PÄR KRISTOFFER CASSEL

EXTRATERRITORIALITY AND IMPERIAL POWER IN NINETEENTH-CENTURY CHINA AND JAPAN

GROUNDS OF JUDGMENT

Grounds of Judgment

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Den här boken tillägnas min morfar Gustaf Ranhagen, som gav mig mod att studera främmande språk och fick mig att påbörja min långa resa till fjärran länder.

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Like many other academic works, this book started as a dissertation, but it is the product of a much longer intellectual trajectory. My love of language and history were two of the reasons why I chose to study Chinese, Japanese, and East Asian history in the first place. My interest in law goes back to my days as an undergraduate, when I applied and was admitted to the Law School at the University of Stockholm. However, I was also awarded a Swedish-Chinese government scholarship to study Chinese history at Nanjing University, so I chose to turn down the offer of Law School and go to China instead. During my year in Nanjing, I became fascinated with the history of the city, where the Manchu Qing dynasty, Chinese nationalism, and Japanese imperialism have left indelible traces. After finishing my undergraduate degree, I worked as an assistant sinologist at the Embassy of Sweden in Beijing, and assisting in the visa section of the embassy opened my eyes to the vagaries of citizenship and nationality laws. My brief stint in government service convinced me that I belonged in academe, and I accepted a Japanese government Monbusho scholarship to study Japanese history in Kanazawa in Japan, where I was finally able to improve my Japanese and consider different graduate programs.

It was in graduate school at Harvard University that I was finally able to combine my interests in a dissertation topic. The idea to draw a parallel between the Qing legal order and consular jurisdiction occurred to me in a conversation with Izumi Nakayama at the Harvard-Yenching Library early in 2001. My advisor, Philip Kuhn, encouraged me to write a seminar paper on the topic of extraterritoriality and publish it as an article in *Late Imperial China*. (Part of this article is republished in chapters 1 and 2 in this book with the kind permission of Johns Hopkins University Press.) While I was writing the seminar paper, my Manchu teacher, Mark C. Elliott, generously shared his yet unpublished manuscript with me, which helped me to develop my ideas on ethnic relations in the Qing. Dani Botsman also gave me important feedback on the Japanese aspects of my project.

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Introduction

> Owing to difference of Opinion between the Swedish Consul and myself as to certain Points of Law (Swedish); I now beg to inform the Public of Shanghai that I have withdrawn from the protection and jurisdiction of the SWEDISH CONSULATE, and placed myself voluntarily under the protection and Laws of the Land that we live in.

On 29 October 1877, Swedish businessman Nils Möller placed the above "Public Notice" on the pages of the *North China Daily News*. In the preceding days, Möller had been sued in the Swedish-Norwegian consulate for damage to a cargo of seaweed that had been shipped from Hakodate to the busy port of Shanghai. The ship in question was registered as British, but it was chartered by a Chinese merchant, and its captain was Danish. The buyer of the seaweed and the plaintiff in the case was a German, who claimed that Möller was the agent of the ship and thus liable for the damages to the cargo. The consul trying the case was Frank B. Forbes, an American businessman whom the Swedish foreign ministry had appointed consul general of Sweden and Norway and who thus held jurisdiction over Swedish and Norwegian subjects in the treaty port of Shanghai.

Möller did not accept that the Swedish-Norwegian consul general held jurisdiction over a case that centered on a British-registered ship. Consequently, he refused to appear as a sworn-in defendant in the consular court, but attended the hearings only in order to answer simple questions of a factual nature. When Forbes declared to the courtroom that he accepted jurisdiction over the case, Möller "demanded in language more forcible than polite that his name be erased from the register of Swedish subjects."[1] Having heard all witnesses to the case, Forbes dismissed the case on account of the fact that the damage to the cargo had been caused by inclement weather, but this failed to soothe the feelings of Möller, who published his declaration in *North China Daily News* the following

day. In so doing, he had effectively renounced his Swedish citizenship for the purposes of consular jurisdiction and submitted himself to the jurisdiction of the Mixed Court in Shanghai, which tried Chinese residents of the International Settlement as well as foreigners who were not represented by consuls.

