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Rule of Law and China's Unequal Treaties: Conceptions of the Rule of Law and Its Role in Chinese International Law and Diplomatic Relations in the Early Twentieth Century

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The unequal treaties that hindered Chinese international relations for much of the one hundred years immediately preceding the Second World War reflected the differences between the traditional Chinese legal system and those in Europe and America. Traditional Chinese law has been characterized as a morals-based system of philosophy and morality, a system of rule by virtue rather than rule of law. The belief that the rule of law, if not law itself, was either inadequate or nonexistent in China shaped pre-modern China's relationships with the world. At the same time, the introduction of foreign legal thought, facilitated by a wave of legal translation in China, exposed the Chinese to foreign notions of law, including principles of international law and the rule of law. Whether they believed the foreign conviction that they had no law, realized they needed to play along with the foreign view in order to restore China's place in the world, or simply favored the foreign definition of the rule of law more than the traditional Chinese conceptions of law, Chinese thinkers in the late nineteenth and early twentieth centuries advocated, and pursued, legal reforms shaped by international standards for the rule of law. However, the philosophical and political texts that influenced traditional Chinese law contained much material that in modern parlance would fall under the umbrella of "law." Though rulers, politics, and policies changed over the centuries, an ancient philosophical debate on the proper way to govern provided an intellectual framework that remained influential.¹

In the nineteenth century, this model of traditional Chinese law became an obstacle in China's relations with the great powers of Europe and America. Concern that Chinese law provided inadequate protection for the rights of foreign nationals prompted many foreign countries to negotiate treaties with China that granted them significant diplomatic, economic, and legal privileges but seldom extended similar privileges internationally to China. In the early twentieth century, as the Chinese embraced legal reforms and foreign legal knowledge, they tried to use international law to challenge unequal treaties. This demonstrated that while China had its own longstanding traditions of legal thought, contact with foreign countries introduced the Chinese to new ways of thinking about law, which also influenced their view of the proper way to govern and achieve order. On the international level, the concept of the rule of law became an important component in early-twentieth-century China's diplomatic efforts to restore sovereign rights that it had lost in the unequal treaties of the previous century.

Defining the Rule of Law:

Comparing the origins of law between legal systems

Before discussing the role of the rule of law in Chinese international law, it is necessary to first examine where the term "rule of law" comes from and what it means. Although the OED dates the term "rule of law" to about 1500,² use of the phrase in English is usually traced to the 1885 *Introduction to the Study of the Law of the Constitution* by legal scholar A. V. Dicey. Dicey argued that the rule of law was peculiar to the common law of England and one of British society's defining characteristics.³ The concept of the rule of law is deeply rooted in the English common law tradition:

At some times we have seen them depressed by overbearing and tyrannical princes; at others so

luxuriant as even to tend to anarchy, a worse state than tyranny itself, as any government is better than none at all. But the vigour of our free constitution has always delivered the nation from these embarrassments, and as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has settled to its proper level.⁴

Though Dicey described the rule of law as peculiarly Anglo-Saxon, the concept of the rule of law can be found in other cultures. The ancient Greeks and Romans placed great importance on law as a check on government. Aristotle wrote in *Politics* that “it is more proper that law should govern than any one of the citizens: upon the same principle, if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardians, and the servants of the laws.”⁵ Roman orator Cicero drew a subtle but powerful connection between the law and those charged with enforcing it: “the magistrate is a speaking law, and the law a silent magistrate.”⁶ In the civil law tradition prevalent in Continental Europe, the concept of rule of law is roughly equivalent to the German *Rechtsstaat* and French *état de droit*. Both terms are generally translated and thought of as the rule of law.⁷

Applying such a comparison with Chinese law is less straightforward. To begin with, there is no Chinese word that exactly translates as “rule of law” (in English or any other language). The conventional Chinese term for “rule of law” is *fazhi*, a compound word made from the characters *fá* (in this case meaning “law,” but can also mean “fair” or “just”) and *zhi* (meaning “to govern”). Thus, rule of law could be understood in Chinese as “to govern fairly” or “to govern justly.” Already, the exactitude of the term has begun to lose its precise meaning.

This confusion is compounded by the fact that the word “law,” as it is understood in the European languages, also

has no direct translation in the Chinese language.⁸ The result is that several distinct Chinese words are often simultaneously (and interchangeably) translated as “law” even though they have different meanings. Already we have seen the confusion surrounding the word *fa*, which means “fair” or “just” but can also mean “method” or “statute,” and in some cases “law.” Other words for “law” that can have additional meanings include *lü* (“model”), *li* (“ritual” or “morality”), *xing* (“punishment”), *zhi* (“control”), and *de* (“virtue”).⁹ So someone talking about *fazhi* could well be talking about “just control” or “fair method,” but not “rule of law.” The linguistics underscore the additional challenge of applying a European legal construct to a non-European culture.¹⁰ Although the rule of law in Western legal systems is typically associated with democratic political ideas, classical liberal democracy, and ideas of constitutional government, this is a Western connotation based on European and American experiences of the relationship between law and government.¹¹ How the rule of law looks in practice depends on the political context of a specific society, and the contexts of the rule of law in European legal history are very different from those of *fazhi* in Chinese legal history.

Variations of the Rule of Law in Chinese Legal History:
The Imperial Confucian model of traditional Chinese law

Understanding the origins of *fazhi* thus depends on understanding the origins of law in China. The historical development of traditional Chinese law was shaped by centuries-long philosophical debates about the proper way to lead and govern—what might be termed political philosophy. Two schools of philosophical thought, Confucianism and Legalism, had a particularly significant influence in shaping the development of traditional Chinese law. In discussing the two schools, it helps that each had its own set of Chinese words to describe specific legal concepts that were central to their respective philosophies. Although neither school was explicitly a legal tradition, each had

its own views on how society should be governed and the role of law in societal ordering.

The Confucian school was grounded in the concept of *li* (meaning “morality,” though the word originally referred to social rituals). *Li* emerged during the Western Zhou dynasty (c. 1046-771 BC), a period when ancient China was divided into feudal vassal states that owed fealty to the Western Zhou kings. The Duke of Zhou, regent for the second Western Zhou king, developed the doctrine that heaven had given the king the right to rule as long as he worked to “harmonize heaven with morality.”¹² Thus, the Duke of Zhou turned *li* into a law-like form of control over the activities of the nobility, whose loyalty and deference to the king’s authority were necessary to maintain the feudal system.

Morality took on additional meanings centuries later as the Zhou kings lost control over their increasingly rebellious vassals, a period known as the Spring and Autumn period (771-476 BC). During this period, Confucius (551-479 BC) took inspiration from the Duke of Zhou’s use of *li* to govern the nobility’s behavior and broadened it to apply to the behavior of all social classes.¹³ Confucian philosophy linked government to ethics, ethics to education, and education to social control. In the Confucian model of government, rulers governed through *li* by educating individuals who deviate from socially accepted rules of behavior—the intention being that education would instill culprits with *li* so that they did not break rules in the future. This was how a government established and maintained control over the people.¹⁴

In a Confucian society, it was crucial that political leaders had superior morality to educate the people by example. The *Book of Rites*, a Confucian classic text, describes the ruler’s role not as administrator or lawmaker, but as that of role model: “The demeanor of the son of Heaven¹⁵ should be characterized by majesty; of the princes, by gravity; of the Great officers, by a regulated composure; of (inferior) officers, by an easy alertness; and of the common people, by simplicity and humility.”¹⁶ The

importance of the leader's example in the Confucian school has led to its view of *li* to be described as “rule by virtue” or “rule by man.” This differs from the “rule of law” in that, significantly, “rule by virtue” depended on the actions of a single powerful leader. Rule by *li* was not what would be recognized as rule of law.

