of all treaties', due to expertise in Sino logic achieved by the French.[58]

20 Although not stated in a separate treaty, the kingdom of Belgium also obtained extraterritorial privileges accorded on the basis of the most-favoured-nation treatment clause contained in the previous instruments signed by other governments.[59] A few years later, Sweden managed to secure its capitulatory rights, while transferring the factual competence to adjudicate its citizens to the American consulate.[60] Russia also managed to consolidate legal privileges for its nationals in China, with the *Treaty of Kuldja* between the Romanovs and the Qing Emperor becoming effective in 1851. An important distinction between that treaty, however, and all other such agreements negotiated between China and the Europeans, was that the 1851 instrument prescribed *reciprocal* extraterritorial rights both for Russians in China and Chinese subjects in Russia.[61] Similarly, in July, 1871, Japan and China entered into a bilateral arrangement for the establishment of consular jurisdiction.[62] By 1918, Germany, Austria-Hungary, Peru, Mexico, Brazil and Switzerland, had also negotiated 'Unequal Treaties' securing the jurisdictional rights of their nationals within the Chinese territories.[63]

21 Together, the above-mentioned instruments jointly established the legal framework that defined and regulated extraterritorial consular jurisdiction in China for nearly one hundred years. Foreigners involved in criminal and civil litigation were exempted from local prescriptive, adjudicatory and enforcement jurisdiction, and both cases involving aliens exclusively and mixed cases involving a Chinese subject increasingly fell under the competence of foreign consulates. Some 'Unequal Treaties' were later modified by further revisions outlining a more precise division between civil and criminal cases and the relevant body of law in defining the nature of the offence.[64] Overall, however, the general legal *milieu* upon which these treaties were based remained unaltered.

22 Although the significance of coercion in pushing the Qing dynasty towards the ratification of these treaties is still under debate, the violent genealogy of extraterritoriality in China cannot be denied.[65] Unlike the case of the Sublime Porte, where capitulations were initially based on voluntary and unilateral concessions of the Sultan, the Chinese Empire had no established custom of granting jurisdictional immunities to foreigners before the arrival of Europeans. The Opium War played a considerable role in establishing the British military superiority that backed the

ratification of the first 'Unequal Treaties'. Similar to that which occurred in the Ottoman Empire, this process led to a rapid and dramatic opening of the Chinese territories to foreign trade. Ever-increasing numbers of foreigners began to arrive and settle in the busy ports of Canton, Macao, Shanghai, Ningbo, Xiamen, Fuzhou and Hong Kong, bringing further complexity to the legal environment of these cities.

b) Proliferation of Foreign and Mixed Courts

23 The settlement of vast expatriate communities in China inevitably led to the intensification of litigious cases involving either aliens exclusively, or both foreign and local subjects. Hence, as occasion needed, the establishment within the city-ports of novel judicial bodies increased. Following the British Crown's unilateral 1833 attempt to establish a British Court in Canton, consular jurisdiction attained its most sophisticated form in the Shanghai area, where Britain, the United States and France jointly established settlements in the 1840s.[66] According to Cassel, by the middle of the nineteenth century, 'Shanghai had developed into the hub of the treaty port system in East Asia, where consular courts from a variety of different countries coexisted with a number of local Chinese courts, creating a very complex legal order.'[67]

24 In 1864, in order to simplify this highly complex legal conglomerate, the British consul Harry Parkers sought to restore law and order by establishing a Mixed Court in the International Settlement.[68] The competence of the Court covered the adjudication of mixed disputes and cases where both litigants were nationals of one of the governments that had directly negotiated treaties with the Qing Emperor. Nevertheless, it was subsequently decided to extend the tribunal's jurisdiction to disputes involving citizens of other, third states as well. Its administration involved British, French and American magistrates, and, when Chinese subjects were concerned, a representative of the Imperial authority. The rules of procedure were relatively flexible and 'the nature of the court depended largely on the personal qualities of the sub-prefect and the assessors'.[69] In just a few years, the importance and range of adjudication of the Mixed Court grew considerably, such that in 1868 the British representative R. J. Forrest stated, astonished, that 'ten times more cases come before the Mixed Court in the course of a year than before our Supreme Court in all its branches!'[70]

25 In 1865, the British judge Sir Edmund Hornby was sent to Shanghai to establish a British Supreme Court, adding another piece to the already complex puzzle of extraterritorial consular jurisdiction in the city.[71] Additionally, in 1906, the U.S. Congress passed the United States District Court for China Act, claiming 'original jurisdiction in most civil and criminal cases where Americans were defendants, and appellate jurisdiction over cases decided first in the U.S. consular courts in China's treaty ports'.[72] Perhaps ironically, the appellate body of the institution was the U.S. Circuit Court in California, a choice that rendered it almost impossible for a Chinese plaintiff to concretely appeal a judgment.[73]

26 Shanghai is but one example among many, as a plurality of foreign tribunals, mixed courts and consular arrangements gradually developed in other treaty ports and, increasingly, within the Chinese inland territories. According to Kayaoğlu 's outstanding study of the reports of the International Commission on Extraterritoriality, China had a total of 120 consular courts in 1926.[74] Accordingly, Japan, which, just a few decades earlier was still struggling to abolish the Western powers' extraterritorial privileges, established thirty-five consular institutions in China. Britain had a total of 26 capitulatory tribunals,

France and the U.S. each had 18 adjudicatory bodies, Portugal and Italy seven, the Netherlands and Belgium four, and Denmark, Sweden and Norway each instituted one extraterritorial consular court in China.[75]

c) Legitimizing Extraterritoriality, Barbarizing Chinese Legality

27 Similar to the justification that Western powers used to defend their capitulations in the Levant, the institution of extraterritorial consular jurisdiction in the Far East was based on the alleged deficiency of those societies' internal legal systems. 'Rightly or wrongly', according to Shin Shun Liu, 'there lurked in the hidden nooks of every Western mind a vague notion that Oriental jurisprudence could not possibly be in keeping with Western ideas of justice, and that an Occidental would certainly do violence to his dignity and pride by rendering obeisance to a deficient judicial regime.'[76] The epistemic milieu – discussed in previous chapters – that backed the institution of extraterritorial privileges was deeply permeated by an *a priori* assumption that humanity could be divided into a 'civilizational pyramid', with Western ideas of law and justice at the pinnacle.

28 The idea that legality, properly speaking, was a primary criteria for a country's membership in the club of Euro-American Christian civilization was prevalent among Western jurists during the nineteenth and early twentieth centuries. With regard to international law, Lassa Oppenheim asserted that 'as a law between Sovereign and equal states based on consent of these States, [it] is a product of modern Christian civilization.'[77] The French jurist, Antoine Pillet, clearly believed that only 'civilized' states could claim the privilege of sovereignty and equality, since 'il n'existe aucune égalité de droits entre les Etats civilisés et les états non civilisés ou moins civilises'.[78]Hence, it may be unsurprising that, during its fifth annual conference, the Association for the Reform and Codification of the Law of Nations proclaimed the nature of legal relations between Christian states and non-Christian Asian societies as 'on the whole extremely unsatisfactory'.[79] European jurists failed to reach a consensus as to whether or not 'the duty of civilized governments to employ moral influence to induce a non-Christian people to reform its laws when these are characterized by injustice or barbarity' existed.[80] A few years later, it was suggested that unless Western-like codes of law were adopted and administrated by courts 'composed by scientific jurists', extraterritorial consular jurisdiction in China and Japan could not be abolished.[81]

29 More pertinent to the case of China, the arguments as to the 'deficiencies' of its internal legal system can be summarized as follows: (1) no positive, Western-style legal codes had ever been drafted; (2) no separation between administration, law-making and enforcement existed; (3) its methods of trial were cruel and unjust; (4) civil law was underdeveloped; (5) the conditions in Chinese prisons were inhumane; (6) no institutions for the study of modern law existed; (7) its judges and officials were corrupt; (8) the principle of responsibility under Chinese penal laws made individuals vicariously responsible for the crimes of others; (9) religion and general cosmological considerations played an excessive role in the adjudicative process; and, finally, (10) Chinese substantive norms and codes of punishment for criminal offences were too brutal and barbarian to be applied to foreigners.[82] Consequentially, according to Koo, a foreign offender 'could see no reason why he should sacrifice his life or freedom to vindicate the laws of a barbarous nation, alike to the humiliation of his compatriots and to the disgrace of his own civilized land.'[83]

30 Many of the charges mentioned above were rooted in concrete perceptions developed by Western travellers and 'experts' in the course of their first encounters with Chinese culture. It is not the purpose of this thesis to glorify the Chinese normative order as a better or more appropriate system, nor is it to deny the atrocious nature that certain punishments in China sometimes assumed. Nevertheless, it is important to underline another form of hypocrisy that characterized European discourses regarding China's 'uncivilized' status. Relying, in particular, on the allegedly 'barbarous' nature of Chinese criminal punishments and the fact that a considerable number of offences were subject by capital punishment, Western scholars often asserted that it was inconceivable to submit foreign citizens to the Imperial justice.[84] From the eighteenth to early nineteenth centuries, however, Chinese laws were not much more severe than penal legislation in England during the same period. This is highlighted by Blackstone's sombre remark that, in 1769, 'among the variety of actions which men are daily liable to commit, no less than an hundred and sixty have been declared by act of Parliament to be felonious without benefit of clergy; or, in other words, to be worthy of instant death.'[85] Capital punishment for offences such as mail theft was not abolished until 1835.[86] The use of torture to compel confessions was common in English courts until 1722, 'when Parliament enacted that standing mute should be considered as equivalent to a plea of guilty'.[87]

31 To conclude, a considerable number of Western legal 'experts' first observed Chinese law through the blurry lenses of a blindly self-assured cultural superiority, culminating in a tendency to condemn it altogether as 'unsatisfactory' and irrational. In other words:

32 'When wholesale denial of Chinese law was untenable, given the long legal tradition in China, Western jurists created a fiction of the Chinese legal system as irrational, instrumentalist, arbitrary, and similar to so-called *kadi* justice, and then compared it with another fiction: idealized European positive law.'[88]

33 The barbarization of Chinese legality, in turn, served as an apology for the establishment of Western jurisdictional privileges, as well as to justify, in general, the Euro-American policy of interventionism in the Far East. Thus, through extraterritoriality, foreign powers further denied the legitimacy of Chinese law, and gradually compelled China to adopt a new legal system, based on the Continental models of positivist legality.

