

STUDIES IN CHINESE DIPLOMATIC HISTORY

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THE COMMERCIAL PRESS, LIMITED
SHANGHAI, CHINA

1924

PREFACE

The present volume is, in substance, my thesis approved for the degree of Doctor of Philosophy in the University of Edinburgh in the spring of 1922. But it has since been revised and, where necessary, amplified. The book does not claim to be a history of Chinese diplomatic relations, nor is it, on the other hand, a random selection of problems arising out of China's intercourse with foreign nations. It is a book of "studies" so far as I have attempted to state the problems and examine them; and it discusses some of the salient factors in the relation of our country with the foreign powers—particularly with Great Britain. Moreover, it has special reference to the "Questions for Readjustment submitted by China to the Paris Peace Conference."

The Washington Conference did not secure for China all that she had asked for at Versailles, but it was, at any rate, the sign of a better attitude on the part of the powers towards her, and the concessions which China gained at Washington go far to prove the justice of the argument of this book.

It is hoped that this work may do something to help towards an understanding, by Chinese and foreigners alike, of the questions connected with China's treaty obligations, their origin and their meaning both in the letter and in the spirit; and if it succeeds in doing this, in however small a degree, it will not have been untimely and will have fulfilled its purpose.

In conclusion, I have to thank those who have helped me in bringing out this book. First and foremost, for his constant encouragement, I must mention Sir Ludovic J. Grant, BART., LL.D., of Edinburgh University, and it is a privilege to express my gratitude to him. Names of authorities and works for reference have usually been given; but, in addition to those I wish to acknowledge my indebtedness to Mr. H. Bunce, M.A., of Medhurst College; and Mr. J. Seng, M.A., of Nanyang University, who have most patiently gone through all the proofs and made many a suggestion; and finally to my wife, who typed almost every word of the manuscript when the work was first undertaken.

C. L. HSIA.

SEPTEMBER, 1924.

INTRODUCTION

From the standpoint of international law and diplomacy, the situation in China is complicated in the extreme. When we attempt to determine China's international status and her treaty obligations, we soon find ourselves on unfamiliar ground. This unfamiliarity is not caused so much by the fact that we are sailing in an uncharted sea as that we have to direct the course of an ill-constructed ship. To speak without metaphor, China's treaty relations are beset with anomalies and irregularities. She is on the one hand invested with all the rights and duties that properly belong to a sovereign state, while on the other hand, she is burdened with numerous obligations and commitments which are at once crushing in their nature and inconsistent with the rôle that has been assigned to her. The complexity of problems in China has been summed up by Dr. Willoughby in a single long sentence :

“When we have a power which permits the exercise within its limits of all kinds of extraterritorial rights or privileges ; when there exist within its territory spheres of interest, special interests, war zones, leased territories, treaty ports, concessions, settlements, and legation quarters ; when there are in force a multitude of special engagements to foreign powers with reference to commercial and industrial rights, railways and mines, loans and currency ; when two of its chief revenue services — the maritime customs and the salt tax — are under foreign overhead administrative control or direction when the proceeds of these and other revenues are definitely pledged to meet charges on foreign indebtedness ; when, at the various points within its borders, there are stationed considerable

bodies of foreign troops under foreign command—when we have these and other phenomena all carrying with them limitations upon the free exercise by the central government of its ordinary administrative powers or its discretionary rights to deal as it deems best with the individual nations with whom it maintains treaty relations, we then have a condition of affairs which furnishes abundant material not only for theoretical or academic discussions by students of international jurisprudence, but for serious conflicts and disputes between the nations concerned.”

It is probably due to this reason that not a few have been attracted to the study of China's treaty relations. But it is only by careful accumulation of facts that progress in the science of international law could be made.

International law is, to a large extent, inseparable from history and diplomacy. The statement that law without history is not justice, is one that possesses peculiar significance in connection with these studies. The writer, as might be expected, has, however, done no more than append a few short historical introductions wherever he thinks necessary. Diplomacy stands between the history and the law of nations; the study of either of these necessitates occasional excursions into the realm of diplomacy. International law, like other branches of law, cannot create facts, persons, or things, and is only competent to deal with what diplomacy has at will created. Such a procedure is imperative when we are called upon to deal, as we do here, with abnormal cases, obscure facts, and uncertain interpretations.

These studies, incomplete as they are, have brought out several significant facts.