The Legalist school opposed many core elements of Confucian legal philosophy. Whereas Confucianism was based on *li*, Legalism was based on *fa* (originally meant “methods” but came to mean “human-made law”) and *xing* (“punishments”). In 952 BC, a nobleman called the Marquis of Lü, prepared a new penal code that codified many existing criminal punishments into a new set of laws. This document, called the *Lü Xing*, is one of the oldest surviving legal codes in Chinese history.¹⁷ The *Lü Xing* described the political purpose of creating penal laws:

All who became liable to those punishments were dealt with without distinction, no difference being made in favour of those who could offer some excuse...Hence, (if anything more were wanted), the clear adjudication of punishments affected the regulation of the people, and helped them observe the regular duties of life.¹⁸

Legalist philosophy maintained that humans were persuaded not by morality and education, but rather by punishment and reward.¹⁹ In this sense, the Legalist school viewed law, especially penal law, as a political tool to control the population. A commonly-cited summary of Legalist thought comes from the *Guanzi*, a text traditionally attributed to Legalist politician Guan Zhong, who advised that “The ruler creates the law; the ministers abide by the law; and subjects are punished by the law. All are subject to law.”²⁰ The implication was that everyone was somehow subjected to the authority of law, and this was how rulers control behavior and maintain order in society.

Traditional Chinese law, as it was practiced for most of China's history, is a fusion of legal ideas taken from the Confucian and Legalist schools. When the State of Qin, one of the former Zhou vassal states, completed its conquest of its neighbors in 221 BC, its rulers embraced the Legalist school and applied it zealously across their new territories, now ruled as a unified empire under the Qin. However, the Qin applied Legalist standards of punishment so severely that after the Qin empire collapsed, Legalist philosophy was tainted by association with the fallen regime. Under the succeeding Han dynasty (206 BC-AD 220), whose rulers took over the empire unified by Qin, Confucianism became the state-sponsored school of thought instead of Legalism.²¹ Legalist views, though officially banned, did not disappear, however.²² Confucian historian Sima Qian, writing in 94 BC after Qin's fall, observed:

The Legalist school is stern and lacks compassion. However, its rectification of the proper relationship between ruler and his ministers, and its insistence on the differentiation between the superior and the subordinate, should be upheld without change. The Legalist school does not discriminate on the basis of closeness of personal relationship or status of noble lineage but makes decisions based uniformly on law. Thus, the sentiments of kinship and respect are eradicated. Such a way of conducting affairs can only be a temporary expediency but cannot succeed in the long term.²³

The fusion of Legalist and Confucian conceptions of law was in part a response to the desire of Emperor Wu of Han (157-87 BC), widely considered one of the most ambitious Chinese emperors, to establish a clear claim to rule. Educated by Confucian scholars, Emperor Wu appreciated the Confucian

doctrine ruling involved “harmonizing heaven with morality.” At the same time, Confucian scholars in the early Han period did not always prove able public administrators. For the most part, the individuals who possessed the bureaucratic skills and experience needed to govern the unified empire were former (Legalist) Qin officials.²⁴ As a result, Legalist knowledge remained an intellectual presence in the Han government. Additionally, the Legalist belief in punishment as a deterrent against improper behavior still compelled many administrators and many Han officials understood that law and punishments were good ways of achieving social control.²⁵ Thus, Imperial Confucianism combined the desired ends of Confucianism with the means of Legalism. Imperial Confucianism gave official recognition to the general idea behind Legalism, that punishments were a realistic way of exercising social control. The difference was that under Imperial Confucianism, the goal of law enforcement was to promote a moral, harmonious society, not merely to punish people for misbehaving.²⁶

A remarkable thing about this new model was how long it lasted. As a legal system, Imperial Confucianism lasted from the early Han dynasty up until the end of Imperial China itself with the fall of the Qing dynasty in 1912.²⁷ The general nature of imperial government and the overall manner in which the country was governed remained largely consistent. If society defines law as an institution for governing behavior that operates independently from the individual wills of the rulers, then the Imperial Confucian legal system was one of the oldest unbroken legal systems in history.

Beginning of the Unequal Treaties

In the nineteenth century, the traditional Chinese legal and political system had a rough awakening at the end of the First Opium War (1839-1842) – a series of land and naval battles between the United Kingdom and the Qing dynasty.²⁸ While

some contemporary observers identified trade issues, particularly the right of British merchants in China to sell opium (officially banned under Qing law) as the cause of the war, legal issues also contributed to the British decision to dispatch a military force to the Chinese coast in 1840.²⁹³⁰ In a February 1840 letter to the Daoguang Emperor, then ruler of the Qing, British Foreign Secretary Viscount Palmerston repeatedly identified concerns about the nature of Chinese law:

Now if a Government makes a Law which applies both to its own Subjects and to Foreigners, such Government ought to enforce that Law impartially or not at all. If it enforces that Law on Foreigners, it is bound to enforce it also upon its own Subjects; and it has no right to permit its own Subjects to violate the Law with impunity, and then to punish Foreigners for doing the very same thing...

the British Government would not have complained, if the Government of China, after giving due notice of its altered intentions, had proceeded to execute the Law of the Empire, and had seized and confiscated all the opium which they could find within the Chinese territory, and which had been brought into that territory in violation of the Law. The Chinese Government had a right to do so, by means of its own officers, and within its own territory...

But for some reason or other known only to the Government of China, that Government did not think proper to do this. But it determined to seize peaceable British Merchants, instead of seizing the contraband opium; to punish the innocent

for the guilty, and to make the sufferings of the former, the means of compulsion upon the latter; and it also resolved to force the British Superintendent, who is an officer of the British Crown, to become an instrument in the hands of the Chinese Authorities for carrying into execution the Laws of China, with which he had nothing to do.³¹

The Qing dynasty found itself suing for peace by 1842 when it became clear that the country was in no position militarily to continue fighting the British. The Qing official sent by the emperor to negotiate the peace settlement, an imperial clansman named Keying,³² did not receive any clear guidance from the emperor for diplomatic objectives beyond the withdrawal of British military forces from Qing territory.³³ His bargaining position already weak following Chinese military losses at British hands, Keying's negotiations were not aided by the fact that neither the emperor nor his foreign policy advisors had a clear understanding or interest in the political, commercial, and (yes) legal demands that the British wanted.³⁴ The Daoguang Emperor wrote to Keying during the negotiations that "the whole business is trifling and tedious" and asked why the British did not understand that "trade and commerce in different places should go by the old rules and there is no need to make changes."³⁵

The 1842 negotiations resulted in the Treaty of Nanking, signed on August 29, 1842, and the subsequent Treaty of the Bogue in 1843 which supplemented and clarified the Treaty of Nanking. This began a century-long trend of agreements in which China was not treated as an equal negotiating party by foreign "treaty powers," who compelled the Chinese to make significant concessions.³⁶³⁷ China entered into anywhere from five hundred to over one thousand such unequal treaties during the 100 years between the end of the First Opium War and the Second World

War.³⁸³⁹



British War Ship sinking Chinese junks (sailing ships) in the Second Battle of Chuenpi (January 7, 1841). Britain's victory in this battle started the negotiations that resulted in the Treaty of Nanking.

While the Treaty of Nanking (and many subsequent treaties) addressed foreign rights to trade in China, the negotiations surrounding the Treaty of Nanking also introduced two important legal concepts that would feature in Chinese debates on international law for the next century: most-favored-nation status and extraterritoriality. The Most-Favored-Nation Clause to the 1843 Treaty of the Bogue, added at the last minute before the treaty was signed, was meant to ensure that any future concessions China made to a different foreign country would also be automatically accorded to the British.⁴⁰ The Most-Favored-Nation Clause in the Treaty of the Bogue provides: “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.”⁴¹ The cascading effect of the Most-Favored-Nation Clause ensured that unequal treaties became greater and greater liabilities as more countries pressured China into entering into similar treaties with them.

The importance of the Most-Favored-Nation Clause is perhaps eclipsed by the still greater, and more notorious, concept of extraterritoriality. Under extraterritoriality, the Chinese government ceded its legal authority over foreign nationals whose countries had treaties with China granting their nationals extraterritorial rights in China. Foreign nationals whose countries had such treaties remained subject to the laws of their home country despite their physical presence on Chinese territory.⁴² As Palmerston’s letter to the Daoguang Emperor made plain, the British had little confidence in the traditional Chinese legal system to protect the safety, property, and interests of British subjects living and trading in China. This concern prompted the British, under diplomat and colonial administrator Sir Henry Pottinger, to introduce a clause into the Treaty of the Bogue that would allow British subjects in China to remain under British law, not Chinese law.