III. Abolishing Extraterritoriality, Exporting Positivist Legality

a) Internal Opposition to Extraterritorial Consular Jurisdiction

34 The general attitude of disdain towards Chinese law held by Western citizens reinforced the Qing authorities' prescient rejection of the institution of extraterritorial consular jurisdiction. According to Horowitz, 'the exemption of foreign nationals from the jurisdiction of Chinese courts, the use of foreign-controlled consular courts that were widely believed to be deeply biased, and the frequent abuse of these privileges became touchstones of growing popular nationalist and anti-imperialist feeling'.[89]With the rise of Chinese nationalist movements and the overthrow of the Qing dynasty, both extraterritoriality and the treaty system more generally quickly became the objects of an even stronger popular opposition.[90] As in the case of the Ottoman Empire, Euro-American governments took advantage of the Chinese displeasure with Western legal interventionism to ask for the initiation of massive legal reforms. The successful example

set by Japan in abolishing foreign extraterritorial rights through the implementation of widespread legal reforms further reinforced the Chinese Republican leaders' determination to recover Chinese sovereignty and to end the 'Century of Humiliation'.[91]

35 Perhaps the best illustration of the reasons underlying China's discontentment with consular jurisdiction is a memorandum entitled 'Questions for Readjustment', submitted to the governments represented at the 1919 Paris Peace Conference following the termination of WWI.[92] By invoking general principles of international law such as territorial sovereignty and sovereign equality, the document requested that China be treated as an equal within the international community, though the implementation of measures such as the revision of their treaties with China, the abrogation of extraterritoriality, the restoration of China's tariff autonomy and the withdrawal of foreign troops and foreign post offices from China. With regard to the request to abolish extraterritorial consular jurisdiction, the final document is particularly interesting, as it provides a clear statement of the Chinese dissatisfaction with the institution. Firstly, similarly to Ali Pasha's assertion that extraterritoriality constituted 'a multiplicity of governments within the government' in Turkey, the circular argued that consular jurisdiction was defective due to the diversity of laws applied:

> 'The prevailing rule by which the consular jurisdiction is determined is that of defendant's nationality: claims against Englishmen must be made in English Courts, against Frenchmen in French Courts, against Americans in American Courts, and so forth. What constitutes an offence or cause of action in one consular court may not be treated as such in another. It is for this reason that different decisions are given, while the facts are exactly the same, and this inequality of treatment hurts the sentiment of equity and justice.'[93]

36 A second source of discontent lay in the alleged lack of effective control over witnesses or plaintiffs of another nationality. When foreign witnesses were invited to appear before Chinese courts, such appearances were based entirely on the individual's voluntary action, and 'he could not be fined or committed for contempt of court, nor could he be punished by that court if he should commit perjury'.[94] Similarly, local courts found it difficult to obtain evidence in cases where a foreigner committed a crime, particularly if the offence occurred inland. According to the treaties, aliens could not be arrested or tried directly, but were to be handed over to the nearest consulate for judgment. This, in the words of the American Minister Reed, meant that 'the foreigner who commits a rape or murder a thousand miles from the sea-board [was] to be gently restrained, and remitted to a Consul for trial, necessarily at a remote point, where testimony could hardly be obtained or ruled on.'[95]

37 The document, moreover, highlights the theoretical and empirical conflict between consular functions, on the one hand, and judicial responsibilities, on the other. In fact, if the primary duty of a Consul was to look after the interests of his nationals, it is 'scarcely consistent to add to that duty the task of administering justice'.[96] The delegation of the two functions to a single person clearly conflicted, from the perspective of Chinese officials, with the principles of neutrality and impartiality of justice that, quite paradoxically, were so often used to reproach Chinese tribunals. Finally, it was emphasized that extraterritorial consular jurisdiction exhibited 'a marked tendency to disappear everywhere sooner or later'.[97] Indeed, it had been totally abolished in Japan in 1899, while in Siam the reorganization of local courts brought Western powers to consent to a partial surrender of the right of jurisdiction to the territorial authorities.

38 The petition concluded by asking for the definitive termination of consular jurisdiction, upon the fulfilment, on the Chinese side, of further legal reforms anticipated to be accomplished by 1924. The project involved the development of criminal, civil and commercial codes, as well as codes of civil and criminal procedure. The promulgation of such codes would then have been complemented by the establishment of a considerable number of new courts in all the districts where foreigners resided.[98] Notwithstanding Wilson's, Clemenceau's and other conference members' informal acknowledgment of the legitimacy of China's demands, they all urged China to submit its complaints to the nascent League of Nations for redress. In the meantime, not much had changed in the concrete application of the Unequal Treaties by the end of the Peace Conference.[99]

39 The next attempt was pursued at the Washington Conference in 1922, when the representatives of Western governments met to discuss their strategic relations in East Asia. Ironically, the United States, Britain, Japan, Italy, Portugal, Belgium, the Netherlands and France jointly recognized the 'sovereignty, independence, and territorial and administrative integrity of China', but the Republic's representatives to the conference were not allowed to participate actively in the substantive negotiations.[100] Despite this, the Chinese delegation did not miss the opportunity to raise the issue of the abolishment of extraterritoriality. As a matter of fact, Dr. Wang Ch'ung-hui presented arguments against the continued existence of consular jurisdiction, 'particularly in view of the fact that China had recently made much progress in the reform of her judicial system and in the codification of her laws'.[101] By the end of the Conference, the representatives had not yet abolished the jurisdictional privileges enjoyed by foreigners. That said, Western governments did opt for a somewhat pragmatic solution, by promoting the creation of a special Commission on Extraterritoriality in China to 'to inquire into the present practice of extraterritorial jurisdiction in China, and into [its] laws, the judicial system and the methods of judicial administration'.[102]

40 The Commission eventually met in Beijing in 1926, at which time a travelling committee charged within inquiring into the administration of justice within the Chinese territories was established and, after 21 sessions, an official Report on Extraterritoriality in China was drafted and published.[103] This Report was divided into four parts: Part I on the 'Present Practice of Extraterritoriality in China', providing a brief historical overview of the development of the institution, as well as statistical accounts of its status in 1926; Part II, entitled 'Laws and Judicial System of China', expressing the 'verdict' the commissioners reached on the development of the Chinese legal system; Part III on the 'Administration of Justice in China', focusing on the status and practices of Chinese prisons and tribunals; and, finally, Part IV, providing 'Recommendations' to both the Chinese and Western governments aimed at reducing abuses of extraterritorial consular jurisdiction.[104]

41 According to Kayaoğlu, 'the Report on Extraterritoriality in China is the clearest expression of the Western judgment about the Chinese judiciary and of the description of the Western requirement for legal reforms in accordance with the legal positivist worldview as a necessity of extraterritoriality.'[105] In fact, the general terms of the document described the Chinese legal system as unsatisfactory, inefficient and incomplete. First of all, it held that Chinese laws could hardly be considered as such, as 'the commission found that few...were ever enacted or confirmed by Parliament in the method generally prescribed by the modern constitutions'.[106] Furthermore, it noted that China lacked a civil code, a commercial code, a bankruptcy code and patent law, lacunae that were further aggravated by the inadequate number of its courts and the

unsatisfactory nature of its prisons.[107] More generally, 'instead of the barbarity of traditional Chinese practices, it was now the weakness of the central government that served as justification for extraterritoriality.'[108] Consequently, the report recommended that the Chinese demand to abolish foreign 'capitulatory' rights could not be met until substantial legal reforms granting securities to foreigners and bringing the Chinese legal system into conformity with Western jurisprudential models had been accomplished.[109]

42 The majority of the members of the Commission on Extraterritoriality were professional lawyers, educated in Western universities, who based their judgments on ideal-typical positivist legal standards and who then, almost naturally, concluded that China 'lacked' something. As previously discussed, Western legal experts played a considerable role in justifying and eventually perpetuating extraterritorial consular jurisdiction in Asia and the Middle East, as governmental policy-makers relied heavily on their reports when making final decisions.[110] Following the publication of the Commission's Report, Western powers decided to maintain extraterritorial consular jurisdiction in China. A further attempt to abolish consular jurisdiction took place in 1930, through a unilateral declaration of termination, which was obviously rejected.[111] Shortly thereafter, internal political unrest, leading to the split of Chinese leadership into Communist and Nationalist fractions – coupled with the Japanese invasion of Manchuria in 1931 and the outbreak of WWII – brought negotiations to a dreadlock. Arguably, at that time, no one could have imagined that, after one hundred years of struggle between China and Western powers, extraterritoriality would crumble relatively peacefully just a few years later.

b) Conceding the End of Extraterritoriality: The Anglo-American Initiative of WWII

43 A joint Anglo-American initiative led to the abolishment of extraterritoriality in China during WWII. Surprisingly, and distinct from the diplomatic efforts Turkey felt compelled to exercise in order to negotiate the termination of capitulations, the Allies themselves took the first steps towards the abrogation of the Unequal Treaties. This initiative was quite unexpected, as it took place at a time when China was particularly weak.[112] Following a preliminary agreement between the British Foreign Office and the U.S. Department of State to act jointly on the issue, diplomatic negotiations were begun with the Chinese government.[113] As a result, January 11, 1943, the *Sino-American Treaty for the Relinquishment of Extraterritorial Rights in China* was signed in Washington. Article 1 of the Treaty prescribed:

> 'All those provisions of treaties or agreements in force between the United States of America and the Republic of China which authorize the Government of the United States of America or its representatives to exercise jurisdiction over nationals of the United States of America in the territory of the Republic of China are hereby abrogated. Nationals of the United States of America in such territory shall be subject to the jurisdiction of the Government of the Republic of China in accordance with the principles of international law and practice.'[114]

44 On the same day, the Chinese foreign minister, Song Ziwen, and the British ambassador to China signed the *Treaty for the Abolition of Extraterritoriality* in Chongqing. Article 2 of the treaty, drafted similarly to the U.S. provision, abrogated all international agreements that granted extraterritorial rights in China to any British national or company.[115] The event was marked with great celebration and the next day the Nationalist Guomindang government published a Letter to All Servicemen and Masses, announcing with triumph

that ‘we, the Chinese nation, after fifty years' of sanguinary revolutions and five and a half years' of sacrifice in the War of Resistance, have finally transformed the history of a hundred years of the Unequal Treaties of sorrow into a glorious record of the termination of the Unequal Treaties’.[116] The Chinese enthusiasm grew as practically all the other states whose nationals had enjoyed extraterritorial rights in China followed the Anglo-American example and rapidly abrogated their old treaties. All the dominoes of the Unequal Treaties suddenly crumbled. During the same year, Japan, Norway and Belgium consented to the termination of extraterritorial consular jurisdiction. The Netherlands and Sweden followed in 1945, while France, Portugal, Denmark and Italy all concluded new treaties for the abrogation of extraterritoriality between 1946 and 1947.[117] Hence, by the end of the 1940s, the long-abhorred institution finally vanished, with both the Nationalist Government in exile and the new People’s Republic of China taking the credit for having unified the country under a single government and territorial jurisdiction.[118]