“It is significant that almost all the treaties . . . belong to the class known to jurists as *iniquum foedus*, the imposed treaty; they are not spontaneous agreements freely entered

into by the parties ; some of them are rather of the nature of what Roman jurists termed *deditio*.”¹ Any right relations in the future seem to lie in the direction of a frank acknowledgment of this fact.

It is also fairly clear that the conditions contemplated in many of the treaties have materially altered, with the flight of decades ; there has been a vital change of circumstances. These obligations having become burdensome and unjust, now fetter the free growth and the natural development of the country, to the serious menace of even its self-preservation. In the circumstances, China is entitled to the protection of the doctrine of *rebus sic stantibus*. While these chapters were being written, the Conference at Washington attempted the solution of some of the questions here discussed. As a result of this Conference some of the anomalies have already been removed.

We may notice another fact : that a state's claim to rights of equality and independence rests upon something more than nationalism ; it depends ultimately upon its political, administrative, and economic conditions, or the life of a state is a mere fiction.

Another significant fact is the economic situation and its growing importance in international relations, and to these economic problems international jurists must now turn their attention. “The older treatises gave most attention to the state of war ; in the future the relations of peace will occupy three fourths of the space and attention. The law of war will sink to the relative unimportance which criminal procedure holds in municipal law system.” Peace relations are mainly of economic character.

¹ Sir John Macdonell, in Preface to Dr. Tyau's “Legal Obligations Arising Out of Treaty Relations Between China and Other States.”

The study of peaceful and growing commercial relations brings before us the vision of world-wide coöperation, which is at once desirable and beneficial. The closer relations and increased activities and coöperation among the nations will call for a greater development of the law that governs them. While this great science is taking on new forms in response to the new situations in the world, it should be remembered that justice must be its peculiar concern. Let this inspire and guide every instinctive work of active men "building wider and wider spheres of affiliation."

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STUDIES IN CHINESE DIPLOMATIC HISTORY

CHAPTER I

CONSULAR JURISDICTION—EX TERRITORIALITY

ORIGIN OF EX TERRITORIALITY IN CHINA

The origin of British extritorial jurisdiction in China may be said to lie in the fact that British traders were never willing to submit to the operation of local laws and have from the beginning pursued a course of sheer contumacy. This in time led to the official attempt on the part of the British government to set up machinery to exercise jurisdiction over their subjects. The resistance of Chinese officials to this "questionable procedure" contributed largely to the cause of the Opium War, at the end of which Great Britain succeeded in wringing from China an official recognition of a system that had already been brought into being and engrafted on her, without her consent or countenance, in the Treaty of Nanking.

A want of regard for the Chinese laws characterized the foreigners who went to China in the seventeenth and eighteenth centuries. They were either adventurers or desperate characters, and, with the exception of a few missionaries, they were all animated by the sole desire to seek their fortune in a new land. It mattered little what the territorial laws required and what they prohibited; they came on a mission to replenish their purses and were prepared to leave as soon as their object was accomplished; in their opinion, it would have been disloyal to themselves to allow their conduct to be shackled by laws

about which they knew nothing and cared less. In the circumstances, it is not surprising that they considered themselves as exempt from all laws, and that they lived in China "very much in what the lawyers called a state of nature, that is, governed by no rule but their own passions or interests."¹ And violence naturally became the favorite means of attaining their ends, however illegitimate they may have been. Thus, in 1831, for instance, several European opium smugglers shot a number of innocent Chinese in order to clear their way of obstructions to the prosecution of their illicit trade. In 1833, another party of foreign traders organized an armed attack on a Chinese village for the same reason. The case of a licensed merchant, James Inns, which occurred about the same time, is of equal interest and significance, as illustrating the attitude of the alien traders of the time.² The conduct of the Western people in Canton could easily be imagined from the candid declaration of one of the witnesses examined in May, 1840, presumably about the opium traffic. "We never paid any attention," he said, "to any law in China that I recollect."³

This attitude of defiance towards Chinese laws was necessarily aggravated by the difficulty of enforcing them on foreigners caused by the transient character of the trade in which they were engaged, and by the inability of the Chinese officers to understand their language and to distinguish their identities one from another.⁴ The disrespect towards the territorial laws was, in the case of the British at Canton, much provoked by the characteristic Anglo-Saxon pride and faith in the superiority of their own institutions, so that they

¹ Davis, "China and Chinese," vol. 1, p. 100.

² See Auber, "China," pp. 364-366.

³ Davis, "China and Chinese," vol. 1, p. 126.