Keying and other officials advising the Daoguang Emperor, eager to simply resolve conflict with the foreigners, agreed to this.⁴³ However, this concession fundamentally altered the Chinese government’s experience with foreign nationals. Perhaps more than any other concession, the Qing dynasty’s acquiescence to the British extraterritoriality clause in 1843 set China up for a century of international inequality. Just a year after the signing of the Treaty of the Bogue, Caleb Cushing, United States Minister to China, demanded extraterritoriality rights for American citizens in China.⁴⁴ The resulting Treaty of Wanghia between the Qing dynasty and the United States, signed by Keying and Cushing on July 3, 1844, included a clause

on extraterritoriality that closely mirrored its British counterpart in the Treaty of the Bogue:

Regulation XIII of the General Regulations, part of the Treaty of the Bogue:

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.⁴⁵

Article XXI of the Treaty of Wanghia:

Subjects of China who may be guilty of any criminal acts 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.⁴⁶

While immunity from local laws for foreign nationals was not unheard of, such immunity was typically restricted to diplomats and their families and staff.⁴⁷ The extraterritorial rights iterated in the Treaty of the Bogue and the Treaty of Wanghia applied to all nationals of the countries named in the treaties. Such arrangements deviated significantly from international norms.⁴⁸ They also differed from previous Chinese legal precedent on criminal jurisdiction of foreign nationals:

The Chinese notion of territorial sovereignty and jurisdiction, as entertained, though at times

vaguely, by the officials of the Empire in the early days, was not essentially different from that which is maintained by modern international jurists. Within the territory of the Empire the imperial laws were supreme; foreigners who went there were permitted to stay only on sufferance; they were under the same obligation as the Chinese subjects to obey them and subject to the same penalties enacted to punish their violation. This notion was vigorously followed by the Chinese rulers in their intercourse with the westerners.⁴⁹

The loss of jurisdiction to such a significant degree within its own borders highlights how the differences between traditional Chinese law and the legal systems of countries like the Britain and the United States were becoming an international liability for China. The legal concerns in Palmerston's letter to the Daoguang Emperor⁵⁰ and the significance of extraterritoriality in settling questions of legal jurisdiction indicate that foreign attitudes on the nature of law in China were key factors in the way they interacted with China. Thus, it is important to understand exactly what foreign, particularly European, observers of China thought about its law and legal system.

Perhaps the earliest, and certainly the most far-reaching, commentary on Chinese law in Europe comes from Montesquieu's *The Spirit of the Laws* in 1748.⁵¹ Montesquieu correctly identified the Confucian model of rule by virtue, "a barrier which men have placed within themselves to prevent the corruption of each other...confounded their religion, laws, manners, and customs; all these were morality, all these were virtue."⁵² However, Montesquieu viewed this form of lawmaking as despotic, "in which laws "in vain did this arbitrary sway, laboring under its own inconveniences, desire to be fettered; it armed itself with its chains."⁵³

In the nineteenth century, rampant corruption and

administrative incompetence in the late Qing period, though not directly the result of the Imperial Confucian model of traditional Chinese law, certainly contributed to negative foreign opinion of Chinese law. In 1846, German missionary Karl Gützlaff, who had translated for the British in the negotiations after the First Opium War, wrote that Chinese magistrates had lost much of their power to govern the local populace.⁵⁴ Gützlaff observed two important differences between nineteenth-century European and Chinese criminal law: that defendants in Chinese criminal trials were seldom represented by attorneys and that Chinese magistrates appeared to possess almost unrestricted power when issuing verdicts and criminal punishments. This power was easily abused:

All evidence they may bring forward is listened to; when, however, the actual trial takes place, the prisoner is solely at the mercy of the Mandarin, who pronounces his sentence unshackled by any guide but his own will, and clothes it in legal language, citing chapter and verse of the code. Appeal to a higher court is perfectly legal, though every step taken involves heavy expenses, and the meanest individual may carry his case to the Court of Requests at Peking. The proceedings in the Court itself are very summary; the accused appears, a few questions are put to him, and he is instantly sentenced, without much reference to his answers.⁵⁵

This idea that Chinese law consisted of individual “legal” pronouncements also extended to private or civil matters like the regulation of trade. In the years leading up to the First Opium War, British diplomats and merchants repeatedly expressed frustration with what they saw as deliberate attempts by the Qing government to restrict British trade and punitive measures to

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dissuade individuals (British or Chinese) who tried to maintain that trade. An 1824 memoir by John Francis Davis, then an East India Company employee based in Canton, the only Chinese port in which foreign merchants could legally trade prior to the Treaty of Nanking, described:

Any person at all acquainted with the early history of our inter course with China, when every separate ship of the Company transacted its own business, and when that intercourse in many points resembled *what a free trade would make it*, must have been struck by the endless and intolerable grievances to which we were subjected by the Chinese, and which frequently reduced us to the brink of giving up the commerce altogether.⁵⁶



Late Qing government official (also called a mandarin) presiding over court proceedings, 1889

Concerns that the Qing dynasty was making it unreasonably difficult for British merchants to legally trade in China have been identified as one of the major causes of the First Opium War and Britain's subsequent negotiation of the Treaty of Nanking with China. Contemporary accounts of British trade in China before the Treaty of Nanking frequently discuss the Chinese legal environment surrounding foreign trade. Chinese officials unfairly targeting British businesses and property are recurring themes. In a report to Queen Victoria written after the First Opium War, British colonial administrator Robert Montgomery Martin noted that in January 1840, before the war, the Qing government had made a law singling out British subjects for special treatment:

[January 14th] brought an edict from the Emperor, approving of all that had been done, and ordering a distinction between to be made in the future treatment between the English and other nations. As to the petty duties paid by the English, it was not to be deemed worth a consideration. Foreigners of other nations were ordered to be submissive, but if they sheltered or protected the English, or conveyed them or their property into Chinese harbors, their punishment would be great.⁵⁷

Britain's decision to negotiate the Treaty of Nanking was an effort to address these concerns and protect the rights and property of British subjects in China. The British government's opinion of Chinese law as arbitrary and punitive, especially after Chinese officials specifically targeted British subjects as noted in Palmerston's letter in 1842, meant that in their minds, extraterritoriality was a necessary guarantee against the abuse of government power, which the British believed Chinese law could not provide.

Treaty powers often reiterated their extraterritorial rights in successive treaties, clarifying or expanding the forms that consular jurisdiction in China would take. This trend began with the Treaty of Tientsin, signed in 1858 in the modern-day city of Tianjin (then spelled Tientsin). When the Treaty of Nanking failed to improve trade and political relations with the Chinese, Britain, aided by France and the United States, fought the Qing again in the Second Opium War (also called the “Arrow War”). The Treaty of Tientsin ended the first phase of this war, which continued until 1860.⁵⁸ Legal concerns featured prominently in the treaty. The Qing signed two versions of the Treaty of Tientsin, one with the United States and one with Britain. The American version of the treaty, signed on June 18, 1858, included no less than three articles on extraterritoriality and jurisdiction over American citizens. Article XI reiterated the Treaty of Wanghia in that Chinese subjects were subject to Chinese law and American citizens were subject to American law. Article XXIV established different legal protocols for Chinese and Americans seeking redress for unpaid debts. Per the new treaty, Chinese subjects who owed debts to American citizens could be pursued in both Chinese courts and by American consular officials. An American who owed debts to a Chinese individual, however, could only be pursued through American consular authorities.⁵⁹

The British version, signed on June 26, 1858, shortly after its American counterpart, was somewhat more equal in that it stated that British and Chinese authorities both had responsibility for apprehending Chinese who owed debts to Englishmen and vice versa,⁶⁰ but this version still stated rather unequivocally that “all questions in regard to rights, whether of property or person, arising between British subjects, shall be subject to the jurisdiction of the British authorities.”⁶¹ The British version of the treaty also required the Qing government to “at all times afford the fullest protection to the persons and property of British subjects, whenever these shall have been subjected to insult or violence. In all cases of incendiarism or robbery, the local

authorities shall at once take the necessary steps for the recovery of the stolen property, the suppression of disorder, and the arrest of the guilty parties.”⁶² The treaty did not include any parallel to this article that required British consular officials to protect Chinese individuals and property to this degree should the guilty party be a British subject, an important omission considering that such an individual would be immune from arrest and prosecution from Chinese authorities under extraterritoriality.