45 Although the reasons behind such a drastic turn in Anglo-American politics are not entirely clear, Realpolitik considerations played a crucial role. This rationale was apparent in the British government’s assessment of the differences between the Americans’ ‘idealized’ vision of the Chinese *vis-à-vis* the cautious British approach to their mutual relations. Shortly before the ratification of the above-mentioned treaties, Sir John Brenan, Counsellor in the British Foreign Office, affirmed that ‘due perhaps to their aloofness from the European scramble for territorial and commercial concessions in China, and to the large American missionary community in the country, the Americans are inclined to draw an idealised and emotional picture of the Chinese’.[119] He further emphasized the dissimilarity of the Anglo and American views by underlining the British traditional, ‘more realistic’ attitude towards China, concluding: ‘It is for this reason also that our wartime dealings with China, while imbued with goodwill due to an important ally, are also restrained by caution.’[120]

46 Hence, particularly on the side of the British, the decision to unilaterally terminate the Unequal Treaties certainly took regional political and strategic considerations into account. Supporting China in order to contain Japan, the common enemy-in-war, certainly played a considerable role both for the Crown and, later, following the Japanese attack at Pearl Harbour, for the Americans. Another consideration in support of abolishment was the desire to encourage the Chinese in any potential post-war cooperation in the Far East. Accordingly, reinforcing the internal popularity of the Chinese National Government at the expense of the growing Communist party became paramount.[121] Yet, a different interpretation of the abrogation of the treaties may be found in the increasing *de-facto* inefficiency of consular courts, mostly due to the Japanese occupation of a considerable portion of Chinese territory.[122]

47 Although asserting that the American government abrogated its jurisdictional privileges *solely* out of ‘an idealised and emotional picture of the Chinese’ would be an exaggeration, ideological considerations certainly played a role in the decision. Shortly before signing the treaty of relinquishment, U.S. Secretary of State Cordell Hull affirmed that extraterritoriality was ‘an anomaly’ incompatible with ‘modern international practices’ and the ‘generally-accepted principles of modern international law’.[123] Consequently, he reaffirmed U.S. support for its definitive abolition in the case of China.[124] Interestingly, given its historic conceptualization as a guarantee against ‘backward’ legal cultures, the discourse surrounding extraterritorial consular jurisdiction gradually shifted towards its categorization as an ‘anomalous and anachronistic practice’. This normative shift

presented extraterritoriality as an institution that increasingly clashed with modern ideas of justice and international law.[125] Chinese internal legal reforms played a considerable role in this process and, consequently, in the decision to terminate the Unequal Treaties. At the time when extraterritoriality was abolished, the new Chinese legal architecture finally began to structurally resemble that of a positivist legal system.

c) Abolishing Extraterritoriality, Exporting Legality: The Positivist Legacy of Extraterritorial Consular Jurisdiction

48 Similar to the reformist trajectory of the Ottoman Empire, China's termination of the 'Unequal Treaties' was closely related to the implementation of large-scale legal reforms. In fact, Western promises to end extraterritoriality pushed the Qing leaders to implement massive structural changes in order to 'modernize' their internal jurisprudence. The accomplishment of judicial modernization, in turn, helps account for the subsequent abolition of the institution. In other words, if Chinese legal culture has been invoked as the primary cause for the establishment of extraterritorial consular jurisdiction, extraterritoriality, in turn, led to the gradual 'positivization' of the Chinese prescriptive order. Hence, what Kayaoğlu refers to as legal institutionalization – 'the codification of laws, the spread of a court system and the establishment of a legal hierarchy'[126] – developed hand in hand with the rise and fall of foreign jurisdictional privileges.

49 The first wave of legal reforms in China began at the end of the nineteenth century. In 1898, encouraged by the Japanese success in negotiating the termination of their Unequal Treaties through a comprehensive programme of judicial modernization, the Guangxu Emperor initiated the so-called 'hundred days of reform'.[127] This attempt gained momentum following the 1902 Mackay Treaty between the Qing Empire and Great Britain, Article XII of which mentioned, for the first time, the possibility of terminating consular jurisdiction in exchange for internal legal reforms.[128] Following the ratification of the instrument, 'for the first time, the Qing court agreed that sweeping reforms were necessary for treaty revision'.[129] There were thus several early initiatives that made the first moves towards the codification of penal law, criminal procedure and constitutional law.

50 In 1904, a Law Codification Commission, jointly led by the British-trained lawyer Wu Tingfang and the progressive Chinese legal scholar Shen Jiabe, was established.[130] With the aid of Japanese legal advisors, the Qing authorities tried to institute European-like corporate and commercial bodies of law. Most importantly, they reformed the old Qing penal code, prohibiting the use of cruel punishments, such as torture, to extract confessions and ended capital punishment.[131] Furthermore, in 1906, the centralization and specialization of the Chinese bureaucracy began, and the administrative model of Western governments – with their sectorial separation into ministerial departments – was applied.[132] Notwithstanding these reformist efforts, however, the initial attempts to 'positivize' the Chinese legal order obtained disappointing results. This was due, in large part, to the Empire's intrinsic legal pluralism, political fragmentation, and its subjects' continuing use of traditional customary law and forms of adjudication.[133]

51 The second wave of 'legal institutionalism' came with the ascendance of the Han ethnic Nationalists, who ousted the Manchu Qing dynasty and assumed the leadership of the newborn Republic of China in 1911.[134] The construction of a unitary, modern state was the primary goal of the revolutionary movement, but its accomplishment necessarily implied

'sacrificing the separate nationality, history, and identity that they [the Han] are so proud of and merging in all sincerity with the Manchus, Mongols, Muslims, and Tibetans in one melting pot to create a new order of Chinese nationalism.'[135] Hence, in addition to the central goal of political cohesion, legal standardization and the achievement of unitary territorial jurisdiction were perceived as fundamental to the modern Chinese nation-state. The project of legal modernization was therefore advanced and, just a few months after the Nationalists' *coup d'état,* a civil code based on that of the Japanese (which, in turn, was based on the German civil code), was promulgated. At the same time, efforts to replace the old Imperial laws with modern criminal and commercial codes continued apace.[136]

52 The best illustration of the early legal 'accomplishments' of the Republicans can be found in the 'Question of Readjustment' submitted by the Chinese to the Western governments during the 1919 Paris Peace Conference.[137] The circular asserted that China acknowledged 'that the Chinese laws and their administration have now reached such a state as has been attained by the most advanced nations', and that China made considerable progress in modernizing its jurisprudence.[138] The document proceeded to enumerate the concrete steps China had made, in response to Western critiques, in the drafting of positive legal codes and the comprehensive reform of its adjudicatory bodies.[139] However, the Paris Peace Conference did not lead to the abolishment of extraterritoriality. The Special Commission on Extraterritoriality in China, subsequently instituted during the Washington negotiations, moreover, found all the above-mentioned accomplishments 'unsatisfactory'.

53 Following the negative account of the Report of the Commission on Extraterritoriality, the Guomindang government launched a third wave of legal institutionalization during the 1930s.[140] By 1928, a new Code on Criminal Procedure had entered into force, followed shortly afterward by a revised Civil Code. In 1931, a new Criminal Code, Commercial Code, and the comprehensive codification of Civil Procedure joined the existing reforms.[141] In the course of the same year, the Chinese judicial powers under Judge Yuan passed laws intended, according to Kayaoğlu, 'to standardize the interpretations of the law and to see that these interpretations were applied throughout the country'.[142] The following year, the Law of the Organization of the Judiciary officially consolidated the long-envisioned hierarchy of courts, headed by the Supreme Court in Nanking.[143] According to the Chinese Ministry of Justice, directed by Judge Yuan, the total number of 'modern courts' grew from 139 in 1926 to 406 in 1937.[144]

54 The inspiration for most of the new Chinese positive codes came from pre-existing Western legal instruments. With regard to the 1928 Civil Code, for instance, the Chinese scholar Yang argued that, if studied carefully from Article 1 to Article 1225 and then compared with the German Civil Code, the Swiss Civil Code and the Swiss Code of Obligations, 'we will find that 95% of its provisions have their origins there [since] they are either copied directly or copied with some changes of expression'.[145] Arguably, a similar conclusion could likely be made regarding the other newly promulgated instruments. Hence, although the outbreak of WWII and the Japanese invasion of Manchuria stalled the nationalist reformist projects, it appears that China had already made astonishing progress in the 'positivization' of its laws at the time when extraterritoriality was finally abolished.

55 The greatest legacy of extraterritorial consular jurisdiction in China was, therefore, the structural conformity of its legal system to Western ideas of positivist legality.[146] As in the

case of the Ottoman Empire, and somewhat paradoxically, the price of terminating Western jurisdictional interference was the 'transplantation' of Continental legal categories and structures to China. Notwithstanding the advent of the People's Republic of China and the drastic political changes that affected the country during the first half of the twentieth century, such structural changes permanently influences the future of Chinese law. As a matter of fact, by gradually breaking down traditional values and practices, these early legal reforms 'laid down the foundation of Western law and legal systems, to be further studied, developed and adapted in China', independently of its subsequent political ideologies.[147]

56 Extraterritorial consular jurisdiction was the centrepiece of this process. Not only did Western promises to abolish the institution promote and accelerate the Chinese reform efforts, but its existence also contributed to the diffusion of Western legal and political ideas, cognitive categories, cultural values, social practices and normative beliefs throughout China.[148] Through the evaluation of legal experts, Chinese law was then measured and categorized with reference to an ideal-typical standard of positivist legality, and subsequently dismissed as 'chaotic', 'lawless' and 'unsatisfactory'. The abolition of extraterritoriality, in turn, played an important role in China's achievement of 'the standard of civilization'. According to Gong, it was only when the British and Americans abrogated their Unequal Treaties that China nominally became a 'civilized' member of international society – albeit an uncomfortable one.[149]The great epistemic question remains, however, as to *who* sets the standard of civilization and *who* becomes its object?

NOTES

1. See Li Zhaojie 'Traditional Chinese World Order', *Chinese Journal of International Law* 1 (2002): 22.

2. 'The Qing state, stretching from the county magistrate at the bottom to the emperor and his Grand Council at the top, was integrated, bureaucratic, and run by a highly educated elite in a large part (but by no means exclusively) chosen through the *examination system*. At the local level, officials were overworked, understaffed, and embattled, but there was no question that officials were ultimately responsible to Beijing.' In Richard S. Horowitz, 'International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century', *Journal of World History* 15, n. 4 (2004): 457 (emphasis added).