To contemporary Western observers, it was ridiculous for a European to voluntarily submit himself to the laws and jurisdiction of the country he happened to live in—the Qing Empire. Möller persisted in refusing the protection of the consulate, and when he made news in the Shanghai press some fourteen years later, one anonymous commentator scorned him for "deliberately lowe[ring] himself to the legal status of a shroff or a coolie."[2] Möller, on the other hand, proudly regarded himself as a "citizen of Shanghai," took exception to the assertion that "all natives of this country" belonged to the class of "shroffs and coolies," and defended his decision to withdraw from the protections of the Swedish consul, as he "considered that neither a man's time nor money were safe under such jurisdiction."[3]

Möller's case speaks volumes about the distance foreign residents in Shanghai were expected to maintain between themselves and the Chinese population of the city, and the peer pressure that faced any foreigner who dared to break the mold by even distantly associating himself with the local legal system. The episode also betrays the acute sense of indeterminacy that surrounded one of the most maligned institutions of nineteenth-century East Asia, an institution that was supposed to give foreigners a privileged status: extraterritoriality.

In the decades preceding the Möller case, gunboats from a number of Western nations had forced Qing China and Tokugawa Japan to open new ports for trade with their merchants. The Qing Empire concluded its first two treaties with the British Empire in 1842–43, followed by the United States and France the next year. In the following two decades, the Qing Empire would conclude a slew of treaties with other nations and colonial empires, eager to avail themselves of the same privileges as the Great Powers. In the 1850s, American gunboats prompted Japan to enter into agreements that were similar to those that the Qing Empire had concluded, and only twenty years later, Japan pioneered the "opening" of Chosŏn Korea by imposing its own commercial treaty on the "Hermit Kingdom," followed by the Qing Empire, the United States, Britain, France, and a number of Western countries in subsequent years.[4] Anyone who wanted to understand the complexities of the new diplomatic order in East Asia had to understand law and had to engage in intricate legal texts, which were sometimes the product of the whim of a diplomat, sometimes the outcome of protracted negotiations and careful deliberations.

The commercial treaties opened a series of coastal ports for trade with Western merchants and laid down regulations for the conduct of trade. They allowed Western consular agents to reside in the new ports, where they could communicate

directly with local authorities, and established fixed rates for the tariffs that local authorities could levy on merchandise traded in the ports. Wherever a military conflict had occurred, the commercial treaties regulated the cessation of hostilities and payment of indemnities. Most important, the treaties established a legal régime for foreign sojourners and subjected them to the jurisdiction of their own consuls. This practice soon emerged as one of the most controversial aspects of the "treaty port system." Over time, the arrangement came to be known sometimes as extraterritoriality, sometimes as consular jurisdiction.[5] Most treaties were not symmetric, which meant that East Asian sojourners in Europe or North America could not expect to enjoy the same privileged status Westerners were granted in East Asia. As a result, these "unequal treaties" became a target of rising nationalist propaganda in the late nineteenth and early twentieth centuries.

The original treaty stipulations regarding jurisdiction over aliens were usually rather vague, merely establishing the basic principle that foreigners who committed crimes in the treaty ports, or were involved in criminal and civil suits, were to be tried by officials appointed by their home government. Western diplomats justified this concession on the grounds that East Asian penal and legal practices—such as torture and the practice of corporeal punishment—were not suited to Europeans.[6] Yet over time, consular jurisdiction developed into a practice that granted most foreigners nearly complete immunity from both local laws and jurisdiction. These privileges often went far beyond the legal immunities that diplomatic personnel typically enjoy under international law.

Although most treaties contained very similar clauses on foreign jurisdiction, extraterritoriality would follow very different trajectories in the different East Asian countries where it was practiced. In Japan, the conclusion of the treaties in the 1850s was followed by drastic régime change a decade later, often called the "Meiji restoration"; extraterritoriality, as well as the entire set of "unequal treaties," were abolished in less than fifty years and replaced by reciprocal arrangements that closely followed European standards.[7] In Korea, the extraterritorial privileges of Westerners, Japanese, and Chinese were soon overshadowed by the ascendance of direct Japanese imperialism after 1895, and the Siamese government was finally able to abolish consular jurisdiction in the 1920s.