In an English-language memoir *America, Through the Spectacles of an Oriental Diplomat*, British-educated Chinese lawyer Wu Tingfang, who served as Minister to the United States under the Qing dynasty and later as Foreign Minister of the Republic of China,⁶³ highlighted a particularly unequal set of treaties with the United States concerning Chinese immigration. Throughout the late nineteenth century, American laws increasingly restricted rights of Chinese to immigrate to the United States, often contrary to treaties between the Qing and the United States on the subject.⁶⁴

In 1868, the United States and China had signed the Burlingame Treaty, negotiated by United States Secretary of State William H. Seward and United States Minister to China Anson Burlingame, the latter for whom the treaty was named. The Burlingame Treaty was probably the first treaty that the China signed which was not completely unequal, giving the Qing an unprecedented number of concessions from the United States government.⁶⁵ These included broad legal rights for Chinese to settle and trade in the United States:

The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other, for purposes of curiosity, of trade,

or as permanent residents. The high contracting parties, therefore, join in reprobating any other than an entirely voluntary emigration for these purposes.⁶⁶

Although ostensibly meant to prevent forced migration, this wording was interpreted as allowing for Chinese immigration and providing for Chinese rights of residence in the United States that mirrored those given to American citizens in China by the Treaty of Wanghia.⁶⁷ Even more remarkably, the Burlingame Treaty reciprocated the most-favored-nation status that the United States enjoyed in China. The treaty text itself uses the word “reciprocally” when discussing most-favored-nation status,⁶⁸ which was this time given *to* the Chinese. Wu Tingfang took great care to highlight Article VI of the Burlingame Treaty:

Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation, and reciprocally, Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation.⁶⁹

Unfortunately, for China, the good news did not last. Within a few years, the United States reneged on the promises made in the Burlingame Treaty and asked the Qing dynasty government to renegotiate the treaty. Wu Tingfang blamed pressure from American labor unions to curb the immigration of cheap Chinese labor for this reversal.⁷⁰ In 1880, a renegotiated treaty undid many of the reciprocal diplomatic and legal concessions made by the United States to China.⁷¹ The Angell

Treaty, named after James Burrill Angell, United States Minister to China, did not hide that it was the United States who unilaterally decided to replace the Burlingame Treaty and that the Chinese reluctantly agreed despite having previously reached an understanding with the United States.⁷² The 1880 treaty preserved rights of residence and trade as well as most-favored-nation status for five classes of Chinese subjects in the United States—scholars, students, merchants, tourists, and Chinese laborers already living in the United States—but gave the United States government the unilateral right to “regulate, limit, or suspend” all other types of Chinese immigrants to the United States.⁷³ This contradicted the United States’ previous insistence on “the inherent and inalienable right of man to change his home and allegiance” stipulated in Article V of the Burlingame Treaty.⁷⁴

In 1894, the United States asked the Chinese government to revisit treaty provisions on immigration again. Between the signing of the Angell Treaty in 1880 and the new round of renegotiations in 1894, the United States Congress had passed the Chinese Exclusion Act of 1882 prohibiting immigration of Chinese laborers to the United States for ten years. The Chinese Exclusion Act did not mention the most-favored-nation rights of Chinese subjects in the United States, nor did it make any reference to the exempt classes of Chinese subjects named in the Angell Treaty.⁷⁵ While the Chinese Exclusion Act technically called for a “suspension” of Chinese immigration rather than an outright prohibition, which would have violated the Angell Treaty,⁷⁶ the Act had the practical effect of curbing a significant amount of immigration.⁷⁷ The 1882 act was extended for another ten years in 1892, shortly before the United States began negotiations for new treaty provisions.

The resulting treaty, called the Gresham-Yang Treaty after the chief American and Chinese representatives who signed it, supported Wu’s characterization of the Chinese Exclusion Act as a “prohibition.” The Gresham-Yang Treaty instituted a ten-year ban on the immigration of Chinese laborers with only a

few exceptions, including those Chinese laborers whose wives, children, or parents already lived in the United States, as well as the exempt classes under the Angell Treaty.⁷⁸⁷⁹ Wu described this series of events as a contravention of both norms of international law and other United States immigration laws:

What is most objectionable and unfair is that the Chinese should be singled out for discrimination, while all other Asiatics such as Japanese, Siamese, and Malays are allowed to enter America and her colonies without restraint...China does not wish special treatment, she only asks that her people shall be treated in the same way as the citizens or subjects of other countries.⁸⁰

China and the World:

The interaction and translation of foreign legal thought into Chinese law and legal thought

The late-nineteenth and early-twentieth centuries witnessed a tremendous amount of legal translation in China as Chinese-speaking jurists and translators produced Chinese translations of major works of Western law, philosophy, politics, history, and other subjects. In the context of legal translations, the practice of translating texts on Western law, particularly international law, into Chinese was known as *yijie* and is a major component of early modern Chinese legal history.⁸¹ This high period of legal translations coincided with a period of transition in Chinese society, during which Western ideas gained influence; As historian Herrlee Creel noted, “more and more Chinese came to realize that it would be impossible to continue to enjoy their traditional way of life, and at the same time to achieve the goal of expelling the foreigner and winning China’s independence.”⁸²

Concerted efforts at legal translation began during the last decades of the Qing dynasty (relatively late by Chinese

historical standards). In 1839, imperial commissioner Lin Zexu commissioned a Chinese translation of Emerich de Vattel's *The Law of Nations* by American missionary Peter Parker and Chinese imperial interpreter Yuan Dehui.⁸³ Later, in 1862, the Qing government established the *Tongwenguan*, a government school in the imperial capital Beijing to promote Western knowledge and languages, including the systematic translation of Western legal texts into Chinese.⁸⁴

One of the first major translations of Western law into Chinese was American missionary W. A. P. Martin's translation of Henry Wheaton's *Elements of International Law* (*wanguo gongfa*, literally "public law of foreign countries") in 1864. Martin's translation broke new ground as one of the first Western texts on international law to be translated into Chinese by introducing a number of new terms into the Chinese legal language.⁸⁵

A particularly interesting word that Martin created is the term *quanli* (meaning "rights"). When Martin was translating in 1864, there was no direct Chinese translation for the English word "rights."⁸⁶ Like the term *fazhi* ("rule of law"), *quanli* was a compound word made from preexisting Chinese characters that had other meanings: *quan* (meaning "power") and *li* (meaning "benefit" or "interest"; note this is a different Chinese character than that for the Confucian term meaning "morality"). Martin's new term *quanli* was homophonous with another, more established term *quanli* (written with a different character *li*) that meant "authority" or "political power."⁸⁷ The word *quan* ("power") appears identically in both terms.

The association between power and rights was preserved in the coining of yet another compound phrase, *minquan* (meaning "people's power").⁸⁸ During the late-nineteenth and early-twentieth centuries, at the height of the *yijie* wave of legal translations, political reformers such as Sun Yat-sen (1866-1925), Kang Youwei (1858-1927), and Liang Qichao (1873-1929) advocated the collective power of the people as a way to strengthen the country politically. Liang, for example, wrote that

as “rights consciousness gets increasingly developed, people’s [political] duties become increasingly strong.”⁸⁹ These reformers were primarily concerned with building up China’s political strength so that it could regain its sovereign rights and ultimately get rid of its unequal treaties.⁹⁰ Rights and the people’s power were meant to bolster the power of the state rather than protect individual citizens from the state. Rights of the people collectively were a step towards strengthening the country, which was why “people’s power” was valued more than individual rights.⁹² It was a means to an end, the end being the political development and ultimately acceptance of China on the international stage.