3. See Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*. (Cambridge University Press, 2010). 164.

4. See Li Zhaojie, ' Traditional Chinese World Order', *Chinese Journal of International Law* 1 (2002): 36.

5. In many ways, Confucianism can be considered an apologist philosophy, as it provided the basis for maintaining a remarkably hierarchical and anti-egalitarian social order. For instance, Confucius advocated that: '[illegible]he duties of universal obligation are five and the virtues wherewith they are practised are three. The duties are those between sovereign and minister, between father and son, between husband and wife, between elder brother and younger, and those belonging to the intercourse of friends. Those five are the duties of universal obligation.

Knowledge, magnanimity, and energy, these three, are the virtues universally binding. And the means by which they carry the duties into practise is singleness.' In: Confucius, *The Doctrine of the Mean*. (University of Adelaide Library, 2008). 20: 8.

6. See Li Zhaojie, ' Traditional Chinese World Order, ' *Chinese Journal of InternationalLaw* 1 (2002): 37.

7. Ibid: 39.

8. In Derk Bodde and Clarence Morris, *Law in Imperial China: Exemplified by 190 Ch'ing Dynasty Cases: With Historical, Social, and Juridical Commentaries*. (Harvard University Press, 1967). 4.

9. On the *Treaty of Nerchinsk* of 1689 between the Russian and the Chinese Empires, see V. S. Frank, 'The Territorial Terms of the Sino-Russian Treaty of Nerchinsk, 1689', *Pacific Historical Review* 16, no. 3 (1947): 265-270. On the *Treaty of Kiakhta of 1727*, see generally, Richard Lotspeich, 'Perspectives on the Economic Relations between China and Russia', *Journal of Contemporary Asia* 36, no. 1 (2006): 48–74.

10. See Jianfu Chen, 'Modernisation, Westernisation, and Globalisation: Legal Transplant in China', in *One Country, Two Systems, Three Legal Orders-Perspectives of Evolution*. (Berlin, Heidelberg: 2009). 110.

11. For a detailed account of the Chinese pluralistic internal legal order, see Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan*. Oxford Studies in International History. (New York: Oxford University Press, 2012). 15–29.

12. See Derk Bodde and Clarence Morris. *Law in Imperial China: Exemplified by 190 Ch'ing Dynasty Cases: with Historical, Social, and Juridical Commentaries*. (Harvard University Press, 1967). Preface.

13. Ibid.

14. This case is taken from Bodde and Morris' outstanding collection of cases adjudicated during the late Qing Empire. Ibid: 276–278.

15. These are just a few examples inspired by the much wider illustrations provided by Bodde and Morris, ibid.

16. Ibid. This also explains why the majority of contemporary scholars tend to argue that China lacked a formal system of civil law, properly speaking. As a matter of fact, the many officialoffences were indeed redressed through various forms of corporal punishment or detention. See Li Zhaojie, 'Traditional Chinese World Order', *Chinese Journal of International Law* 1 (2002): 41 –'Firstly, until the beginning of this century, there had existed no jurisprudential distinction between criminal law and civil law. The written codes as well as decrees addressed mainly matters which would be classified under criminal law and administrative law in the light of modern standard.' See also George Williams Keeton, *Extraterritoriality in International and Comparative Law.* (Hague: Librairie du Recueil Sirey 1948). 303–304: 'On the other hand, as far as civil cases were concerned, it should be remembered that the Chinese Code was not concerned with private disputes, especially between traders, and these, even where Chinese merchants alone were concerned, were habitually settled by the merchant guilds in accordance with customs of great antiquity.'

17. See Bodde and Morris (1967): *supra* at 4.

18. Ibid.

19. In Li Zhaojie, 'Traditional Chinese World Order', *Chinese Journal of International Law* 1 (2002): 40.

20. Ibid.

21. See Benjamin Isadore Schwartz, *The World of Thought in Ancient China*. (Harvard University Press, 2009). 32. The *li* is the set of Confucian traditional ritual norms.

22. 'Before the nineteenth century, Siam, Qing China, and the Ottoman Empire were all complex, compound states in which external boundaries were poorly defined, and near the frontier the use of indirect rule and suzerain tributary relationships with local power holders were common.' In

Richard S. Horowitz, 'International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century', *Journal of World History* 15, n. 4 (2004): 475.

23. See, generally, Hosea Ballou Morse, *The Chronicles of the East India Company, Trading to China, 5 Volumes.* (Cambridge: Oxford University Press 9, 1926); Kirti N. Chaudhuri, *The Trading World of Asia and the English East India Company: 1660–1760*. (Cambridge University Press, 2006); Anthony Farrington, *Trading Places: The East India Company and Asia 1600–1834*. (British Library Board, 2002).

24. On China's involvement in the tributary system and other relations with neighbouring polities, see the essays in John King Fairbank and Ta-tuan Chen, *The Chinese World Order: Traditional China's Foreign Relations*. Vol. 32. (Harvard University Press, 1968); and, from a different perspective, James Louis Hevia, *Cherishing Man from Afar: Quing Guest Ritual and the Macartney Embassy of 1793*. (Duke University Press, 1995). 29–56.

25. See Li Zhaojie, 'Traditional Chinese World Order', *Chinese Journal of International Law* 1 (2002): 26.

26. Zhaojie in particular argues that the tributary system was not merely an hegemonic institution, but a complex set of diplomatic and ritual arrangements, whereby ' n addition to the enormous cost for the operation of the [tributary] system, the Chinese emperor's gifts were usually more valuable than the tribute he received.' Ibid: 55.

27. Liu, however, argues that the early origins of extraterritorial jurisdiction in China go back to the Imperial trade with Russia in seventeenth century. Accordingly, he refers to the Treaties of Nipchu or Nerchinsk concluded in 1689, Article 4 of which stated: 'If hereafter any of the subjects of either nation pass the frontier and commit crimes of violence against property or life, they are at once to be arrested and sent to the frontier of their country and handed over to the chief local authority for punishment.' Similarly, he invokes the 1727 Treaty of Kiakhta, which allegedly contains extraterritorial provisions for the suppression of brigandage along the borders. See Liu, Shih Shun. *Extraterritoriality: Its Rise and Decline* (1925). New York: AMS Press, 1969: 37. It is difficult, however, to classify such instruments as institutionalizing extraterritorial consular jurisdiction in the later meaning of the term. In fact, they provided privileges of a reciprocal nature, no consulates were ever mentioned or established and, instead, they seem to have aimed at establishing a sort of 'extradition system' for offences committed along the common borders.

28. 'Relations with the Ottoman Empire offered European powers a model of how to carry on relations with large, non-Christian Eurasian governments. This model was then pressed into use in the Treaty of Nanking that ended the Opium War, which in turn formed the basis for treaties with Siam and Japan.' In Richard S. Horowitz, 'International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century,' *Journal of World History* 15, n. 4 (2004): 447.

29. See Wellington Koo, *The Status of Aliens in China*. (Columbia University, 1912). 62; George Williams Keeton, *Extraterritoriality in International and Comparative Law.* (Hague: Librairie du Recueil Sirey 1948). 300.

30. See Li Chen, 'Law, Empire, and Historiography of Modern Sino-Western Relations: A Case Study of the Lady Hughes Controversy in 1784, *Law and History Review* 27, no. 1 (2009): 1–53; See also Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan*. Oxford Studies in International History. (New York: Oxford University Press, 2012) 43; Koo (1912), Ibid: 69.

31. For a detailed description of the factual background of the case, see Peter Auber, *China: An Outline of its Government, Laws, and Policy: And of the British and Foreign Embassies to, and Intercourse with, that Empire*. (Parbury: Allen and Company, 1834). 181–187.

32. In Wellington Koo, *The Status of Aliens in China*. (Columbia University, 1912). 71.

33. Koo, Ibid: 62 – 'Alien traders, particularly the British, early began to withdraw themselves, by open defiance, from the operation of the local laws, and that to a considerable degree, they were successful in pursuing their course of sheer contumacy'. For references to similar cases following

the *Lady Hughes* controversy, wherein foreign offenders successfully managed to avoid Chinese adjudication, see Koo, Ibid: 71–79.

34. 'It was therefore only in homicide cases where the finger of suspicion pointed in the foreigner's direction that the Canton officials made a claim for surrender.' In George Williams Keeton, *Extraterritoriality in International and Comparative Law.* (Hague: Librairie du Recueil Sirey 1948). 303.

35. See *Act of the British Parliament to Regulate the Trade to China and India*, 28 August 1833. In *British and Foreign StatePapers 1832–1833.* H.M. Stationery Office, 1836: 256.

36. See *Act of the British Parliament to Regulate the Trade to China and India*, 28 August 1833, Ibid. Article VI – 'And be it enacted that it shall and may be lawful for His Majesty by any such Order or Orders Commission or Commissions as to His Majesty in Council shall appear expedient and salutary to give to the said Superintendents or any of them Powers and Authorities over and in respect of the Trade and Commerce of His Majesty's Subjects within any part of the said Dominions and to make and issue Directions and Regulations touching the said Trade and Commerce and for the government of His Majesty's Subjects within the said Dominions and to impose penalties forfeitures or imprisonments for the breach of any such Directions or Regulations to be enforced in such manner as in the said Order or Orders shall be specified and to create a Court of Justice with Criminal and Admiralty Jurisdiction for the trial of offences committed by His Majesty's Subjects within the said Dominions and the Ports and Havens thereof and on the high seas within 100 miles of the Coast of China and to appoint 1 of the Superintendents herein before mentioned to be the Officer to hold such Court and other Officers for executing the Process thereof and to grant such Salaries to such Officers as to His Majesty in Council shall appear reasonable.' (Emphasis added).

37. In Wellington Koo. *The Status of Aliens in China*. (Columbia University, 1912). 63.

38. See Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan*. Oxford Studies in International History. (New York: Oxford University Press, 2012). 47; George Williams Keeton, *Extraterritoriality in International and Comparative Law.* (Hague: Librairie du Recueil Sirey 1948). 307.

39. Keeton, Ibid. See also, Wu Yixiong, 'The Development and Early Practice of British Extraterritoriality in China before the Opium War', *Historical Research* 4 (2006).

40. See Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan*. Oxford Studies in International History. (New York: Oxford University Press, 2012). 57.

41. Ibid.

42. Ibid. See also Henry Dundas. Napier, *Field-Marshal Lord Napier of Magdala*. (London: E. Arnold & Company, 1927).

43. See Harry Gelber, *Opium, Soldiers and Evangelicals: England's 1840–42 War with China, and its Aftermath*. (New York: Palgrave Macmillan, 2004). 11.

44. Cited in Hosea Ballou Morse, 'The Period of Conflict 1834–1860', in *The International Relations of the Chinese Empire*. Vol. 1. (Longmans, Green, and Company, 1910). 142.