In China, on the other hand, extraterritoriality endured for exactly one hundred years, and in the 1920s, China stood virtually alone in having a full-fledged extraterritorial legal order. When the treaty port system reached its apogee in the early twentieth century, there were no fewer than ninety-two treaty ports in China, in addition to several leased territories, extensive Christian missionary activities, economic and strategic spheres of influence, foreign-controlled railroads, and mines.[8] Practically any interaction between foreigners and native populations could be "extraterritorialized." The foreigner not only carried his

own laws and institutions into the host country, but the nebulous idea of "foreign interests" meant that almost anything a foreigner was involved with had an extraterritorial aspect.[9] Yet extraterritoriality was far from a coherent legal order that was simply implanted from the outside. In the most important treaty port, Shanghai, a large number of different consular courts coexisted, which often competed for jurisdiction and sometimes did not even cooperate with each other.[10] This allowed foreign and native vagrants to evade jurisdiction by claiming different nationalities according to circumstances.[11]

Far from being a *system*, in the sense of a planned and orderly arrangement, extraterritoriality is better regarded as a *practice*, which evolved and took shape in contact with a legally pluralistic environment. Further complicating the problem was the fact that most "unequal treaties" contained most-favored-nation clauses, which in theory meant that any treaty power could claim privileges conceded to any other nation. However, the extent to which extraterritorial privileges were covered by most-favored-nation clauses is a complicated question and depended on the actual wording of the article in the relevant treaty. In the British and American construct, extraterritorial privileges were not covered by the most-favored-nation arrangement, whereas in the French construct they were. Indeed the legal scholar Georges Soulié de Morant identified no fewer than five different constructs of the arrangement, which illustrates that the treaty port system was very far from being a monolith.[12]

By the 1920s, the entire corpus of commercial treaties with China had attained such an extraordinary degree of complexity that even accomplished international lawyers complained that it was difficult to say with certainty exactly what China's treaty obligations were, and scholars still argue over exactly how many unequal treaties China signed during the "Century of Humiliations."[13] The complexity of the treaty port system intruded on everyday life in a variety of ways. The quaint anomalies of the system ranked high among the things first time foreign visitors to the major treaty port of Shanghai had to acquaint themselves with. A guidebook from 1934, for example, pointed out that whereas eastbound traffic on Avenue Edward VII was subject to the traffic rules of the International Settlement, westbound traffic on the very same road were subject to the regulations of the French Concession.[14] Yet this extraordinary development was not originally spelled out in the treaties and could hardly have been foreseen by either of the contracting parties when the first commercial treaty was concluded in 1842.

Given the obviously "foreign" nature of extraterritoriality, it is easy to lose sight of the equally obvious fact that the history of extraterritoriality in East Asia can teach us just as much about the nature of colonial forms of law as it can about indigenous legal systems and the trajectories of state-building in the region. It was one thing to force or intimidate Asian officials into signing a treaty that

ceded jurisdiction over foreigners; it was quite another to devise a new legal order that would work for both native and foreign merchants once the gunboats had left the shores of East China Sea for more pressing imperial tasks elsewhere.[15] The British may have been able to enshrine the English versions of the treaties as the legally binding ones,[16] but in actual fact the treaties had to work in more than one language. In the mid-nineteenth century, very few officials in East Asia had even a rudimentary understanding of English or French, and a lot of correspondence between diplomats and officials had to be conducted in the local language, or through an intermediary language such as Dutch. Whereas the Japanese government trained officials who were able to negotiate with the foreign powers in English after the Meiji restoration in 1868, Qing officials insisted on using Chinese in their diplomatic correspondence for most of the nineteenth century.[17] As the Qing Empire and Meiji Japan concluded a treaty in 1871 that granted Chinese and Japanese extraterritorial privileges in each other's countries, this "linguistic hegemony" of the Chinese meant that classical Chinese had to convey the concepts of extraterritorial jurisdiction in correspondence between Chinese and Japanese officials. However, the Japanese had developed their own varieties of classical Chinese over the centuries and also used Chinese characters to assimilate Western legal concepts, so Japanese officials did not always understand the terms of traditional Chinese legal language. Qing officials were equally puzzled by the way their Japanese counterparts used Chinese characters. Getting a better grasp on how extraterritorial jurisdiction was understood by Chinese and Japanese requires attention to how their native legal orders operated, how they used language and terminology, and how this changed over time. Extraterritoriality was not only a product of the encounter between the "East" and the "West" but also the result of a complex and triangular relationship between China, Japan, and the Western powers.