Law and International Relations:
The Systematic Introduction of the Rule of Law to Foreign
Policy

Concessions in unequal treaties over the second half of the nineteenth century made it harder for the Qing government, already weakened by corruption and various rebellions against imperial rule, to maintain control of the country. The unequal treaties were an important factor in the ultimate collapse of the Qing dynasty in 1912, whose demise marked the end of a several-thousand-year-old imperial dynastic tradition.⁹³ The new regime, the Republic of China, was faced with a messy diplomatic and legal situation. Yet between 1912 and 1943, a period less than a third of a century, the Republic of China government managed to renegotiate, revise, and ultimately replace all the unequal treaties that crippled its predecessor. Learning from the Qing dynasty’s struggles, the government of the new Republic of China understood the importance of bringing China in line with modern political, diplomatic, legal, and social norms. Republic of China leaders understood that reforming China’s legal system and bringing China in conformity with modern norms of international law would solidify the new republican regime’s political legitimacy, strengthening the Chinese state

while restoring China's status under the law of nations.⁹⁴

Law and the rule of law were crucial to achieving these objectives. There were two important connections between the rule of law and the abolition of the unequal treaties. First was that domestic legal reform would have the direct consequence of satisfying a major condition for renegotiating extraterritoriality in unequal treaties. Foreign dissatisfaction with the norms and customs of traditional Chinese law had been the motivation for pursuing and maintaining extraterritorial rights through treaties, and the treaty powers had already indicated a willingness to relinquish consular jurisdiction if there was a sufficiently modernized Chinese legal system to take its place.^{95,96}

This important consideration was demonstrated in the 1902 negotiations for a new commercial treaty between the Qing dynasty and Britain. The Chinese negotiators sent to meet with the British this time understood that legal reforms and reevaluating Chinese law from the perspective of foreigners', particularly Europeans', understanding of law would be necessary before the treaty powers would consider making concessions to China. One of the Chinese negotiators, Zhang Zhidong, raised this issue before the British: "We intend to reform our legal system and will appoint commissioners to prepare for this in the near future. Would you agree that, after our legal system has been overhauled, all foreign nationals [in China] ought to be subject to Chinese law?"⁹⁷ The British subsequently pledged in the Mackay Treaty, signed on September 5, 1902, that "Great Britain agrees to give every assistance to such reform, and she will also be prepared to relinquish her extraterritorial rights when she is satisfied that the state of the Chinese laws, the arrangement for their administration, and other considerations warrant her in so doing."⁹⁸ Thus, legal reform was a path towards the renegotiation of unequal treaties.

The second reason was that international law was a fundamental element to the Republic of China's strategy for eliminating unequal treaties. A new generation of Chinese

international lawyers would gradually but successfully argue on the international stage that the unequal treaties violated China's rights as a sovereign nation under international law and that under international legal norms, revising and replacing the treaties with more equal terms was the way to restore Chinese sovereign rights to an equitable state.⁹⁹

During the first fifteen years after the establishment of the Republic of China, a period referred to as the Beiyang government (1912-1927) because it was based in Beijing, the government prioritized the study of international law as well as the professionalization of the Chinese diplomatic corps as ways of bringing Chinese foreign policy in line with accepted international norms. The Beiyang government established a new Chinese foreign ministry, called the *Waijiaobu* (literally meaning "External Intersection Ministry" or "Diplomacy Ministry," often translated as "Ministry of Foreign Affairs") in 1911.¹⁰⁰ Under the leadership of Lou Tseng-Tsiang,¹⁰¹ a former Qing diplomat who later served four terms as Minister of Foreign Affairs of the Republic of China (1912, 1912-1913, 1915-1916, 1917-1920), the new foreign ministry became a modernized government bureaucracy whose leaders had lived overseas, could speak foreign languages, and understood how foreign powers practiced international relations.¹⁰² Foreign-educated diplomats and lawyers comprised the bulk of *Waijiaobu* leaders: of the fourteen men who served as Minister of Foreign Affairs during the Beiyang government, nine had been educated in the United States, Britain, Japan, or Germany.¹⁰³ The recruitment of well-educated, cosmopolitan, and multilingual officials, hired through regular entry examinations, lent a degree of professionalism and prestige to the *Waijiaobu* as a competent and specialized institution for conducting Chinese diplomacy.¹⁰⁴ The internationalism and professionalism of this foreign ministry attracted the attention of foreign countries and provided a sturdy foundation for subsequent Chinese efforts to conform with international standards of diplomacy and international law.

China's Unequal Treaties

The use of law to persuade treaty powers to renegotiate unequal treaties required familiarity with international law and an understanding of foreign legal systems, knowledge that many Republic of China diplomats possessed. International lawyers held significant influence in the Ministry of Foreign Affairs throughout the early twentieth century. China's efforts to renegotiate and replace unequal treaties gave Chinese international lawyers a platform to broadly apply their legal training and understanding of law to China's foreign policy goals.¹⁰⁵ The significance of international lawyers in Chinese diplomacy persisted even after the Beiyang government gave way to the Nationalist government



China: The Cake of Kings and Emperors, 1898.

Political cartoon depicting the treaty powers of Britain, Germany, Russia, France, and Japan dividing China among themselves. China is depicted as the cake.

of Chiang Kai-shek. In 1935, lawyers comprised thirty percent of prominent diplomats in the Ministry of Foreign Affairs, a greater percentage than those who held doctoral degrees.¹⁰⁶ These legal credentials added further prestige, intellectual depth, and professionalism to the practice of international law and ensured that Chinese diplomacy was sufficiently well-informed about legal matters to interact with treaty powers in an international legal framework.¹⁰⁷

The Shantung Question:
Revisiting and replacing unequal treaties through international
law

China's first major attempt at using international law to challenge an unequal treaty came during the First World War (1914-1918). In 1914, Japan declared war on the German Empire and subsequently invaded the German concession (territory legally under Chinese sovereignty but occupied by another through treaty rights) in the northern province of Shandong (also spelled Shantung). The Japanese invasion and occupation of Shandong violated the wartime neutrality that the Republic of China had declared shortly after the First World War began in Europe. In November 1914, Germany and its ally Austria surrendered to Japanese forces in Shandong.¹⁰⁸ After Germany's surrender, the Chinese government re-declared its wartime neutrality and requested that Japan withdraw its troops from Shandong Province. Japan refused. The Japanese government subsequently pressured Yuan Shikai, President of the Republic of China, to sign the Twenty-One Demands, an unequal treaty that recognized Japanese rights to the former German concession in Shandong.¹⁰⁹ On May 7, 1915, Japan gave the Republic of China an ultimatum: sign the treaty by May 9 or "the Imperial Government will take steps they may deem necessary."¹¹⁰

After the war, Japan put forward its claims to the German concession in Shandong at the Paris Peace Conference (January

18, 1919-January 21, 1920). When Japan cited the Twenty-One Demands, the Chinese delegation at the conference rejected Japan's argument, countering that Yuan had signed the treaty with Japan under coercion in wartime. The immediate threat posed by Japanese troops already in Shandong had prevented the Chinese government from finding an alternative, mutually agreeable diplomatic solution back in 1915:

Although threatened by the presence of large bodies of troops dispatched by the Japanese Government to South Manchuria and Shantung – whose withdrawal, the Japanese Minister at Peking declared in reply to a direct inquiry by the Chinese Government, they would not be effected “until the negotiations could be brought to a satisfactory conclusion” – the Chinese Government issued an official statement immediately after this satisfactory conclusion” had been effected under pressure of the Ultimatum of May 7, 1915, declaring that they were “constrained to comply in full with the terms of the Ultimatum[.]”¹¹¹

The Chinese delegation also attempted to make a constitutional argument that the treaties were not binding under domestic Chinese law because they had not been ratified by the Chinese legislature.¹¹² The 1912 Provisional Constitution of the Republic of China required legislative approval for all treaties to be valid.¹¹³ However, the revised constitution of 1914 allowed the President of the Republic of China to unilaterally make treaties except when said treaty involved either a “territorial change” or an “increase of the burden of nationals.”¹¹⁴ Since foreign concessions were technically still Chinese territory and shifting extraterritorial rights in the concession between Germany and Japan had not caused any additional adverse effect on Chinese nationals, the