45. 'It was only after the termination of the Opium War in 1842 that extraterritoriality was formally introduced into China by a treaty premised upon her independence and sovereignty.' See Shih Shun Liu, *Extraterritoriality: Its Rise and Decline*. (New York: AMS Press, 1969). 41. See also Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan*. (New York: Oxford University Press, 2012). 46–52 ; Pär Kristoffer Cassel, 'Excavating Extraterritoriality: The "Judicial Sub-Prefect" as a Prototype for the Mixed Court in Shanghai', *Late Imperial China* 24, no. 2 (2003): 156 – 182; John Wu, 'The Problem of Extraterritoriality in China', in *Proceedings of the American Society of International Law at Its Annual Meeting* (1921-1969. (American Society of International Law, 1930). Vol. 24: 182-194. On the Opium War more generally, see Arthur Waley, *The Opium War through Chinese Eyes*. (Stanford

University Press, 1968); Harry Gelber, *Opium, Soldiers and Evangelicals: England's 1840–42 war with China, and its Aftermath*. (New York: Palgrave Macmillan, 2004); Peter Ward Fay, *Opium War, 1840–1842: Barbarians in the Celestial Empire in the Early Part of the Nineteenth Century and the War by Which They Forced Her Gates Ajar*. (UNC Press, 1998); Brian Inglis, *The Opium War*. (Hodder and Stoughton, 1976); Timothy Brook and Bob Tadashi Wakabayashi, *Opium Regimes: China, Britain, and Japan, 1839-1952*. (University of California Pr., 2000).

46. See Cassel, Ibid : 49

47. Ibid. On Commissioner Lin, see also Hsin-pao Chang, *Commissioner Lin and the Opium War*. (Harvard University Press, 1954). Vol. 18.

48. 'Suppose a man of another country comes to England to trade, he still has to obey English laws; how much more should he obey in China the laws of the Celestial Dynasty?' Cited in Cassel, Ibid. The translation reported by Liu is: 'How can you bring the laws of your nation with you to the Celestial Empire?' In Shih Shun Liu, *Extraterritoriality: Its Rise and Decline* (New York: AMS Press, 1969). 37.

49. Cassel, Ibid: 50.

50. *Treaty of Nanjing* (Nanking), 1842. Ratifications exchanged at Hong Kong, 26th June 1843.For the complete text of the treaty, see Inspector General of Customs. *Treaties, Conventions, etc., Between China and Foreign States.* Vol. 1. Shanghai: Statistical Department of the Inspectorate General of Customs, 1917: 351. For further reading, see John Ouchterlony, *The Chinese War: An Account of all the Operations of the British Forces from the Commencement to the Treaty of Nanking*. (Saunders and Otley, 1844); John King Fairbank, 'Chinese Diplomacy and the Treaty of Nanking, 1842', *The Journal of Modern History* 12, no. 1 (1940): 1 – 30; Katherine A. Greenberg, 'Hong Kong's Future: Can the People's Republic of China Invalidate the Treaty of Nanking as an Unequal Treaty', *Fordham International Law Journal* 7 (1983): 543.

51. See Xinbao Zhang, *Commissioner Lin and the Opium War* (New York: Norton, 1970): 186.

52. *General Regulations, Under Which The British Trade Is To Be Conducted At The Five Ports Of Canton, Amoy, Fuchow, Ningpo, And Shanghai,* 1843. For the complete text of the treaty, see Inspector General of Customs. *Treaties, Conventions, etc., Between China and Foreign States.* Vol. 1. Shanghai: Statistical Department of the Inspectorate General of Customs, 1917: 338.

53. Article XIII - *General Regulations*, 1843. Ibid.

54. See Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan.* (New York: Oxford University Press, 2012). 52.

55. See Article XVI. – 'Chinese subjects who may be guilty of any criminal act towards British subjects shall be arrested and punished by the Chinese authorities according to the Laws of China. British subjects who may commit any crime in China shall be tried and punished by the Consul or other Public Functionary authorized thereto according to the Laws of Great Britain. Justice shall be equitably and impartially administered on both sides.' *Treaty of Tianjin*, concluded on 26 June 1858. In: Inspector General of Customs. *Treaties, Conventions, etc., between China and Foreign States.* Vol. 1. Shanghai: Statistical Department of the Inspectorate General of Customs, 1917: 404. Compare to Article XVII – 'A British subject having reason to complain of a Chinese must proceed to the Consulate and state his grievance. The Consul will inquire into the merits of the case, and do his utmost to arrange it amicably. In like manner, if a Chinese have a reason to complain of a British subject, the Consul shall no less listen to his complaint, and endeavour to settle it in a friendly manner. If disputes take place, then he shall request the assistance of the Chinese authorities that they may together examine into the merits of the case and decide it equitably.' Ibid.

56. Article VIII - 'The Emperor of China having been graciously pleased to grant to all foreign Countries whose Subjects, or Citizens, have hitherto traded at Canton the privilege of resorting for purposes of Trade to the other four Ports of Fuchow, Araoy, Ningpo and Shanghai, on the same terms as the English, it is further agreed, that should the Emperor hereafter, from any

cause whatever, be pleased to grant additional privileges or immunities to any of the subjects or Citizens of such Foreign Countries, the same privileges and immunities will be extended to and enjoyed by British Subjects l but it is to be understood that demands or requests are not, on this plea, to be unnecessarily brought forward.' *Supplementary Treaty Signed By Their Excellences Sir Henry Pottinger And Ki Ying Respectively, On The Part Of The Sovereigns Of Great Britain And China*, At The Bogue, 8th October 1843. In Inspector General of Customs. *Treaties, Conventions, etc., Between China and Foreign States.* Vol. 1. Shanghai: Statistical Department of the Inspectorate General of Customs, 1917: 393.

57. Article XXI – 'Subjects of China who may be guilty of any criminal act towards citizens of the United States shall be arrested and punished by the Chinese authorities according to the laws of China, and citizens of the United States who may commit any crime in China shall be subject to be tried and punished only by the Consul or other public functionary of the United States thereto authorized according to the laws of the United States; and in order to secure the prevention of all controversy and disaffection, justice shall be equitably and impartially administered on both sides' In *Treaty of Wang-Hea* Between the United States and the The Ta-Tsing Empire, 1844. See *Treaties, Conventions, etc., Between China and Foreign States.* Vol. 1, Ibid: 677.

58. The provision on extraterritorial consular jurisdiction read as follows: Article XXVII – 'Si malheureusement, il s' élevait quelque rixe ou quelque querelle entre des Français et des Chinois, comme aussi dans le cas où, durant le cours d' une semblable querelle, ou un plusieurs individus seraient tués ou blessés. soit par des coups de feu soit autrement, les Chinois seront arrêtés pat l'Autorité Chinoise, qui se chargera de les faire examiner et punir, s'il y a lieu, conformément aux lois du pays. Quant aux Français, ils seront arrêtés à la diligence du Consul, et celui-ci prendra toutes les mesures nécessaires pour que les prévenus soient livrés à l'action régulière des lois françaises dans la forme et suivant les dispositions qui seront ultérieurement déterminées par le Gouvernement Français. Il en sera de même en toute circonstance analogue et non prévue dans la présent Convention, le principe étant que, pour la répression des crimes et délits commis par eux en Chine, les Français seront constamment régis par les lois Françaises.' *Treaty of Whampoa* between France and China, signed on 24 October 1844. For the original and complete version of the instrument see *Treaties, Conventions, etc., Between China and Foreign States.* Vol. 1, Ibid: 785.

59. See Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan*. (New York: Oxford University Press, 2012). 55.

60. Ibid.

61. 'The Treaty of Kuldja gave Russia the right to send consuls to the Chinese treaty ports and provided for mutual extraterritorial rights both for Russians and Qing subjects along the Russo-Chinese border.' See Cassel, ibid.

62. However, through the ratification of the Shimonoseki Treaty and the Treaty of Commerce and Navigation of 1896, China relinquished extraterritorial rights in Japan while Japan maintained them in China. See *Report of the Commission on Extraterritoriality in China, Peking, September 16, 1926: Being the Report to the Governments of the Commission Appointed in Pursuance to Resolution v of the Conference on the Limitation of Armaments*. Govt. Print. Off., 1926: 9.

63. See *Report of the Commission on Extraterritoriality in China*, Ibid.

64. 'Rather than abolishing extraterritoriality, Western states strengthened it in 'response to non-Western states' complaints about the "abuses of extraterritoriality" through the revision process.' In Turan Kayaoğlu *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*. (Cambridge University Press, 2010). 153.

65. According to Cassel, the Chinese opposition to extraterritoriality is generally overestimated: 'It is almost as if nineteenth-century foreign commentators on Chinese affairs acted as ventriloquists of a perceived Chinese resistance to extraterritoriality, reflecting their own anxieties and doubts about the justifiability of a practice that had little foundation in international law.' See Cassel, *Supra*: 50. On the contrary, Liu argues that China was very jealous

of the territorial application of its laws and extraterritoriality was clearly imposed as a result of the Opium War. See Shih Shun Liu, *Extraterritoriality: Its Rise and Decline*. (New York: AMS Press, 1969).

66. On the establishment of foreign territorial possessions within the Shanghai area generally, see Linda Cooke Johnson, *Shanghai: From Market Town to Treaty Port, 1074–1858*. (Stanford University Press, 1995); Arnold Wright, *Twentieth Century Impressions of Hong Kong, Shanghai, and Other Treaty Ports of China: Their History, People, Commerce, Industries, and Resources*. Vol. 1. (Lloyds Greater Britain publishing Company, 1908); Ernest O. Hauser, *Shanghai: City for Sale*. (Harcourt, Brace and Co. 1940); Mark Elvin and George William Skinner, eds. *The Chinese City Between Two Worlds*. (Stanford University Press, 1974); Charles B. Maybon and Jean Fredet. *Histoire de la concession française de Changhai*. (Plon, 1929); Linda Cooke Johnson, *Cities of Jiangnan in Late Imperial China*. (Suny Press, 1993).

67. See Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan.* (York: Oxford University Press, 2012). 63.

68. For a detailed account of the history, establishment, case law and procedure in the Shanghai Mixed Court, see Pär Kristoffer Cassel, 'Excavating Extraterritoriality: The "Judicial Sub-Prefect" as a Prototype for the Mixed Court in Shanghai' *Late Imperial China* 24, no. 2 (2003): 156–182. See also Mark Elvin, 'The Mixed Court of the International Settlement at Shanghai', *Papers on China* 17 (1963): 131–159; Anatol M. Kotenev, *Shanghai: Its Mixed Court and Council: Material Relating to the History of the Shanghai Municipal Council and the History, Practice and Statistics of the International Mixed Court. Chinese Modern Law and Shanghai Municipal Land Regulations and By-laws Governing the Life in the Settlement*. (Cheng Wen Pub. Co., 1968).