Indeed, the "unequal treaties" were not concluded in a vacuum, but in polities that had their own legal orders with long histories of engagement with the outside world and with conflicts over jurisdiction. When the Manchus established the Qing Empire in the early seventeenth century, they not only inherited the edifice of the Chinese legal tradition from the Ming dynasty, they also brought their own indigenous legal tradition and the Mongol legal tradition. When the Manchu emperors expanded their empire west into Central Asia and established both direct and indirect rule in these regions, they encountered a number of different legal traditions with which they had to establish a new modus vivendi. As the Manchus confronted the expanding Romanov Empire in Siberia, they chose to define their relations in a number of formal treaties beginning in 1689, aided by Jesuit missionaries.[18] Japan's relative geographical isolation created a different trajectory. The Tokugawa state, the dominant polity on the Japanese archipelago from the seventeenth through the nineteenth centuries, had to

contend with a number of smaller territorial states, and the legal order was thus considerably fragmented. At the fringes of the Tokugawa order, local lords maintained their own forms of foreign relations with Chosŏn Korea, which carefully avoided any violation of contemporary standards of tributary protocol.[19]

The contentious question of extraterritoriality and foreign jurisdiction needs to be understood within this context of competing institutions and legal orders. Every new legal instrument had to be reconciled within the framework of the existing legal structures, and any attempt to challenge or renegotiate these treaties posed new challenges to the existing legal order. Scholars of premodern Asia and early modern Europe have pointed out that imperial and royal sovereigns usually claimed sovereignty over people rather than over territories, and the shift from sovereignty over people to exclusive sovereignty over territories is intimately connected to projects of state-building and the emergence of the centralized nation-state.[20] In order to fully understand how extraterritoriality operated within the native legal order, it is necessary to look beyond the modern concept of exclusive territorial sovereignty, not only because it is a product of the modern nation-state and thus ill suited to describe the legal realities of nineteenth-century East Asia but also because any narrative that is based on the idea of modern state sovereignty will privilege current nation-states at the expense of other historical state formations in the region.

One of the most fruitful ways of approaching the question of foreign jurisdiction and its relationship to state-building is by employing the concept of legal pluralism. This concept was first developed by legal scholars and judges who were studying the legal order in colonial settings, where European settlers established a dual legal system, one for the native population and one for Europeans.[21] In order to determine what constituted local law, anthropologists and other social scientists were sent to collect and identify local customs in order to set up "native courts" for native populations, a process that inevitably involved the invention of local legal traditions. One of the most prominent examples of these efforts is the compilation of customary law (*adat*) in the Dutch East Indies.[22] Following decolonization after World War II, the concept of legal pluralism widened. Instead of assuming that uniform territorial jurisdiction is the norm for all societies, anthropologists have claimed that almost any social order evinces some degree of legal pluralism.[23] The advantage of this approach is that it moves the focus away from the state as the supreme law-making and law-enforcing agency and toward different forms of law made in local communities. For instance, anthropologists studying Brazilian shantytowns have observed how the *favelados* have "created their own legality" in the absence of effectively administered justice by the state. Those researching the legal order in Papua New Guinea have found that village courts there "replicate state structures."[24]

Although anthropologists studying China have generally not used the term "legal pluralism" explicitly,[25] scholars have pointed out that nongovernmental institutions such as common descent groups did exercise important legal functions, and that local contractual practices created a legality that ran parallel to the formal state apparatus.[26]

While such a wide definition of legal pluralism may be a suitable framework for an anthropologist or sociologist, who collects research data through interviews and surveys, it can be unwieldy and difficult for the historian, who often must use primary sources that are generated through the state. In order to bring about some coherence to an increasingly confusing field of inquiry, some scholars have suggested that a distinction be made between legal pluralism in a "juristic" and a "social" sense.[27] According to anthropologist Sally Merry, a "legal system is pluralistic in the juristic sense when the sovereign commands different bodies of law for different groups of the population varying by ethnicity, religion, nationality, or geography, and when the parallel legal régimes are all dependent on the state legal system."[28]