Twenty-One Demands did not fit either of these exceptions, so the constitutional argument against Yuan Shikai's acceptance of the treaty with Japan was weak. Nevertheless, the use of this argument at the Paris Peace Conference set a precedent in China for abolishing treaties by constitutionally-provided for legislative action. The Republic of China would ultimately use this tactic during the Second World War, when the Chinese legislature voted to cancel all treaties between China and Japan.¹¹⁵

The Chinese delegation at the Paris Peace Conference made an additional claim against the Twenty-One Demands using the legal principle *rebus sic stantibus* (Latin for "a fundamental change in circumstances").¹¹⁶ Under *rebus sic stantibus*, changes in circumstances, such as the state of war between the Republic of China and Germany after China entered the First World War in 1917, meant that China could no longer justify the existence of a German concession on its territory. Therefore, it was within the Republic of China's rights under international law to claim the concession back despite having previously granted rights over the territory to Germany.¹¹⁷ The Chinese added that had it not been for Japan's illegal action to claim the territory, "the leased territory of Kiaochow would in any event have been directly restored to China as one of the States associated with the Allied Powers and the United States in the war against the Central Powers."¹¹⁸

Prior to the start of the Paris Peace Conference in 1919, the Japanese government had enlisted diplomatic support for its position on the Shantung Question from Britain and France. The Republic of China tried to get support from the United States. To this end, Wellington Koo, Chinese Minister to the United States, met with Woodrow Wilson in Washington. Wilson, while offering general support for China, made it clear that other countries had already made their own binding agreements between themselves regarding the Shantung Question.¹¹⁹ In a note to Japanese Minister for Foreign Affairs Motono Ichirō on February 16, 1917, British Ambassador to Japan Conynham

Greene confirmed the details of a deal between the British government and Japan:

His Majesty's Government accedes with pleasure to the request of the Japanese government for an assurance that they will support Japan's claims in regard to the disposal of Germany's rights in Shantung and possessions in Islands North of Equator on the occasion of Peace Conference, it being understood that the Japanese Government will, in eventual peace settlement, treat in same spirit Great Britain's claims to German Islands South of Equator.¹²⁰

In March 1917, Japan reached a similar agreement with France, with the French agreeing to support Japanese claims in China if the Japanese promised to pressure China into “rupturing” diplomatic relations with Germany after the war. Such a “rupture” would have included that China seize German ships located in China ports and require that all German nationals leave Chinese territory.¹²¹ It should be noted that the Chinese government was not informed of this agreement between Japan and France.

While the Paris Peace Conference did see the end of Germany's extraterritorial rights in China, the conference did not deliver China's desired result on the Shantung Question. The Treaty of Versailles that resulted from the Paris Peace Conference gave control of the former German concession in Shandong to Japan instead of returning the territory to China.¹²² The refusal of the foreign powers to return the former German concession led to the Republic of China's refusal to sign the Treaty of Versailles.¹²³ The Chinese gave the following statement invoking international law about the loss of Shandong:

The Peace Conference having denied China justice in the settlement of the Shantung question

and having today in effect prevented them from signing the treaty without sacrificing their sense of right, justice, and patriotic duty, the Chinese Delegates submit their case to the impartial judgement of the world.¹²⁴

China's loss, however, was short-lived. In 1922, the Republic of China had another opportunity to rally international support on the Shantung Question at the Washington Naval Conference. The United States organized the Washington Naval Conference (November 11, 1921-February 6, 1922) to address the future of regional stability in East Asia and the Pacific. While the agenda for the conference originally focused on the naval arms race between the United States, Britain, France, Japan, and Italy, countries represented at the conference also discussed the future of diplomatic relations in China.¹²⁵

In 1922, China was in a better bargaining position than it had been in 1919. The great powers in Europe and the United States had become concerned about an increasingly aggressive Japan.¹²⁶ Senator James A. Reed of Missouri, an opponent of the Treaty of Versailles' handing Shandong to Japan, warned his colleagues in the United States Senate:

The cunning Prussian of the Orient proposes to get a title sanctioned, warranted, and guaranteed by the league of nations with its holy seal affixed, and then it will settle the question hereafter whether it thinks that it is ready to give back this property that it has taken. It is a good thing to mix a little common sense even in our dreams. He who thinks on this matter from the practical standpoint of life must know that Japan, having laid her hand of steel upon the throat of China, does not intend to relax her grip.¹²⁷

Law has been an important influence on the development of Chinese society at some of the most crucial periods in China's long history. The development of traditional Chinese law was shaped by competing philosophical theories on the role of human-made law in governance and social control. The Han dynasty compromise between the virtuous moral objectives of Confucianism and the practical enforcement mechanisms of Legalism produced a type of legal system that endured the rise and fall of a dozen successive dynasties. In the twentieth century, international law gave China ways to renegotiate and ultimately replace the unequal treaties that had held China down during the previous century. Chinese desire for equitable treatment under international law shaped China's foreign policy for much of the early twentieth century. Debates about the rule of law and the role that law should play in the state are a common theme in China's history. Chinese law has had a rich history of fusion and negotiation between people and ideas—much like China today.

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Notes

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² "Rule of law, n.". OED Online. January 2018. Oxford University Press. Accessed February 20, 2018.

³ Dicey, Albert Venn. *Introduction to the Study of the Law of the Constitution*, ed. Roger E. Michener. Indianapolis: Liberty Fund, 1982.

⁴ Confucius and James Legge, trans., *The Sacred Books of the East: The Texts of Confucianism, vol. III (Part I: The Shu King, The Religious Portions of the Shih King, The Hsiao King)* (Delhi: Motilal Banarsidass, 1966), p. 254-259. Ironically, the *Lü Xing* survives as part of a Confucian classic text, the *Book of Documents*. See Confucius and Legge, vol. III, part I.

⁵ Aristotle, trans. William Ellis, *Politics*, 3.16.

⁶ Cicero, trans. Francis Barham, *The Political Works of Marcus Tullius Cicero: Comprising his Treatise on the Commonwealth; and his Treatise on the Laws. Translated from the original, with Dissertations and Notes in Two Volumes. (Vol. II. The Treatise on the Laws)* (London: Edmund Spettigue, 1841-42), p. 134.

⁷ See Carl Schmitt, trans. George Schwab, *The Concept of the Political: Expanded Edition* (Chicago: University of Chicago Press, 2008); Nadia E. Nedzel, "The Rule of Law: Its History and Meaning in Common Law, Civil Law, and Latin American Judicial Systems," *Richmond Journal of Global Law and Business*, vol. 10 issue 1 (2010), 57-109.

⁸ Deborah Cao, *Chinese Law: A Language Perspective* (Aldershot: Ashgate, 2004), p. 20.

⁹ *Ibid.*, p. 20.

¹⁰ *Ibid.*, p. 41.

¹¹ S. Ratnapala, *Welfare State or Constitutional State?* (Sydney: Centre for Independent Studies, 1990); Robert S. Summers, "A Formal Theory of the Rule of Law," *Ratio Juris* 6(2): 127-142, p. 135; in Cao, p. 44.

¹² Jianfu Chen, *Chinese Law: Context and Transformation* (Leiden: Brill, 2008), p. 22-23.

¹³ *Ibid.*, p. 35.

¹⁴ *Ibid.*, p. 27, 35.

¹⁵ Common Chinese terminology for a king or emperor.

¹⁶ Confucius and James Legge, trans., *The Sacred Books of the East: The Texts of Confucianism, vol. XXVII (Part III: The Li Ki)* (Delhi: Motilal Banarsidass, 1966), p. 112.

¹⁷ Zhongyuan Fu, *China's Legalists: The Earliest Totalitarians and Their Art of*

Ruling. (Armonk, N.Y.: M.E. Sharpe, 1996), p. 57.

¹⁸ Confucius and James Legge, trans., *The Sacred Books of the East: The Texts of Confucianism, vol. III (Part I: The Shu King, The Religious Portions of the Shih King, The Hsiao King)* (Delhi: Motilal Banarsidass, 1966), p. 254-259. Ironically, the Lü Xing survives as part of a Confucian classic text, the *Book of Documents*. See Confucius and Legge, vol. III, part I.

