

# The Development of Extraterritoriality In China \*

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The principle of territorial sovereignty requires that the authority of a free and independent state shall be exclusive over its territory; and jurisdiction shall cover not only the members of its own community and their property, but also the foreign persons and property as long, at least, as they are not entitled to immunity by the principle of extraterritoriality. By extraterritoriality, the person and property of a foreign resident is entitled to the protection of his own national laws administered by his own national officials rather than the law and the jurisdiction of the land of his residence. Thus, extraterritoriality is a derogatory limitation to the full exercise of the supreme powers of a state, which no independent and awakening people of the world would tolerate.

For this reason, China has for a long time, especially during the last decade, steadily and strenuously struggled for the abolition of this intrusive regime upon her political entity. Although she took every opportunity to set before the world her grievances, yet some inveterate opposition on the part of the foreign powers always manifested itself. The legacy left by the Opium War and successive manoeuvres of force and chicanery has thus remained the source of incessant quarrels between Chinese and foreigners. The essential point of the main argument of the foreign powers is that China has no adequate safeguard, through her laws, for the foreign interests in China, and that this inadequacy in law provisions and method of administration contravenes with the principle of equality of individuals before the ordinary law, which is as dear to the Westerners as the principle of equality of states is to the Chinese. In other words, it is because of the incompatibility of the Chinese law and jurisdiction that they have to uphold the extraterritorial privileges in China; it is because of the principle of equality of individuals that they are disinclined to give them up.

But so far as we can trace in the authentic historical works on China's international relations, the real cause that gave rise to extraterritoriality was not the unequal treatment of foreign nationals in China. In citing the mixed cases between Chinese and foreigners prior to the extraterritorial period, the official chronicler of the East India Company declares that "The Chinese have no desire to screen their countrymen from punishment when guilty; but the inquiry must be carried on according to their own forms and usages." In his *International Relations of the Chinese Empire*, Mr. H. B. Morse corroborates this statement and positively asserts: "This proviso is true, not only in the case of charges against Chinese, but as well when Chinese brought complaint against the foreign sailors." This plainly shows that China had

never subjected the foreign nationals to unequal treatment even when they had not yet been entitled to the protection of their own national laws.

What according to foreign commentators of China of the past may be taken for granted as the real cause for the complaints of the foreigners is this: In the financial and commercial dealings there was no bankruptcy law. In criminal cases, intention was never taken into account. "For a life lost, a life must be taken" was the maxim of the Chinese penal code. These were the prominent defects in China's law provisions of about a century ago. The remarkable features of China's judicial system were "savage and cruel." One accused of a criminal act was in China assumed to be guilty from the mere fact that he was accused; he was forbidden to have the aid of lawyers; torture was common in trials; and the trial was more for the purpose of publicly establishing the charge and determining the penalty, than of ascertaining the truth. Another and most potent of all causes, however, was "the responsibility to which every subject of the empire is held for anything that may occur, however remotely connected with him." Under the impulse of responsibility the judgment of Chinese authorities was "for their execution, and not for equitable trial." Both in theory and practice, the doctrine of responsibility appears savage and cruel in the light of modern jurisprudence.

The last British subject who received the death sentence in a Chinese court was the gunner of that country's ship "Lady Hughes," who, while saluting, caused the death of a Chinese. There is no record of the nature of the trial accorded to him, and he was strangled on January 8, 1785, under orders from Peking. Considering the dates, the order must have been sent in reply to the first instance on the occurrence and not after any trial of the gunner. As to America, the last instance that was surrendered to Chinese jurisdiction was the case of Terranova. He was strangled in October 1821 owing to his throwing an earthen jar, which caused a woman in a boat to fall overboard. In the first trial, the Chinese magistrate "refused to allow testimony or argument for the defendant, and adjudged the accused guilty." At the second trial, "no one not Chinese was present, and he was again adjudged guilty and executed by strangulation." These and some other instances made China's law and jurisdiction repulsive to the westerners. "Their own law of homicide was more harsh than the Chinese, but at least they expected a fair trial for the accused."

The deep impression on the mind of the foreign powers that extraterritoriality was the only dependable and beneficial way under which they may live in China was justifiable by such instances demonstrating the imper-

\*This is the first of a series of six articles by the same author on the question of extraterritoriality.

fection of law provisions and the arbitrariness in the administration of law in the China of the past; but it is unwarranted by the conditions of today.