The concept of "classical" legal pluralism in its juristic sense is a fruitful way to analyze how the legal orders of Qing China and Tokugawa Japan were renegotiated and reshaped by the introduction of extraterritoriality in the nineteenth century. This approach bridges national histories and brings the long nineteenth century back to the core of historical inquiry in East Asia. One corollary of legal pluralism is the inclination of the legal order to rule over persons rather than territories, often called "personal jurisdiction," which is the governing principle of all extraterritorial régimes.[29] Personal jurisdiction has prevailed in many premodern legal orders and often coexisted with forms of territorial jurisdiction. In premodern state formations, which did not claim or were unable to exercise exclusive territorial jurisdiction, personal jurisdiction was most problematic when the plaintiff and the defendant in a given lawsuit belonged to two different jurisdictions, so-called mixed cases. In such cases, the competent authorities had to negotiate rules to decide which agency or agencies should assume jurisdiction and what body of law should determine the outcome of the case. In order to prevent too many mixed cases from occurring, the authorities often implemented systems of residential segregation. By contrast, modern nation-states usually claim jurisdiction in all cases that occur with their territorial boundaries, especially in criminal matters, whereas the law applied can vary in civil and commercial cases. Indeed, the idea that the law follows the person remains an important element in the field of family law. The fact that national authorities in Europe claim jurisdiction in so-called honor killings within immigrant communities is another contemporary example of how the modern nation-state asserts legal sovereignty in cases where a premodern legal régime would not necessarily have insisted on criminal jurisdiction.[30]

While the invocation of unequal power relationships in the nineteenth century might explain why one party managed to force its will on another, it cannot adequately account for the conditions under which cooperation between two governments took place in such a complex legal order as extraterritoriality. Here the use or threat of force might explain *why* extraterritoriality was introduced in China, but not *how* it worked or why it endured for so long. As historian John King Fairbank pointed out in relation to the establishment of the international settlement in Shanghai:

> the British could force their way into the power structure of China's composite ruling class and in time play a part in the government of the empire. But they could do this only with Chinese help, only by making a mutual accommodation with the ruling establishment, and only so long as the Chinese populace was not mobilized against them by modern nationalist sentiment.[31]

It is far too simplistic to reduce the problem of extraterritoriality to a simple power relationship. Indeed, Qing policy-makers sometimes chose to go to war over ostensibly smaller issues, such as the residence of foreign diplomats in Beijing,[32] while they did not challenge extraterritorial institutions, even when there was little risk involved. For instance, when the Japanese government managed to convince British diplomats to prohibit Britons from running Japanese-language newspapers in Japan, the Qing government did not avail itself of the opportunity to do the same to the lively Chinese-language press in Shanghai, even though it was certainly aware of the Japanese precedent.[33]

One of the most puzzling aspects of the Chinese encounter with extraterritoriality is the fact that the topic seems not to have attracted the attention of Chinese writers until the late nineteenth century. The famous drug czar Lin Zexu confronted the British on the question of criminal jurisdiction in 1839–40, but after the defeat of the Qing Empire in the Opium War, there is very little evidence that a debate on foreign jurisdiction took place in China, either in official circles or among private scholars.[34] In a magisterial work on the momentous Treaty of Nanjing, historian Guo Weidong failed to find a single instance of resistance to extraterritoriality prior to 1868, the year when senior Manchu statesman Wenxiang suggested to the British diplomat Sir Rutherford Alcock that the Qing Empire might be willing to allow Britons to reside in the interior of China, if the British government gave up the privilege of extraterritoriality.[35] Even after that date, for most of the nineteenth century, there is little evidence that the Qing government ever made a concerted effort to abolish extraterritoriality.[36] The only evidence of resistance to the practice consists of scattered remarks by astute observers both outside and inside the government, such as the scholar

Wang Tao.[37] Confronted with the alleged Chinese failure to tackle extraterritoriality, most writers have concluded that Qing officials were ignorant of international law in general and extraterritoriality in particular.[38] This is seen as a reflection of the corrupt Qing dynasty and its inept Manchu officials, often symbolized by the affable nobleman Qiying, who negotiated most of the early treaties with the West. However, this simplistic portrayal is belied by the fact that Qing officials—both Manchu and Chinese—spelled out on several occasions the acceptable limits for foreign legal privilege, declarations that are not easily framed by modern concepts such as territorial sovereignty. For instance, while Qing policy-makers generally accepted that foreigners were under the jurisdiction of their own consuls, they consistently resisted any extension of such privileges to Chinese subjects. As early as 1844, the Manchu statesman Qiying agreed to persuade his government to rescind the ban on Christianity, on the condition that this should not be used as an excuse to extend extraterritorial privileges to Chinese.[39]