69. See Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan*. (New York: Oxford University Press, 2012). 67.

70. Ibid. See also Edmund Griani Hornby, *Sir Edmund Hornby: An Autobiography*. (Houghton Mifflin, 1928).

71. See *R. J. Forrest's Second Memorandum to Consul Charles A. Winchester* (November 1868). In Foreign Office of Great Britain, *Correspondence*: 169.

72. See Eileen P. Scully, *Bargaining with the State from Afar: American Citizenship in Treaty Port China, 1844-1942*. (Columbia University Press, 2001). 98. See also Teemu Ruskola, 'Canton is not Boston: The Invention of American Imperial Sovereignty', *American Quarterly* 57, no. 3 (2005): 859-884.

73. See Kal Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law*. (Oxford: Oxford University Press, 2009). 18. For the original source of the study, see *Report of the Commission on Extraterritoriality in China, Peking, September 16, 1926: Being the Report to the Governments of the Commission appointed in Pursuance to Resolution V of the Conference on the Limitation of Armaments*. Govt. Print. Off. 1926.

74. In Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*. (Cambridge: Cambridge University Press, 2010). Table 7, 151.

75. Ibid.

76. See Shih Shun Liu, *Extraterritoriality: Its Rise and Decline* (New York: AMS Press, 1969). 39. It is, however, important to notice that this goes without prejudice to the remarkable exceptions of opinions held by some Western thinkers towards legality in the Far East. Caleb Cushing, for instance, underlined how 'Europeans and Americans had a vague idea that they ought not to be subject to the local jurisdiction of barbarian Governments, and that the question of jurisdiction depended on the question, whether the country was a civilized one or not; and this erroneous idea confused all their reasoning in opposition to the claims of the Chinese; for it is impossible to deny to China a high degree of civilization, though the civilization is, in many respects, different from ours.' Cited in Liu, Ibid. On Caleb Cushing, see also Claude M. Fuess, *The Life of Caleb Cushing*. 2 vols. (New York, 1923); Richard E. Welch, 'Caleb Cushing's Chinese Mission and the Treaty of Wanghia: A Review', *Oregon Historical Quarterly* 58, no. 4 (1957): 328–357.

77. Lassa Oppenheim, *International Law*. (London: Longmans, Green and Co., 1905). 44.

78. 'Les Etats ne sont pas égaux entre eux. D'abord, il n'existe aucune égalité de droits entre les Etats civilisés et les états non civilisés ou moins civilisés. Les premiers se gèrent constamment dans leurs rapports avec les seconds comme des supérieurs chargés de la mission de les faire entrer de gré ou de force dans les voies de la civilisation: à cc titre ils s'arrogent envers eux certains droits de direction, de contrôle et parfois d'administration que ceux-ci ne possèdent en aucune façon à leur égard. Entre la condition des uns et la condition des autres, il y a inégalité fragrante et cette inégalité est en la matière la véritable base de leurs relations.' In Antoine Pillet, *Recherches Sur Les Droits Fondamentaux Des Etats Dans L'ordre Des Rapports Internationaux Et Sur La Solution Des Conflits Qu'ils Font Naitre*. (Paris, 1899). 6.

79. Association for the Reform and Codification of the Law of Nations. *Report of the Fifth Annual Conference Held at Antwerp*en. 30 August to 3 September 1877. London: William Clowes and Sons, 1878: 58.

80. Ibid.

81. Association for the Reform and Codification of the Law of Nations. *Report of the Seventh Annual Conference held at the Guildhall, London*. 11-16 August 1879. London: William Clowes and Sons, 1880.

82. See George Williams Keeton, *Extraterritoriality in International and Comparative Law.* (Hague: Librairie du Recueil Sirey 1948). 303 – 304. For a more detailed account of how Western experts perceived the deficiencies of the Chinese legal order in 1926, see *Report of the Commission on Extraterritoriality in China, Peking, September 16, 1926: Being the Report to the Governments of the Commission Appointed in Pursuance to Resolution V of the Conference on the Limitation of Armaments*. Govt. Print. Off., 1926.

83. See Wellington Koo, *The Status of Aliens in China*. (Columbia University, 1912). 80.

84. See, for instance, the remarks that Sir George introduced to the House of Commons in 1833: 'That, lastly, the state of the trade under the operation of the Chinese laws in respect to homicides committed by foreigners in that country, calls for the early interposition of the Legislature, those laws being practically so unjust and intolerable that they have in no instance for the last forty-nine years been submitted to by British subjects; great loss and injury to their commercial interests accruing from the suspension of trade in consequence of such resistance, and the guilty as well as the innocent escape with impunity; and that, it is, therefore, expedient to put an end to this anomalous state of law by the creation of a British naval tribunal upon the spot, with competent authority for the trial and punishment of such offences.' *Hansard, Parliamentary Debates, 3rd ser., vol. xviii: 700.*

85. William Blackstone, *Commentaries on the Laws of England* (1765–1769). (Chicago: University of Chicago Press, 1979). 18. Similarly, Walpole argued: 'Among the grievances which formed the subject of remonstrance and complaint, both in Parliament and out of doors, nothing was more anomalous, more unfortunate, and more indefensible than the criminal code which disgraced the statute-book. During the earlier years of the present century the punishment of death could be legally inflicted for more than 200 offences.' See Spencer Walpole, *History of England*. Vol. 2 (London: Samuel Maunder Publisher, 1830). 59.

86. See James Fitzjames Stephen, *A History of the Criminal Law of England*. Vol. 3. (Macmillan, 1883). 474.

87. See Wellington Koo, *The Status of Aliens in China*. (Columbia University, 1912). 90.

88. In Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*. (Cambridge : Cambridge University Press, 2010). 162.

89. Horowitz, 'International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century', *Journal of World History* 15, n. 4 (2004): 459.

90. On the 1911 Republican revolution, see Joseph Esherick, *Reform and Revolution in China: The 1911 Revolution in Hunan and Hubei*. (Berkeley: University of California Press, 1976); Jean Chesneaux, Marianne Bastid, and Marie-Claire Bergere, *China from the Opium Wars to the 1911*

Revolution. (Harvester Press, 1977); Edmund S.K Fung, *The Military Dimension of the Chinese Revolution: The New Army and its Role in the Revolution of 1911*. (University of British Columbia Press, 1980).

91. David Scott, *China and the International System, 1840-1949: Power, Presence, and Perceptions in a Century of Humiliation*. (SUNY Press, 2008).

92. See *Questions For Readjustment*. Submitted by China to the Peace Conference. Paris, 1919: 14 - 18. Available at: http://archive.org/details/questionsforread00paririch.

93. See *Questions For Readjustment*, Ibid: 16

94. Ibid.

95. Ibid.

96. Ibid.

97. Ibid.

98. The document also requested that the powers immediately consent that: (1) 'Every mixed case, civil or criminal, where the defendant or accused is a Chinese be tried and adjudicated by Chinese Courts without the presence or interference of any consular officer or representative in the procedure or judgment'; *and* (2) 'That the warrants issued or judgments delivered by Chinese courts may be executed within the concessions or within the precincts of any building belonging to a foreigner, without preliminary examination by any consular or foreign judicial officer' Ibid: 17.

99. See Zhang Yongjin, 'China's Entry into International Society: Beyond the Standard of' Civilization', *Review of International Studies* 17, no. 1 (1991): 13.

100. Cited in Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China.* (Cambridge University Press, 2010). 155.

101. Cited in Robert Thomas Pollard, *China's Foreign Relations: 1917-1931*. (New York, 1933) 217.

102. 'The governments of the powers represented in the Conference, except China, should each appoint one member of a Commission having power to inquire into the present practice of extraterritorial jurisdiction in China, and into the laws and the judicial system and the methods of judicial administration of China with a view to reporting their findings of fact in regard to these matters, together with their recommendations as to such means as they may find suitable to improve the existing conditions of the administration of justice in China, and to assist and further the efforts of the Chinese Government to effect such legislative and judicial reforms as would warrant the several powers in relinquishing, either progressively or otherwise, their respective rights or extraterritoriality'. In *Resolution V and Additional Resolutions Adopted by the Washington Conference on the Limitation of Armament.* December 10, 1921. Ibid.

China expressed its desire to 'to appoint a representative who shall have the right to sit as a member of the said Commission, it being understood that China shall be free to accept or to reject any or all of the recommendations of the Commission. Furthermore, China is prepared to cooperate in the work of this Commission and to afford to it every possible facility for the successful accomplishment of its tasks.' However, the Chinese proposal was rejected and the resolution was adopted without amendment. Ibid: 218: 219.

103. *Report of the Commission on Extraterritoriality in China, Peking, September 16, 1926: Being the Report to the Governments of the Commission Appointed in Pursuance to Resolution v of the Conference on the Limitation of Armaments.* Washington Govt. Print. Office, 1926.

104. Ibid.

105. In Turan, Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China.* (Cambridge: Cambridge University Press, 2010), 173.

106. 'In fact [Chinese laws] have as their basis mandates of the President or orders of the Ministry of Justice, neither of which has, strictly speaking, any legal or constitutional authority to make laws.' See *Report of the Commission on Extraterritoriality in China*. Supra: viii.

107. See *Report of the Commission on Extraterritoriality in China.* Ibid: Part II and Part III.

108. Pär Kristoffer. Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan*. (New York: Oxford University Press, 2012). 177.

109. For a detailed account of the reforms urged by Western powers, see *Report of the Commission on Extraterritoriality in China*. Supra: Part IV.

110. 'Like some eminent lawyers and jurists of the nineteenth century, with their efforts to justify the development of extraterritoriality, some lawyers became an integral part of twentieth-century imperialism with their efforts to maintain extraterritoriality.' Kayaoğlu, Supra: 172. Similarly, Gong argues that Western states established the Commission on Extraterritoriality in order to 'measure' the Chinese degree of 'civilization'. He further suggests that the Commission recommended retaining extraterritoriality because the Chinese legal order did not meet the 'standards of civilization' of the time. See GerritGong, 'China's Entry into International Society'. In *The Expansion of International Society*. (Oxford University Press, 1984). 183.

111. See Wesley R. Fischel, *The End of Extraterritoriality in China*. (Berkeley: University of California Press, 1952). 170.

112. As already mentioned above, internal political fragmentation and the Japanese occupation paralyzed the negotiations on the abolishment of the 'Unequal Treaties', and it was generally thought that the issue would not be discussed until after the conclusion of the war. 'The question of extraterritoriality in China did not re-emerge in its own right until early in the spring of I942. China had been promised on several occasions in the summers of I940 and I94I by both Britain and America that they would resume negotiations on the matter, but not before peace was restored in the Far East.' In K. C. Chan, 'The Abrogation of British Extraterritoriality in China 1942-43: A Study of Anglo-American-Chinese Relations', *Modern Asian Studies* 11, nº 02 (1977): 266.