The feeling against continued submission to this law and its "arbitrary and inequitable application" had been growing. By order in Council of December 9, 1833, a British Court was opened at Canton, with criminal and admiralty jurisdiction. Although this was limited to the port of Canton, namely, within the Bogue, and the instructions to the trade superintendents also enjoined them to impress on all British subjects the "duty of conforming to the laws and usages of the Chinese Empire, so long as such laws and usages shall be administered towards British subjects with justice and good faith and in the same manner" as towards Chinese and other foreigners, we cannot but take it as the first step in the direction of securing extraterritorial privileges in China. And as a matter of course, only four years later, Captain Elliot, with reference to two lascars accused of wounding Chinese subjects, wrote to Lord Palmerston: "They have been in my custody ever since; and Your Lordship may be assured that I will never give them up to any other form of trial than that to which I have pledged myself, namely, a trial according to the forms of British law."

This unconciliatory attitude was growing more and more irresistible, and when the Lin-Wei-hi incident of July 7, 1839, was so aggravated that evacuation of British nationals was demanded, all British organisations urged their government to "act with firmness and energy." The continual agitation on both sides culminated in a war, when at Macao in 1842, the British imported opium was all made a bonfire of by the Chinese viceroy Lin. "At the mouth of the cannon of the British fleet, and under the threat of an assault of the city of Nanking by British troops," in the words of Mr. Morse, the Treaty of Nanking was imposed on China, the first treaty that embraces extrality in its embryo form:

Her Majesty the Queen of Great Britain, etc., will appoint Superintendents, or Consular Officials, to reside at each of the above named cities or towns, to be the medium of communication between the Chinese authorities and the said merchants, and to see that just duties and other dues of the Chinese Government, as hereafter provided for, are duly discharged by Her Britannic Majesty's subjects.

The vagueness and indefiniteness of this provision regarding consular jurisdiction was further clarified in No. XIII of the General Regulations annexed to the supplementary treaty of Hoomunchai (1843), which stipulated:

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 in force; and regarding the punishment of Chinese criminals, these will be tried and punished by their own laws, in the way provided for by the correspondence which took place at Nanking after the concluding of the peace.

By this provision, the consular function in mixed cases between Chinese and foreigners was for the first time roughly defined. But the jurisdiction in mixed cases between foreigners of different nationalities was still a question of dispute and left unsettled until the conclusion in 1844 of the Treaty of Wanghea between China and the United States.

Hitherto, America had adopted the "quiescent policy" and this was maintained even after the occurrence of the Terranova incident until Mr. Caleb Cushing took up the question of consular jurisdiction in 1844. Refusing to give up to Chinese jurisdiction the murderer of a Chinese, Hsu A-man, he wrote to Mr. Forbes, the American consul at Canton, that he was of the opinion that consular jurisdiction "is to be applied to China. Americans are entitled to the protection and subject to the jurisdiction of the officers of their own government. . . I shall refuse at once all applications for the surrender of the party who killed Hsu A-man; which refusal involves the duty of instituting an examination of the facts by the agency of officers of the United States." In this spirit and following the example of the British Nanking Treaty of 1842, he proposed to Kiyong a draft treaty which was signed several days later at Wanghea on July 3rd, and therein added, *inter alia*, an elucidation to the administration of mixed cases between foreigners of different nationalities:

Article XXV. All questions in regard to rights, whether of property or person, arising between citizens of the United States in China shall be subject to the jurisdiction of and regulated by the authorities of their own government, and all controversies occurring in China between the citizens of the United States and the subjects of another government shall be regulated by the treaties existing between the United States and such governments respectively, without interference on the part of China.

The sphere of extraterritoriality extended not only over the foreign residents but also over Chinese who claimed foreign protection during the progress of the Taiping rebellion, which reduced hundreds of thousands of people to a piteous condition, the power of the Chinese authorities was badly shattered; and as the system of mixed courts had not yet been devised, the administration of justice was assumed by the British and American consuls, each dealing with cases of Chinese accused of offences with which their nationals were concerned, and the two dividing the cases of police regulations which concerned the community as a whole. This procedure was plainly set forth in the reply of the consuls to the Taotai's request in November, 1854, for sending him a return of all Chinese in the employ of their nationals with a view to detecting the false claims to foreign protection; "If the Chinese authorities wish to arrest anyone, specific charge describing the offence must be made, and if the accused claim foreign protection, the claim must then be referred for the decision of the consul concerned." This established the precedent for the quasi right of asylum in premises occupied by for-

eigners and on foreign ships, and for the issue of foreign nationality certificates to Chinese citizens.

While the demand for extraterritorial privileges became more and more pressing, the unyielding spirit of the Chinese people grew equally more and more stubborn. And a second war became necessary in which the French joined hands with the English, and a second time America and other interested powers came in and secured treaties simultaneously and identical with those signed by the British and French envoys. These treaties, signed independently by Great Britain, France, Russia, and the United States in 1858, by Prussia and the North German Confederation in 1861, and by other powers in later years, are still the "charter of liberty" of the foreign residents in China; and in each of them, in addition to a "most favored nation" clause, is contained the stipulation of extraterritoriality.