Needless to say, China's "failure" and Japan's "success" in abolishing extraterritoriality cannot be reduced to a single, monocausal explanation. Using the concept of legal pluralism, however, will shed new light on how and why extraterritoriality penetrated the Chinese legal order far more deeply than its Japanese counterpart. Foreign models certainly mattered in the evolution of extraterritoriality in East Asia, but established practices such as extraterritoritial privileges in the Ottoman capitulations or the piecemeal adoption of international law cannot fully account for the way the practices of extraterritoriality developed in East Asia. Nowhere is this clearer than in the case of Sino-Japanese relations. As the central chapters of this book demonstrate, extraterritoriality was a defining feature in the encounter between the Qing Empire and Meiji Japan. The single largest community that enjoyed extraterritorial privileges in Japan before 1895 was the Chinese one, which was much more influenced by its own native legal order than by Western precedents when it conceptualized extraterritorial privileges. This crucial period in Sino-Japanese relations from 1871—when the first Sino-Japanese treaty was concluded—to 1895 forces a rethinking not only of the nature of extraterritoriality but also of Sino-Japanese history in the latter half of the nineteenth century that has been completely overshadowed by the Japanese victory in the Sino-Japanese war in 1895.[40]

It is a central argument of this book that extraterritoriality and the treaty port system can only be properly understood within a larger framework of international history, which is why I have deliberately avoided some teleological assumptions of postcolonial discourse, which tend to privilege current nation-states at the expense of alternative narratives.[41] In the totality of the interactions between the Qing Empire and the Tokugawa state on one hand and their neighbors on the other, there is no reason why first Western, and later

Japanese, intervention in East Asia should be considered more "imperial" or "colonial" than the actions of other empires in the region. It is true that the treaty port century integrated China into what in retrospect looks like the "discursive hegemony" of national sovereignty and international law, but many of those concepts cut both ways. At the same time that the British Empire and other colonial powers set up extraterritorial enclaves in the Eastern seaboard of China, the imperial powers propped up the Qing Empire for most of the nineteenth century and recognized its claims on its territories in Central Asia right up to the fall of the dynasty. Furthermore, Qing statesmen were discussing and tentatively executing rather ambitious projects of internal colonization in the Western parts of the empire.

The chapters that follow will employ the concept of legal pluralism to explore the question of extraterritoriality in order to trace the trajectories of state-making and modern citizenship in China and Japan. Prior to the Opium Wars in the mid-nineteenth century, both Qing China and Tokugawa Japan were familiar with the principle of personal jurisdiction and the fact that some ethnic and social groups had separate legal existences prior to the Opium War. In the Qing legal order, the Manchu conquest elite enjoyed extensive legal privileges, which placed them outside the criminal jurisdiction of the local Chinese administration. Similarly, the Tokugawa shogunate was accustomed to devolving jurisdiction to local domains and different status groups. The fact that the Tokugawa order collapsed in 1867 whereas the Qing dynasty did not collapse until 1911 would have momentous consequences for the implementation of consular jurisdiction in the two countries. Chapters 2 and 3 chart the evolution of jurisdiction over foreigners in Qing China from the late nineteenth century through the Sino-British "Chefoo Convention" of 1876, which was the last British treaty to deal with extraterritoriality to any large extent before the turn of the century. Prior to the Opium War, the Qing Empire granted foreigners far more legal autonomy than the contemporary Ottoman Empire did under the "Capitulations," a series of treaties between the Sublime Porte and Western nations, which were concluded from the sixteenth through the early nineteenth centuries. Chapter 3 follows the institutionalization of consular jurisdiction after the Opium War, with a special focus on the Mixed Court and British Supreme Court in Shanghai, which were established in the 1860s in order to resolve criminal and civil cases between Britons, Chinese, and other nationalities. Comparing the Chinese version of treaty texts with other legal sources shows that Qing officials borrowed and adapted long-standing Sino-Manchu legal concepts and institutions when they accepted and cooperated in the establishment of these courts.

Chapter 4 explores the evolution of jurisdiction over foreigners in Japan from the promulgation of the "expulsion edict" in 1825 through the conclusion