113. For a comprehensive account of the diplomatic negotiations preceding the ratification of the Treaties, see K.C. Chan, 'The Abrogation of British Extraterritoriality in China' supra: 257–291.

114. *Treaty Between The United States And China For The Relinquishment Of Extraterritorial Rights In China And The Regulation Of Related Matters*. Signed in Washington, January 11, 1943. In Foreign Affairs Ministry, *Zhongwai tiaoyue jibian*: 660. See also Wang Dong, *China's Unequal Treaties: Narrating National History*. (Lexington books, 2005). 93.

115. *Sino-British Treaty for the Abolition of Extraterritoriality and Related Rights in China.* Signed in Chongqing, January 11, 1943. In Foreign Affairs Ministry, Zhongwai tiaoyue jibian: 589–594. See also Wang, Ibid.

116. Wang Dong, 'The Discourse of Unequal Treaties in Modern China', *Pacific Affairs* 76, no. 3 (2003): 399.

117. In Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*. (Cambridge: Cambridge University Press, 2010). 151, Table 7. For further readings on the abolishment of extraterritorial jurisdiction in China, see Quincy Wright, 'The End of Extraterritoriality in China', *The American Journal of International Law* 37, no. 2 (1943): 286-289; Wesley R Fishel, *The End of Extraterritoriality in China*. (Octagon Books, 1974); John Carter Vincent, *The Extraterritorial System in China: Final Phase*. (East Asian Research Center, 1970).

118. 'Later, as the Japanese government and the Allies were clamouring to win the support of the Chinese, extraterritoriality was officially abolished in both the Nationalist and Japanese-occupied areas with great fanfare in early 1943. In the British Embassy in Chongqing, the temporary capital of Nationalist China, representatives from the British and Chinese governments signed a new Sino-British treaty on 11 January 1943, and Wang Jingwei's pro-Japanese régime soon followed suit with a similar agreement with the Japanese government. However, it was not the Nationalists who would enjoy the fruits of this foreign policy victory, as they would be expelled to the island of Taiwan six years later. Instead, the People's Republic of China would claim the credit for unifying China under one government exercising full jurisdiction over all its

inhabitants.' In Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan*. (New York: Oxford University Press, 2012): 179.

119. 'The latter are regarded as a people with all the virtues and few failings, except weakness, who deserve to be supported by the United States in their efforts to free themselves from the exploitation of the predatory European Powers, among whom, of course this country had been predominant ... We have a wider experience of dealings with the Chinese and take a more realistic view. Our interests in China are much greater than those of the United States, we have negotiated many more agreements with the Chinese Government, we have a common boundary in India and Burma, and we have large Chinese communities in our Far Eastern colonies. We know that with all their attractive qualities, their ancient culture and their artistic gifts the Chinese have a shrewd political and commercial sense and are able to look after themselves in these respects.' Brenan John, in *Brenan's Minute on British and American Policy towards China*. December I942, FO 371/31627: 28.

120. Ibid.

121. For support to this view, see generally Wang Dong, 'The Discourse of Unequal Treaties in Modern China', *Pacific Affairs* 76, no. 3 (2003): 399–425. See also Wang Dong, *China's Unequal Treaties: Narrating National History*. (Lexington books, 2005).

122. 'With the outbreak of the Pacific war British courts could no longer function in Japanese-occupied China. At the suggestion of the Swiss government, Britain transferred the jurisdiction over British subjects in occupied China to the Swiss consuls.' In K. C. Chan, 'The Abrogation of British Extraterritoriality in China 1942–43: A Study of Anglo-American-Chinese relations', *Modern Asian Studies* 11, no. 2 (1977): 267.

123. See *The Secretary of the State to the Ambassador in the United Kingdom (Winant)*. Washington, August 27, 1942. In: *Foreign Relations of the United States. Diplomatic Papers*. Volume *China* (1942): 282–285. Available at : http://digicoll.library.wisc.edu/cgi-bin/FRUS/FRUS-idx?type=header&id=FRUS.FRUS1942China&q1=1942%20China.

124. On the role that public consciousness against extraterritoriality played in shaping the U.S. policy towards China, Hull stated: 'The Department's study of the question of relinquishment of this country's extraterritorial and related rights in China has continued. In this study we have of course taken into account *the trend of public opinion in this country.* While there has been no strong concerted pressure upon the Government to take action, *it has been obvious from editorial comment and from speeches by and letters received from interested persons that popular sentiment in favour of action toward abolishing extraterritoriality is fairly widespread*. It is believed that any request by the Chinese Government for abolition would receive strong support in the United States. In the light of this and other factors, we are inclining to the view that, although this is not an entirely opportune moment to take some affirmative steps in the matter, it is doubtful whether any much more favourable occasion is likely to occur in the near future. On the contrary, we might later, because of the natural trends of political thinking in China as well as in this and other countries, find ourselves in a position less advantageous than at the present while *the question of initiative is within our control.*' In FRUS 1942, Ibid: 282 (Emphasis added).

125. See Turan, Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China.* (Cambridge: Cambridge University Press, 2010). 185.

126. See Kayaoğlu, Ibid: 122.

127. See Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan*. (New York: Oxford University Press, 2012). 175. For further explication of the connection between the abolition of extraterritoriality in Japan and the Chinese legal reforms, see Douglas Robertson, Reynolds, *China, 1898–1912: The Xinzheng Revolution and Japan*. (Cambridge, MA: Council on East Asian Studies, Harvard University, 1993).

128. Article XII – 'China having expressed a strong desire to reform her judicial system, and to bring it into accord with that of Western nations, Great Britain agrees to give every assistance to

such reform, and she will also be prepared to relinquish her extra-territorial rights when she is satisfied that the state of the Chinese laws, the arrangement for their administration, and other conditions warrant her in so doing'. *The Mackay Treaty* between China and Great Britain, 1902. The text of the instrument is available at: Inspector General of Customs, ed. *Treaties, Conventions, etc., between China and Foreign States.* 2nd ed. Vol.1. Shanghai: Statistical Department of the Inspectorate General of Customs, 1917 : 557.

129. See Cassel, *supra*: 175.

130. See Richard S. Horowitz, 'International Law and State Transformation in China, Siam and the Ottoman Empire during the Nineteenth Century', *Journal of World History* 15, no 4 (2004): 464; See Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*. (Cambridge: Cambridge University Press, 2010). 163; Cassel (2012), Ibid.

131. 'While this has usually been seen as simply an effort to end extraterritoriality by adopting European standards, Jerome Bourgon argues that the abolition of "cruel punishments" drew as much on indigenous movement within Chinese legal scholarship as it did on foreign influences.' Horowitz, Ibid. On the abolishment of cruel punishments in China, see Jerome Bourgon, 'Abolishing "Cruel Punishments": A Reappraisal of the Chinese Roots and Long Term Efficiency of the Xinzheng Legal Reforms', *Modern Asian Studies* 27.4 (2003): 851–862.

132. Horowitz, Ibid.

133. 'In sum, despite various attempts, the late Qing and early republican governments failed to consolidate the central government's legal hierarchy in China in the 1910s. The failure to institutionalize state law explains why the Chinese were unsuccessful in abolishing extraterritoriality in the 1920s.' Kayaoğlu, *supra:* 165.

134. For references on the Republican revolution, see *supra:* footnote 301.

135. In Julie Lee Wei, Ramon Hawley Myers, and Donald G. Gillin, eds, *Prescriptions for Saving China: Selected Writings of Sun Yat-sen* (Hoover Press, 1994). 225.

136. Philip C. Huang, *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared* (Stanford University Press, 2001). 29.

137. See *Questions For Readjustment*. Submitted by China to the Peace Conference. Paris, 1919: 14–18. Available at: http://archive.org/details/questionsforread00paririch

138. Ibid.

139. Such reformist 'steps' can be summarized as follows: (1) the adoption of a National Constitution prescribing the separation of governmental powers, assuring both Chinese and foreigners the fundamental rights of life and property and guaranteeing the independence of judicial office; (2) the preparation of five legal codes, namely, the criminal, civil and commercial codes, and the criminal and civil codes of procedure; (3) the drafting other important pieces of legislation, such as the Law for the Organisation of the Judiciary, the Provisional Regulations of the High Courts and their Subordinate Courts, the Ordinance for Commercial Associations and the Regulations for the Court of Arbitration in Commercial Matters; (4) the explicit adaptation of the laws of 'the most advanced nations' to the Chinese context; (5) the establishment of a three-tiered hierarchical court system had been established, namely the District Courts, the High Courts or Courts of Appeal, and the Taliyuan or the Supreme Court in Beijing; (6) the complete separation between civil and criminal cases and the publication of all trials and judgments rendered; (7) in criminal matters, the abolishment of corporal punishment in coercing confessions; (8) the establishment of institutions providing modern legal education, as well as examinations regulating access the legal profession; (9) the requirement all the judicial officers of the courts, high and low, received regular legal training, with a large number having studied abroad, and, finally, (10) the successful improvement of the prison and police systems.

140. Admittedly, the following information owes much to Kayaoglu's accurate research on the subject.

141. See Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*. (Cambridge: Cambridge University Press, 2010). 177-178. On the Guomindang reformist process, see also Philip C. Huang, *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared*. (Stanford University Press, 2001); Xu Xiaoqun, Klaus Mühlhahn, and Paul R. Katz, *Trial of Modernity: Judicial Reform in Early Twentieth-Century China, 1901–1937*. (Cambridge University Press, 2008); Meredith P. Gilpatrick, 'The Status of Law and Law-making Procedure under the Kuomintang, 1925-46', *Far Eastern Quarterly* 10, no. 1 (1950): 38–55; Chen Tsung-Fu, 'Transplant of Civil Code in Japan, Taiwan, and China: With the Focus of Legal Evolution', National Taiwan University Law Review 6 (2011): 389; Philip Huang, 'Whither Chinese Law?' *Modern China* 33, no. 2 (2007): 163–194; Jianfu Chen, 'Modernisation, Westernisation, and Globalisation: Legal Transplant in China'. In *One Country, Two Systems, Three Legal Orders-Perspectives of Evolution*. (Berlin, Heidelberg: Springer, 2009). 110; Randall Peerenboom, *China's Long March Toward Rule of Law*. (Cambridge University Press, 2002); Alice E. S. Tay, 'The Struggle for Law in China', *University of British Columbia Law Review* 21 (1987): 561–580; Jianfu Chen, *Chinese Law: Context and Transformation*. (Martinus Nijhoff Publishers, 2008).