¹⁹ John W. Head and Lijuan Xing, *Legal Transparency In Dynastic China: The Legalist-Confucianist Debate and Good Governance In Chinese Tradition* (Durham: Carolina Academic Press, 2013), p. 39.

²⁰ Quoted and translated in Chen, p. 15.

²¹ J.A.G. Roberts, *A Concise History of China* (1999), p. 28; quoted in Head and Xing, p. 55.

²² Head and Xing, p. 53.

²³ Confucius and James Legge, trans., *The Sacred Books of the East: The Texts of Confucianism, vol. III (Part I: The Shu King, The Religious Portions of the Shih King, The Hsiao King)* (Delhi: Motilal Banarsidass, 1966), p. 254-259. Ironically, the Lü Xing survives as part of a Confucian classic text, the *Book of Documents*. See Confucius and Legge, vol. III, part I.

²⁴ Creel, Herrlee Glessner, *Chinese Thought, From Confucius to Mao Tsê-Tung* (Chicago: University of Chicago Press, 1953), p. 165.

²⁵ Head and Xing, p. 63.

²⁶ *Ibid*, p. 63.

²⁷ *Ibid*, p. 64.

²⁸ In this section and for the remainder of this paper, the terms “Qing dynasty” and “Qing” refer to the political entity whose territory included modern-day China and existed from 1644 to 1912 (the traditional beginning and end dates for the Qing period). From 1644 to 1912, “China” was functionally synonymous with “Qing.”

²⁹ Dong Wang, *China's Unequal Treaties: Narrating National History* (Lanham, MD: Lexington Books, 2005), p. 11.

³⁰ The causes of the Opium Wars are complicated and interconnected on both the British and Chinese sides. See James M. Polachek, *The Inner Opium War* (Cambridge, Mass.: Council on East Asian Studies/Harvard University, 1992).

³¹ “Lord Palmerston to the Minister of the Emperor of China,” in Hosea Bailou Morse, *The International Relations of the Chinese Empire (vol. 1)* (London: Longmans, Green, and Co., 1910), Appendix A, p. 621-626.

³² Keying is the native pronunciation of his Manchu language birth name. In Chinese, Keying is known as Qiying.

³³ Description of hostilities in 1842, in Mark S. Bell, *China: Being a Military Report on the North-eastern Portions of the Provinces of Chih-li and Shan-tung*,

Nanking and Its Approaches, Canton and Its Approaches: Together with an Account of the Chinese Civil, Naval and Military Administrations, and a Narrative of the Wars Between Great Britain and China, Volume II (Calcutta: Office of the Superintendent of Government Printing, India, 1884), p. 282-294.

³⁴ Wang, p. 12.

³⁵ Quoted in *Yapian zhanzheng dang'an shiliao* [Archival sources on the Opium War] (Tianjin: Tianjin guji chubanshe, 1992), 6:114-115; in Wang, p. 12.

³⁶ Many unequal treaties were with the United Kingdom and the United States, although France, Germany, Belgium, Austria-Hungary, Italy, Portugal, and eventually Japan all had unequal treaties with China.

³⁷ Wang, p. 10.

³⁸ *Ibid.*, p. 2.

³⁹ For a comprehensive list of these treaties, see John Van Antwerp MacMurray, *Treaties and Agreements with and Concerning China* (Washington: Carnegie Endowment for International Peace, 1929).

⁴⁰ Pasha L. Hsieh, *The Discipline of International Law in Republican China and Contemporary Taiwan*, 14 Wash. U. Global Stud. L. Rev. 87 (2015), p. 106. See also Wang, p. 16.

⁴¹ *Supplementary Treaty Signed By Their Excellencies Sir Henry Pottinger and Ki Ying Respectively, On The Part Of the Sovereigns of Great Britain and China, At the Bogue, 8th October 1843.* (1843). See Article VIII.

⁴² Stephen G. Craft, *V.K. Wellington Koo and the Emergence of Modern China* (Lexington: University Press of Kentucky, 2004), p. 1-2.

⁴³ Wang, p. 16.

⁴⁴ *Ibid.*, p. 15-16.

⁴⁵ *Supplementary Treaty* (1843), under *General Regulations, Under Which the British Trade Is To Be Conducted At the Five Ports of Canton, Amoy, Fuchow, Ningpo, and Shanghai.*

⁴⁶ *Treaty of Wanghia*, under "Peace, amity, and commerce," in Charles I. Bevans, ed., *Treaties and other international agreements of the United States of America, 1776-1949. Compiled under the direction of Charles I. Bevans* [Washington, Dept. of State; for sale by the Supt. of Docs., U.S. Govt. Print. Off., 1968-76], vol. 6, p. 647-658.

⁴⁷ See for example, Diplomatic Privileges Act 1708 (7 Ann c 12), in force in the United Kingdom until 1964.

⁴⁸ Yang Xiangqun et al., eds. *Zeng Jize chushi yingfa riji* [Zeng Jize's diary in England, France, and Russia] (Changsha: Yuelu shushe, 1985), p. 164-165; quoted in English from Wang, p. 25.

⁴⁹ Vi Kyuin Wellington Koo, *The Status of Aliens in China* (New York: Columbia University, 1912), p. 47. See also Liu, Shih Shun, *Extraterritoriality:*

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Its Rise and Decline (New York: Columbia University, 1925) for additional discussion of the legal history of extraterritorial rights under international law.

⁵⁰ See "Lord Palmerston to the Minister of the Emperor of China," in Morse, Appendix A, p. 621-626.

⁵¹ Melvin Richter, *The Political Theory of Montesquieu* (Cambridge: Cambridge University Press, 1977), p. 279, quoted in MacCormack, *The Spirit of Traditional Chinese Law*, xiii.

⁵² Montesquieu, Charles de Secondat, and Thomas Nugent. *The Spirit of the Laws* (New York: Hafner Pub. Co., 1965), p. 301.

⁵³ *Ibid*, p. 124-125.

⁵⁴ C. Gutzlaff, "Replies to Queries in Relation to China, Proposed by Sir G. T. Staunton, Bart., M.P., in the Year 1846," *The Journal of the Royal Asiatic Society of Great Britain and Ireland*, Vol. 12(1850), p. 392.

⁵⁵ *Ibid*, p. 393.

⁵⁶ John Francis Davis, "Memoir concerning the Chinese," *Transactions of the Royal Asiatic Society of Great Britain and Ireland*, Vol. 1, No.1 (1824), p. 16.

⁵⁷ Robert Montgomery Martin, *China, Political Commercial and Social: In an Official Report to Her Majesty's Government* (London: J. Madden, 1847), vol. 2, p. 38.

⁵⁸ *Correspondence Respecting the Revision of the Treaty of Tien-Tsin: Presented to the House of Lords by Command of Her Majesty, In Pursuance of Their Address Dated March 24, 1871* (San Francisco: Chinese Materials Center, 1975).

⁵⁹ *Treaty of Tientsin*, under "Peace, amity, and commerce," in Bevans, *Treaties and other international agreements of the United States of America, 1776-1949*, vol. 6, p. 659-670.

⁶⁰ Article XXII, *Treaty of Tien-Tsin, Tien-tsin, June 26, 1858, Peace Treaty between the Queen of Great Britain and the Emperor of China* (1858).

⁶¹ Article XV, *ibid*.

⁶² Article XVIII, *ibid*.

⁶³ Also known as Ng Choy and Ng Achoy. His name in Chinese is generally written as Wu Tingfang which is the name he is most known by outside of China.

⁶⁴ Wu Tingfang, *America, Through the Spectacles of an Oriental Diplomat* (New York: Frederick A. Stokes Co., 1914), p. 40.

⁶⁵ John Schrecker, "'For the Equality of Men – for the Equality of Nations': Anson Burlingame and China's First Embassy to the United States, 1868", *Journal of American-East Asian Relations* 17.1 (2010): 9–34.

⁶⁶ Article V, *Burlingame Treaty*, under "Peace, Amity, and Commerce," in Bevans, *Treaties and other international agreements of the United States of America, 1776-1949*, vol. 6, p. 682.

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⁶⁷ See Article III, *Treaty of Wanghia*, p. 648.

⁶⁸ Article VI, *Burlingame Treaty*, p. 683.