of the Sino-Japanese Treaty of Tianjin in 1871, a neglected chapter in Sino-Japanese relations. I compare the extraterritorial arrangements in the "Ansei Treaties," which Japan concluded with Western powers in 1854–58, with the corresponding arrangements in the Sino-Japanese Treaty of Tianjin. The extraterritorial arrangements in the Treaty of Tianjin were informed by the Chinese experience of legal pluralism, which stood in sharp contrast to the lack of reciprocity in the Qing Empire's relations with the Western treaty powers. Since there were far more Chinese in Japan than there were Japanese in China prior to 1895, the Treaty of Tianjin had a much greater impact in Japan than in China. In effect, the treaty amounted to an extension of the Qing legal order into Japan, which chapter 5 demonstrates by analyzing a series of criminal cases in China and Japan, most of which were prosecuted under the Treaty of Tianjin. Qing statesmen were quite successful in exporting their understanding of consular jurisdiction into Japan; they were not particularly impressed with contemporary Japanese legal reforms, which were designed to convince the Western treaty powers to abolish consular jurisdiction in Japan. Japanese politicians gradually realized that failure to revise the treaty with China might threaten—or even jeopardize—Japan's efforts to revise the treaties with the West. Consequently, the Japanese resolved to circumvent their obligations to China under the Treaty of Tianjin, by skillful use of international law and Western criminal procedure.

Consular jurisdiction and extraterritoriality were abolished in Japan in the late nineteenth century and in China in the mid-twentieth. Following the Meiji restoration, the Japanese government quickly abolished all territorial domains and the "status system," and set out to create a uniform citizenry, a necessary prerequisite for any modern nation-state. Consular jurisdiction remained an alien body in the Meiji state, and Japanese policy-makers were determined to keep it that way in order to prevent it from affecting other institutions. In the 1890s, consular jurisdiction was finally abolished in Japan, after Japan had convinced the Western treaty powers that their legal system was sufficiently "modern." The Treaty of Tianjin was abrogated during the Sino-Japanese war of 1894–95 and replaced by the onerous Treaty of Shimonoseki, which granted unilateral extraterritorial privileges to Japanese in China. In Qing China, serious efforts to abolish Manchu privilege, creating a "modern" constitution and eliminating consular jurisdiction, did not start until after the Sino-Japanese war. When the Qing dynasty and its legally pluralistic order finally collapsed in 1911, extraterritorial jurisdiction had already sunk deep roots in Chinese society, and subsequent efforts to abolish consular jurisdiction through legal reform under the nationalist régime failed. Consular jurisdiction was not abolished until 1943, as part of the Allies' efforts to strengthen their alliance with China against Japan.[42]

Nils Möller would do well without the protection of the consul general of Sweden-Norway and created a fortune through his businesses in Shanghai. The fact that he had "denationalized" himself in 1877 did not prevent him from eventually returning to his native Sweden, where he passed away in 1902.[43] He left behind no fewer than ten children, some of whom would continue to live in Shanghai and leave a certain legacy to this day. Whereas the old Mixed Court, the chancellery of the Shanghai magistrate, and most consular courts have disappeared without a trace,[44] the residence of one of his sons, Eric Möller, survived the end of the treaty port era. After 1949, it served as an office building of the Communist Youth League, and with the advent of the reform era, it was opened as a luxury hotel for foreign visitors, who are once more taking up residence in the old treaty port to make business, albeit this time without any extraterritorial privileges.[45]

1

Excavating Extraterritoriality

The Legacies of Legal Pluralism, Subjecthood, and State-Building in China and Japan

Prior to the arrival of Western gunboats, Qing China and Tokugawa Japan possessed rich legal traditions that could be described as two discrete plural legal orders. Both countries had centuries of experience in handling conflicts between ethnic, professional, and social groups that belonged to different jurisdictions, experiences that had profound consequences for how the nineteenth century's commercial treaties were received by the local legal system. China and Japan were not the only countries in East and Southeast Asia that were forced to sign "unequal treaties" that included unilateral extraterritorial arrangements. In 1858, the kingdom of Siam entered into a commercial treaty with Britain,[1] and Japan concluded a treaty with Korea in 1876, soon followed by a number of countries, including the Qing Empire, which imposed similar unequal treaties on Korea.[2] However, China and Japan constitute comparative counterparts in a number of ways. Both countries share a common cultural heritage and were forced to "open" to the West at roughly the same time. In contrast to Korea, which was first forcibly "opened" by Japan in 1876 and then gradually succumbed to Japanese colonialism, neither Japan nor China ever became colonies in the strict sense of the word. Despite external constraints, the governments of both countries, with different degrees of success, possessed a certain degree of freedom to design their own—sharply divergent—policies on how to deal with the problem of extraterritoriality.

Subjecthood and Legal Pluralism in Qing China

The late imperial Chinese state has often been described as a "highly centralized" and "unitary state."[3] In the Qing dynasty, the territories of China proper were organized into twelve to thirteen hundred districts (*xian*) and one hundred