The interminate rule in mixed cases, that is, a sort of arbitration between the consul and the Chinese authorities in cases which the consul could not arrange amicably, dragged on, however, for a number of years. Palmerston's original proposal that all cases in which British subjects were defendants should be tried by the British court, was fully carried out until the signing of the Chefoo Convention of 1876:

Section 11 (iii). It is further understood that so long as the laws of the two countries differ from each other, there can be but one principle to guide judicial proceedings in mixed cases in China, namely, that the case is tried by the official of the defendant's nationality, the official of the plaintiff's nationality merely attending to watch the proceedings in the interests of justice. If the officer so attending be dissatisfied with proceedings, it will be his power to protest against them in detail. The law administered will be the law of the nationality of the officer trying the case.

It is by this provision that the nationality of the court of trial in mixed cases is once for all clearly defined. The uncertainty that had existed for more than thirty years was now settled, and China's jurisdiction in cases involving foreigners in China was sharply and distinctly excluded. For every step the foreign powers took in enforcing their law and their jurisdiction on Chinese soil, at least as far as their nationals and proteges were concerned, the stretch of China's sovereign power on her own territory was set back one step likewise, until her political entity is now so much impaired that she can hardly be recognized as a real independent, sovereign

state in the world. A list of the treaties the foreign Powers imposed on her by force or by chicanery, which contain extraterritorial provisions, may be given below: Sino-British Treaty of Nanking, 1842, article II.

General Regulations for the British Trade at the five ports, 1843, Nos. XII, XIII.

Treaty of Wanghea, 1844, with U.S.A. articles XXI, XXIV, XXV.

Sino-French Treaty of Whampoa, 1844, articles XXV, XXVII, XXVIII.

Sino-Swedish-Norwegian Treaty of Canton, 1847, articles XXIV, XXI.

Sino-British Treaty of Tientsin, 1858, articles VII, XV, XVI, XVII.

Sino-French Treaty of Tientsin, 1858, articles XXXV, XXXVIII, XXXIX.

Sino-American Treaty of Tientsin, 1858, articles XXVII, XXVIII.

Sino-German Treaty of Tientsin, 1861, articles XXXIV, XXXV, XXXVIII, XXXIX.

Sino-Danish Treaty of Tientsin, 1863, articles XV, XVI, XVII.

Sino-Dutch Treaty of Tientsin, 1863, articles VI.

Sino-Spanish Treaty of Tientsin, 1864, articles XII, XIII, XIV.

Sino-Austrian-Hungarian Treaty of Peking, 1865, articles XXXVIII, XXXIX, XL.

Sino-Belgian Treaty of Peking, 1865, articles XVI, XIX, XX.

Sino-Italian Treaty of Peking, 1866, articles XV, XVI, XVII.

Sino-Japanese Treaty of Tientsin, 1871, articles VIII, IX, XI, XIII.

Sino-Peruvian Treaty of Tientsin, 1874, articles XII, XIII, XIV.

Chefoo Agreement, 1876, with Britain, Section II (iii).

Supplementary Treaty of Peking, 1880, with U.S.A. article IV.

Sino-Brazilian Treaty of Tientsin, 1882, article X.

Sino-Portuguese Treaty of Peking, 1887, articles XLVII, XLVIII, LI.

Sino-Japanese Treaty of Peking, 1896, articles XXI, XXII.

Sino-Mexican Treaty of Washington, 1899, articles XIII, XIV, XV.

## CHIEF EVENTS

June 16—June 22

### GOVERNMENT

#### FENG READY TO LEAVE COUNTRY

From all indications and reports of last few days, Feng Yu-hsiang has definitely arrived Yuncheng on June 19

from Huaying. Gen. Yen Shih-shan has asked him to proceed to Taiyuan, where they will confer on matters regarding Feng's trip abroad. President Chiang is understood to have accepted Feng's conditions, provided Feng will completely retire from political activities in the country.

The conditions are:

1. Payment of \$3,000,000 to Feng's soldiers, which sum has already been remitted to Gen. Yen to be turned over to Marshal Feng.

2. Payment of \$200,000 as Feng's travelling expenses.

3. The State Council to revoke its previous order for the arrest of Feng upon the latter's departure from China.

4. The re-arrangement of Feng's troops by Feng's own men, Generals Soong Che-yuen and Shih Chiang-ting.

Gen. Yen has been appointed by the State Council as Provisional Director-General of Relief Measures of the North West Districts and also to readjust all the military and administrative affairs of the above districts. Gen. Yen may