⁶⁹ Article VI, *ibid*, p. 683. See also Wu, p. 45.

⁷⁰ Wu, p. 45-46.

⁷¹ This treaty is not to be confused with a different treaty on “Commercial Regulations and Judicial Procedure” that was also negotiated when Angell was United States Minister to China and which was signed on the same day as the Angell Treaty. For this other treaty, see “Commercial Regulations and Judicial Procedure,” in Bevans, *Treaties and other international agreements of the United States of America, 1776-1949*, vol. 6, p. 688-690.

⁷² Preamble and Article I, *Angell Treaty*, under “Immigration” in Bevans, *Treaties and other international agreements of the United States of America, 1776-1949*, vol. 6, p. 685-687.

⁷³ Articles I-III, *ibid*, p. 686.

⁷⁴ Article V, *Burlingame Treaty*, p. 682.

⁷⁵ Chinese Exclusion Act of 1882, also called *An act to execute certain treaty stipulations relating to the Chinese*, May 6, 1882; Enrolled Acts and Resolutions of Congress, 1789-1996; General Records of the United States Government; Record Group 11; National Archives.

⁷⁶ *Angell Treaty*, p. 686.

⁷⁷ Wu, p. 40-48.

⁷⁸ Article II, *Gresham-Yang Treaty*, under “Immigration,” in Bevans, *Treaties and other international agreements of the United States of America, 1776-1949*, vol. 6, p. 692.

⁷⁹ Article III-IV, *ibid*, p. 692-693.

⁸⁰ Wu, p. 51.

⁸¹ Cao, p. 162.

⁸² Creel, p. 240.

⁸³ Cao, p. 161.

⁸⁴ *Ibid*, p. 162.

⁸⁵ *Ibid*, p. 162.

⁸⁶ *Ibid*, p. 71.

⁸⁷ *Ibid*, p. 72.

⁸⁸ *Ibid*, p. 73.

⁸⁹ Liang Qichao, “On Rights Consciousness,” quoted in Stephen C. Angle, *Human Rights and Chinese Thought: A Cross-Cultural Inquiry* (New York: Cambridge University Press, 2002), p. 159.

⁹⁰ Cao, p. 73.

⁹¹ Sun Yat-sen, “The Principles of Democracy,” *Sources of Chinese Tradition: From 1600 Through the Twentieth Century*, compiled by Wm. Theodore de Bary and Richard Lufrano, 2nd ed., vol. 2 (New York: Columbia University

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Press, 2000), p. 323-324.

⁹² Cao, p. 73.

⁹³ Ku, p. 70.

⁹⁴ Hsieh, p. 94.

⁹⁵ Ibid, p. 105.

⁹⁶ Bryna Goodman, “‘Law is One Thing, and Virtue is Another’: Vernacular Readings of Law and Legal Process in 1920s Shanghai,” in Chen, Li, and Madeleine Zelin, eds., *Chinese Law: Knowledge, Practice and Transformation, 1530s to 1950s* (Leiden: Brill, 2015), p. 150.

⁹⁷ *Xinchou heyue dingli yihou de shangyue tanpan*, minutes of the nineteenth meeting of the Sino-British negotiations for treaty revision (July 17, 1902), p. 137; quoted in English from Wang, p. 22.

⁹⁸ Quoted in Wang, p. 22.

⁹⁹ Hsieh, p. 94.

¹⁰⁰ Ibid, p. 37-38.

¹⁰¹ His name in Chinese was Lu Zhengxiang. Lou Tseng-Tsiang is an alternative spelling of his name and it is by this spelling that Lou is best known outside China.

¹⁰² Editorial Comment, *American Journal of International Law* 7:1 (1913), pp. 158-161.

¹⁰³ Wang, p. 38.

¹⁰⁴ Ibid, p. 38-39.

¹⁰⁵ Hsieh, p. 97.

¹⁰⁶ Ibid, p. 99.

¹⁰⁷ Ibid, p. 99.

¹⁰⁸ Ku, p. 70-71.

¹⁰⁹ Ibid, p. 71.

¹¹⁰ Japan's Ultimatum delivered by the Japanese Minister to the Chinese Government, on May 7th, 1915; quoted in Ge-Zay Wood, *The Twenty-One Demands: Japan Versus China* (New York, Chicago: Fleming H. Revell Company, 1921), p. 139.

¹¹¹ Confucius and James Legge, trans., *The Sacred Books of the East: The Texts of Confucianism, vol. III (Part I: The Shu King, The Religious Portions of the Shih King, The Hsiao King)* (Delhi: Motilal Banarsidass, 1966), p. 254-259. Ironically, the *Lü Xing* survives as part of a Confucian classic text, the *Book of Documents*. See Confucius and Legge, vol. III, part I.

¹¹² Hsieh, p. 108.

¹¹³ Article 35 in *The Provisional Constitution of the Republic of China*.

¹¹⁴ Hsieh, p. 108.

¹¹⁵ Ibid, p. 109.

¹¹⁶ Ibid, p. 109.

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¹¹⁷ Ibid, p. 109.

¹¹⁸ *Claims of China submitted, 1915*, p. 17.

¹¹⁹ Ku, p. 71.

¹²⁰ Note quoted in Thomas F. Millard, *The Shantung Case at the Conference: 2nd Edition* (Shanghai: Millard's Review of the Far East, 1921), p. 8-9.

¹²¹ Quoted in Ibid, p. 10-11.

¹²² Article 156, *Treaty of Versailles, in Bevans, Treaties and other international agreements of the United States of America, 1776-1949, vol. 1*, p. 114.

¹²³ *Why China refused to sign the Peace Treaty. July, 1919.* (New York: Chinese Patriotic Committee, 1919).

¹²⁴ Quoted in Ku, p. 73.

¹²⁵ The naval arms race was addressed in the Five Power Treaty between the named countries, signed in December 1921. See Ku, p. 76.

¹²⁶ Ku, p. 79.

¹²⁷ Speech quoted in *America's Position on the Shantung Question: as indicated in public speeches by President Harding, ex-President Wilson, Senator Lodge, etc., and in official hearings and state papers* (Shanghai: Weekly Review of the Far East, 1921), p. 14.

¹²⁸ Ge-Zay Wood, *The Shantung Question; A Study in Diplomacy and World Politics* (New York, Chicago: Fleming H. Revell Company, 1922), p. 278.

¹²⁹ *Conversations Between the Chinese and Japanese Representatives in Regard to the Shantung Question: Treaty for the settlement of outstanding questions relative to Shantung. Agreed terms of understanding recorded in the Minutes of the Japanese and Chinese delegations concerning the conclusion of the treaty for the settlement of outstanding questions relative to Shantung* (Washington: Government Printing Office, 1922).

¹³⁰ "Treaty Between Japan and China for the Settlement of Outstanding Questions Relative to Shantung," *The American Journal of International Law*, Vol. 16, No. 2, Supplement: Official Documents (Apr., 1922), pp. 84-94.

¹³¹ Ibid.

¹³² Ku, p. 79.

¹³³ Ibid, p. 83.

Images

Page 19: The East India Company iron steam ship Nemesis, commanded by Lieutenant W. H. Hall, with boats from the *Sulphur*, *Calliope*, *Larne* and *Starling*, destroying the Chinese war junks in Anson's Bay, on 7 January 1841, Edward Duncan, 1843, via Wikimedia Commons, https://commons.wikimedia.org/wiki/File:Destroying_Chinese_war_junks,_by_E._Duncan_

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(1843).jpg (accessed January 11, 2019).

Page 24: Court sitting during Qing dynasty, 1889, via Wikimedia Commons, <https://en.wikipedia.org/wiki/File:Yamen-sitzung.jpg> (accessed January 11, 2019).

Page 35: *China – the cake of Kings and Emperors* (original caption *En Chine - Le gâteau des Rois et... des Empereurs*), Henri Meyer, illustration from supplement to “Le Petit Journal,” January 16, 1898. Reproduction from Bibliothèque nationale de France, via Wikimedia Commons, https://commons.wikimedia.org/wiki/File:China_imperialism_cartoon.jpg (accessed January 11, 2019).