⁴ See Staunton, "Notices of China," p. 419.

could not see how any of their countrymen could have committed a crime in China, and if perchance one of them was found guilty, they could still see no reason why he should sacrifice his life or freedom to vindicate the laws of a barbarous nation, alike to the humiliation of his compatriots and to the disgrace of his own civilized land.

The British merchants in China, with the wealth and organized power of the East India Company at the back of them, were able to oppose the Chinese authorities with a considerable degree of success, and also to give reasons for their action. The principal grounds assigned by the foreigners at Canton generally and the British in particular for opposing the course of Chinese law were these: that the provisions of Chinese law were unjust, because of the indiscrimination between intentional and unintentional killing; that the Chinese courts did not often discriminate, with respect to Europeans at any rate, between accidental and willful homicide; that the Chinese laws as they stood then were too harsh and severe in punishments, especially for offenses against the person; that the doctrine of extensive responsibility upheld by Chinese law in criminal matters is objectionable; that there was much maladministration of justice in the Chinese courts. Dr. V. K. Wellington Koo has refuted all these allegations and shown that these complaints were more imaginary than real, and, for the most part, were generally mistaken or exaggerated. It seems clear that these vague allegations were mainly due to suspicion born of a want of familiarity on the part of foreigners generally with the process of administering justice in China, and of their well-known and characteristic contempt of Chinese law, rather than due to justifiable causes. Moreover, many of the cases given in various official records, particularly of accidental homicide, seem to have shown that, as a rule, justice was done to foreigners.

But however invalid or insufficient the grounds may have been, the fact of their resistance to authority remains. As a consequence of their chosen policy of nonsubmission to the Chinese criminal jurisdiction, the condition of British merchants was always more or less precarious, and their trade was frequently subjected to interruption during the first part of the nineteenth century. Feelings of embarrassment and anxiety were thus expressed :

“The peculiar circumstances under which foreigners are received in China are, in fact, such that the body or nation suffers from individual offenses, almost equally, whether those offenses are subject to punishment, or permitted to escape with impunity. The latter event naturally tends to render foreigners objects of hatred and aversion, while the former invariably entails upon them humiliation and disgrace.”¹

It was this apprehension and anxiety along with the approaching expiration of the charter of the East India Company that prompted the introduction into the British House of Commons of the discussion on foreign jurisdiction.

Prior to 1833, the East India Company, while retaining the monopoly of the British trade with China, by virtue of its power and influence, was always able, on the one hand, to oppose the acts of the local government “with considerable success,” and on the other hand, by virtue of its right to control their trade, to restrain the British traders from too frequent recourse to open violence. But when, in 1833, the Company’s charter was about to expire, Sir George Staunton, then a member of Parliament and a veteran advocate of the Company’s monopolistic interests, seeing the hazard of throwing open the China trade to all British subjects, made such suggestions as his experience in China had dictated. The

¹ Staunton, “Notices of China,” p. 153.

suggestions were embodied in a set of nine resolutions.¹ The last resolution deals solely with the question of criminal jurisdiction over British subjects in China. It runs thus:

“That, lastly, the state of the trade under the operation of the Chinese laws in respect to homicides committed by foreigners in that country, calls for the early interposition of the legislature, those laws being practically so unjust and intolerable that they have in no instance for the last forty-nine years been submitted to by British subjects, great loss and injury to the commercial interests accruing from the suspension of trade in consequence of such resistance, the guilty as well as the innocent escaping with impunity; and that it is therefore expedient to put an end to this anomalous state of law, by the creation of a British naval tribunal on the spot, with competent authority for the trial and punishment of such offenses.”

Here lies the first seed which in time grew into this present complicated system of consular jurisdiction in China.

In suggesting such a novel device as the creation of a British tribunal in China, Sir George Staunton was probably prompted by a feeling of anxiety about the situation at Canton and no less the desire to find a solution. If such was the intention, then it was a regrettable incident, for “the establishment of a British court in China was destined rather to increase than to diminish the hazard to the British trade. Bearing in mind the consequences which it brought forth, it seems clear that the institution of a British court in China, as suggested by Sir George Staunton, meant only the perpetuation of the defiance to the Chinese jurisdiction and, as such, it was far from being an expedient measure to relieve the British trade of its constant interruptions, which were as a rule deliberately invited by the Select Committee’s persistent obstruction of the

¹ Cf. 18 Hansard’s “Parliamentary Debates,” 1833, p. 698; Staunton, “Notices of China,” pp. 44-50.