142. See Kayaoğlu, Ibid: 178.

143. Below the Supreme Court were the High Courts, which functioned as an appellate system in the provinces, and the District Courts, which acted as adjudicatory bodies of first instance.

144. Cited in Kayaoğlu, *supra*.

145. In H. Yang, *A History of Chinese Legal Thought. Zhongguo FaliiSixiangshi* (1937). Volume 2. (Beijing: Commercial Publishing House, reprinted by Shanghai Publishing House, 1984). 369.

146. 'The Western Power's promise to relinquish extraterritorial rights and to assist in law reform along Western lines propelled a concentrated effort to adopt and adapt Western law at the turn of the twentieth century.' In Jianfu Chen, 'Modernisation, Westernisation, and Globalisation: Legal Transplant in China', In *One Country, Two Systems, Three Legal Orders-Perspectives of Evolution*. (Berlin, Heidelberg: Springer, 2009). 93.

147. See Chen, Ibid. The author emphasizes the continuity between the Chinese early legal reforms, law under Communism and legal globalization today.

148. This process occurred primarily through the settlement of large foreign expatriate communities in Chinese cities, protected by extraterritorial jurisdictional guarantees, and their interaction with the local population.

149. Gerrit Gong, 'China's Entry into International Society', In *The Expansion of International Society* , ed. Hedley Bull and Adam Watson. (Oxford: Clarendon Press, 1984). 183.

Conclusion

1 The purpose of this thesis has been to show the ways in which China and the Ottoman Empire came to 'positivize' their legal cultures through the institution of extraterritorial consular jurisdiction over the course of the nineteenth and early-twentieth centuries. I have examined the question as to how two political entities that remained comparatively insulated from Western influences and possessed radically different conceptions of law and justice, eventually came to adopt typically European jurisprudential logics. Although the *substantive* laws of China and modern Turkey certainly diverge from those of the various European and American legal systems, the underlying *structural* architecture is strikingly similar. Not only did *positum* legal codes of criminal, civil, commercial and procedural matters become the primary sources of Chinese and Turkish law, but the structure of these counties' adjudicatory mechanisms and the organization of legal education also conformed to Western standards. Consequently, the Enlightenment's notion that the law shall be validated by its *form* – i.e. official pronouncements, emanating from a sovereign legislator, codified into comprehensive legal codes and founded upon a social contract among its subjects – gradually took hold China and the Ottoman Empire.

2 My broader argument is that extraterritorial consular jurisdiction was the centrepiece of this process. Not only did Western promises to abolish it promote and accelerate the Chinese and Ottoman reform efforts, but the existence of extraterritoriality also contributed to the diffusion of Western legal structures, political ideas, cognitive categories, cultural values, social practices and normative beliefs throughout the Qing Empire and Turkey. This, in turn, was largely due to the settlement of ever-expanding expatriate communities, whose rights and property were protected by extraterritorial jurisdictional guarantees, in Asia and the Levant. The dissemination of such novel ideas then played a major role in pushing China and Turkey to 'modernize' their judicial and political systems in conformity with typically Western standards of 'progress' and 'civilization'. Such reformatory programmes were further motivated by the strong desire of the Chinese and Turkish leaders to abolish extraterritoriality. Through the analysis of a variety of treaty provisions, diplomatic correspondence and academic writings, this thesis demonstrates the substantial connections between Euro-American promises to terminate 'Unequal Treaties', on the one hand, and their parallel demands that China and

Turkey reform their domestic legal systems in accordance with Continental jurisprudential ideals, on the other.

3 Following a general illustration of what is meant by extraterritorial consular jurisdiction, the paper provides an overview of its early articulations in the Mediterranean. It is argued that consular institutions granting a special jurisdictional status to aliens were not a novel invention of the nineteenth century, but rather that their origin can be traced as far back as the age of Antiquity. Having emphasized the non-territorial nature that characterized legality during that era, as well as the substantial differences between early proto-consular institutions and the meaning that extraterritorial jurisdiction later assumed, I further explore the institution's manifestation during the Middle Ages. With the rise of the so-called doctrine of the personality of laws, it often occurred 'that five men, each under a different law, would be found walking or sitting together'.[1] This pluralistic and fragmented legal environment in turn promoted the development of 'judge-consuls', charged with administrating justice in disputes involving merchants conducting business overseas. It was, however, only with the rise of the doctrine of territoriality as the primary basis for the attribution of jurisdiction, and the parallel ascendance of state sovereignty on the Continent, that consular adjudication – and its extraterritorial applications – became a *public* competence of the sovereign state.

4 Understanding the predominant epistemic *milieu* that characterized Western legal scholarship during the nineteenth century is key to understanding the establishment of extraterritoriality in the Far and Middle East. Since the traditional Chinese and Turkish normative orders were generally characterized as 'chaotic', 'lawless', 'irrational' and 'unsatisfactory', Western powers believed that the establishment and/or maintenance of special jurisdictional guarantees for resident aliens were indispensable. Hence, extraterritorial consular jurisdiction was a direct consequence of the common belief in an alleged 'lack of real law' in Asia and the Levant. Such a belief in turn contributed to the consolidation of Western legal identities and the framing of what did and did not constitute (international) 'law'. Legal 'experts' played a key role in this process of discursive 'Orientalization', as they were frequently the first evaluators of Chinese and Ottoman 'legality', measured by reference to the strict standards of Continental legal positivism. Their role in filtering and (poorly) translating those countries' cultures, as well as in performing *political* functions, was fundamental to the legitimation of consular jurisdiction. Language and translation also contributed considerably to the production of the collective 'misperception' of the alleged lack of law in China and Turkey, as, at that time, very few European officials knew Chinese or Arabic.

5 In the Ottoman Empire, Western consular jurisdiction developed as a result of the long-lasting custom of the concession of capitulary privileges by the Ottoman sultans. The capitulations were voluntary commercial legations the Sublime Porte traditionally granted to foreign traders as a sign of friendship and grace, as well as a direct consequence of the belief in the immiscibility of the alien into its religious community. Following their codification into the form of positive treaties backed by an enormous potential for military coercion, however, such early jurisdictional and economic privileges came to be abused over the course of the nineteenth century. The Sublime Porte perceived the ever-increasing numbers of consular courts within its territories as constituting a multiplicity of governments within the government, thus rendering the ordinary administration of justice extremely difficult. The factual evidence that aliens were not only virtually immune from local laws, but also often went unpunished by their

own legal procedures exacerbated the internal opposition to extraterritoriality. Therefore, beginning with the 1856 Congress of Paris and its unfulfilled promises to abolish consular jurisdiction, the Ottoman rulers repeatedly attempted to terminate these 'Unequal Treaties'. Western demands for the 'modernization' of the Turkish legal system as a necessary condition for the abrogation of their capitulary privileges usually followed. After several decades of massive legal reforms aimed at 'Westernizing' the Ottoman legal culture by transplanting positivist Continental codes and procedures, diplomatic negotiations in the course of the1923 Lausanne Conference led to the abolition of extraterritorial consular jurisdiction.

6 No coherent custom of granting foreigners special jurisdictional status existed in China before the arrival of Europeans. As such, the East India Companies played a pioneering role in essentially garnering their traders *de facto* immunity from local laws and customs – particularly with respect to penal matters. Extraterritorial consular jurisdiction was only formally instituted, however, following the first Opium War between the Qing Empire and Great Britain, which concluded in 1943. The capitulatory regime of the Ottoman Empire served as both a practical and theoretical frame of reference in establishing 'Unequal Treaties' in East Asia. The American and a variety of other European governments soon followed the British Example. As in the case of Turkey, internal opposition to foreign legal privileges gradually developed among the Chinese, particularly following the 1911 nationalist revolution. Strikingly similar to events in the Levant, Western demands for wide-scale structural administrative and judicial reforms were sufficient to rebuff the Chinese desire to abolish extraterritoriality. A century after its institution consular jurisdiction was finally abolished, through a joint Anglo-American initiative in 1943.

7 Hence, the legacy of extraterritoriality in China and the Ottoman Empire was the structural readjustment of their indigenous legal cultures to comply with typically Western conceptions of law and normativity. China and the Ottoman Empire are, however, just two examples of a much broader phenomenon. Western powers also invoked extraterritorial consular jurisdiction in Algiers, Morocco, Tripoli, Tunis, Persia, Muscat, Zanzibar, Egypt, Congo, Abyssinia and Madagascar. In the Far East, it extended to Japan, Korea, Siam, Borneo, Tonga and Samoa. It had also previously applied to many other areas, such as India and Malaya, where it ended only when they became formal colonial possessions.[2] Although a comprehensive treatise of the legal history of the institution these areas is clearly beyond the scope of this thesis, it is likely that, at least to some extent, extraterritoriality influenced the internal legal and political development of these polities as well.

8 The purpose of this thesis is not to reject, *a priori*, Western legal categories as evil or flawed. Nor does it aim to present an idealized or nostalgic depiction of nineteenth century law in China and the Ottoman Empire. Instead, this work is a small contribution towards 'provincializing Europe' through the demonstration that many conventional European legal categories, which today appear profoundly normal, were not natural manifestations of every legal culture around the world.[3] Their transplantation to radically different societies was rooted in a hierarchical epistemology of progress, wherein civilization was understood as directly proportional to legalization. Accordingly, it was only when Western governments terminated their Unequal Treaties' that China and Turkey formally became 'civilized' members of international society.[4]When, in contrast, a country's law significantly differed from European ideas of legality, the

country was dismissed as merely stagnating in the 'Third World'. Yet, cultures – including legal cultures – do not come labelled with ordinal numbers.[5] And thus, the great epistemic question remains: *Who* sets the standard of civilization and *who* becomes its object?

9 **1.** The statement appears in Friedrich Karl Von Savigny, *Geschichte des römischen Rechts im Mittelalter* vol.i. (Heidelberg: JCB Mohr, 1834). 116.

10 **2.** See George Williams Keeton, *Extraterritoriality in International and Comparative Law.* (Hague: Librairie du Recueil Sirey 1948); Shin Shun Liu, *Extraterritoriality: Its Rise and Decline*. (New York: AMS Press, 1969).

11 **3.** Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference*. (Princeton University Press, 2009).

12 **4.** Gerrit Gong, 'China's Entry into International Society', In *The Expansion of International Society*, ed. Hedley Bull and Adam Watson. (Oxford: Clarendon Press, 1984: 183).

13 **5.** See Teemu Ruskola, 'Legal Orientalism', *Michigan Law Review* 101, no. 1 (2002): 185.

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7 *Sino-British Treaty for the Abolition of Extraterritoriality and Related Rights in China.* Signed in Chongqing, January 11, 1943. In Foreign Affairs Ministry, Zhongwai tiaoyue jibian: 589–594.

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