course of Chinese law and justice. And, further, the system was never meant to set up a permanent state of things for the regulation of intercourse between nations, and this being so it remains a very artificial device and, after three quarters of a century of working, in our day a most perplexing question. Perhaps the wisest step for the purpose in view would have been to do what other nations represented at Canton, such as France and the United States, had done, namely, to leave the British subjects committing crimes in China to be punished and protected by Chinese law and courts. It might in the end have worked out harmoniously. After all, as it has been shown and indorsed by Sir George Staunton, there was nothing fundamentally wrong in the Chinese law. To say the least, the measure was not necessary, inasmuch as cases of homicide involving British subjects rarely occurred, the total number of such cases that arose in the century preceding the year 1833, not being more than half a dozen."

Sir George Staunton's resolutions, however, were rejected at the time but eventually passed the Parliament on July 28, 1833, in a modified form and become "An Act to Regulate the Trade to China and India," which sought to provide machinery for the government of British subjects in China.

RESPONSIBILITY FOR THE OPIUM WAR

It may be interesting to note that this act was largely responsible for the first war between China and Great Britain, the Opium War. The act, by its provision in Section 5, intrusted the supervision of the British trade, hitherto controlled by the Company, to a body of three superintendents, who were to reside in China. Section 6 authorized the establishment of a British court in China.¹ Here, in Section 5,

¹ Cf. 20 "British Foreign State Papers," 1832-1833, p. 256.

was sown the seed of the war which led to China's defeat, and, as a result, China was forced to accept the extraterritorial demand; and Section 6 contained the essence of the British consular jurisdiction in China.

For, in pursuance of the act, several orders in council were issued on December 9, 1833. Thereupon three "superintendents of trade of British subjects in China" were appointed with Lord Napier as the chief. But unfortunately, as there was no previous consent to these innovations having been obtained from the emperor of China, Lord Napier's assertion of equality and his demand for an official interview, presumably for the purpose of putting the act into operation, were rejected by the viceroy. This was the beginning of formal and official strain between the two nations. It may be pointed out that the viceroy's attitude was quite justifiable, inasmuch as Lord Napier, as Sir George Staunton remarked, "had no official station or public privilege in China whatsoever."¹

But Lord Napier decided to use force to compel a recognition by the viceroy of his official position. In his dispatch of August 14, 1844, to Viscount Palmerston, he recommended the following measures to his government:

"Looking now at the utter imbecility of the government and the favorable disposition of the people, I cannot for a moment suppose that, in treating with such a nation, His Majesty's government will be ruled by the ordinary forms prescribed among people. . . . Our object should be to get a settlement on the same terms that every Chinaman, pagan, Turk, or Christian, sits down in England. This, no doubt, would be a very staggering position in the face of a Red Chop, but say to the emperor, 'Adopt this or abide the consequences' and it is done. Now abiding consequences immediately

¹ Staunton, "Notices of China," p. 16.

presupposes or anticipates all the horrors of a bloody war against a defenseless people. The Monopolists would cry out, 'But I anticipate not the loss of a single man and we have justice on our side.' Such an undertaking would be worthy of the greatness and the power of England, as well from its disinterestedness towards other nations as from the brilliant consequences which must naturally ensue!"

To these spirited suggestions the Duke of Wellington tersely and not unnaturally replied in February, 1835:

"It is not by force and violence that His Majesty intends to establish a commercial intercourse between his subjects and China; but by the other conciliatory measures so strongly inculcated in all the instructions which you have received."¹

But before this reminder reached him, the trade had already been stopped in August and Lord Napier had put his militant notion into practice. The guerilla war was already in progress. As it may be inferred from what has been said, Lord Napier did not have an opportunity to put into operation the British criminal court in China, and two succeeding superintendents hesitated to exercise a too vigorous control over their countrymen, who were accustomed to untrammelled ways of living. On January 25, 1834, Viscount Palmerston sent also the following instructions to the chief superintendent:

"With respect to questions of law, the Order in Council appears to give you ample instructions, but I have to apprise Your Lordship, that although it has been deemed advisable at once to constitute a court of justice, yet it is His Majesty's pleasure that you should not, unless in case of absolute necessity, commence any proceedings under such Order in Council until you have taken the whole subject into your most serious consideration. And you will, in the meanwhile, fully report to me, for the information of His Majesty's government

¹ 22 "British and Foreign State Papers," 1833-1834, p. 1263.