

# SHANGHAI:

## Its Mixed Court and Council

MATERIAL RELATING TO THE HISTORY OF THE SHANGHAI MUNICIPAL  
COUNCIL AND THE HISTORY, PRACTICE AND STATISTICS  
OF THE INTERNATIONAL MIXED COURT.

CHINESE MODERN LAW AND SHANGHAI  
MUNICIPAL LAND REGULATIONS AND  
BYE-LAWS GOVERNING THE LIFE IN  
THE SETTLEMENT.

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## PREFACE

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Every slightest improvement in the domestic situation of China, every success, even of a doubtful nature, in her foreign policy, will revive the question of the present status of the International Mixed Court in relation to its surrender to the Chinese Government, and the solution of this problem, in some way or other, will, undoubtedly, deeply affect the welfare of the Foreign and Native Communities residing in the International Settlement of Shanghai.

The present status of the International Mixed Court forms an integral part of the extraterritorial jurisdiction of the Treaty Powers. It is a natural, and, maybe, inevitable result of the development of this principle, and therefore every change in the present *status quo* of the Mixed Court tending towards its exclusion from the direct control of the Treaty Powers will mean the diminution of the privileges, acquired partly by specific stipulation of the Treaties concerned, partly by the law of historical necessity.

And yet the International Mixed Court in its present position is not entirely based on the provisions of the Treaties obtained by the Powers as a result of successful wars against China. The vagueness of the clauses granting to a part of Europe, America and Japan the privilege of extraterritorial jurisdiction hardly can be called the foundation of the existing legal status of the International Mixed Court, which extends jurisdiction under foreign control not only to cases of a "mixed," Chinese and Foreign, nature, but also to cases in which no foreign interests are involved, in which the litigants are Chinese, and the Defendant is one of the million or more Chinese living in the International Settlement. The origin of this status should be sought elsewhere, and the scrutiny will lead us to the conclusion that the present status of the Court is the result of the growth of the International Settlement of Shanghai and its economical and political powers, and of a constant striving on the part of those responsible for the welfare of the Settlement to create an independent Court, uninfluenced by the ever-changing internal situation in China.

As a matter of fact, analysing the development of the Mixed Court up to its present position, one realizes that its progress is closely bound up with the evolution of the foreign Settlement in Shanghai, which led to the inauguration of an independent judicial institution in the territory of the Concession. The first indefinite provisions of the Treaties of August 29th, 1842, July 3rd and October 24th, 1844, and the supplementary Treaty of October 8th, 1848, concerning the permission for foreigners "to reside for the purpose of carrying on their mercantile pursuits without molestation and restraint at the cities and towns . . . of Shanghai," and providing that the "ground and houses of the foreigners shall be set apart by the local officers in communication with the Consul," resulted in the little less vague provisions of the Land Regulations, governing the Foreign Settlement of Shanghai North of the Yang

King Pang. This, nevertheless, gave birth to one of the most progressive Municipalities in the world, which has succeeded in reconciling the conflicting cultures of Europe and China and in creating astoundingly favourable conditions for the peaceful cohabitation of such an antipodean population as the European and Chinese.

The same political, commercial and psychological factors which prevailed in the above process formed also the foundation of the evolution of the Mixed Court, which in the course of its short history attained the same results and reconciled the modern conception of European jurisprudence with the Chinese principle of the unlimited preponderance of material interests over personal liberty.

This was not an artificial process by means of which the foreigners, taking advantage of China's temporary political weakness, forcibly imposed upon the native population their law, or introduced in a country of a refined original culture strange judicial institutions, highly detrimental to its sovereign rights. It was an inevitable historical deed, which alone was able to secure the progress of the political and commercial relations between China and the outer world.

The privilege of a Municipal Council conferred by the terms of the Charter.—“*It being expedient and necessary for the better order and good government of the Settlement*” to make some provisions “*for the appointment of an Executive Committee or Council, and for the construction of public works, and keeping the same in repair, and for cleaning, lighting, watering and draining the Settlement generally, the establishing of a watch or Police therein*,”—in the absence of any obligation on the part of the Chinese Government, as to safety and good order in the Foreign Concessions, substantiated by a complete indifference to the fate and welfare of the foreigners and Chinese residents during seventy years, appears to impart an obligation on the part of the foreigners. This, as is true of every obligation, should be followed by certain rights in favour of the binding party. These rights, in respect to the foreigners, have taken the form of the right of the Municipal Council in the International Settlement to issue ordinances and to enforce them against Chinese and unregistered foreigners through a Court situated in the Settlement, the functions of which necessarily are co-ordinated with the general policy of the Council in defending the unhindered growth of the Concession.

The present status of the International Mixed Court is the logical outcome of this complicated situation, and the control over its functions, performed since 1911 by the Shanghai Consular Corps, is an effort to reach a full co-ordination between the Court's practice and the Municipal policy for the protection of the mutually-entangled interests of the heterogeneous population of the Settlement. This position has, to some extent, the indirect sanction of the Chinese Government, and is consolidated by a number of precedents which, in course of time, have acquired the force of custom, the sole basis of all Oriental Law. This principle, though much disputed now by contemporary Chinese writers, gives the Mixed Court authority to continue the work and to complete a kind

of unwritten law unparalleled in the history of the legislation of any other country or nation.

European jurists, with the noted criminologist, Prof. F. Liszt, at their head, maintain the view that the existing Mixed Courts are transitory judicial institutions doomed, logically, to disappear, but this view can hardly be attributed to the International Mixed Court at Shanghai. An analysis of the materials relating to the history and functions of this court, let the latter even be far from perfection, leads to quite a different conclusion, particularly taking into consideration some details of the evolution of Extraterritoriality in China, which still should be taken as being in progress.

We agree with the Chinese contention that the claim to extraterritoriality on the part of the Westerners prior to the XIXth century was more due to the desire of the latter to avoid every jurisdiction than to any other reason, but this cannot be attributed to the foreigners in China in the period closely preceding the conclusion of the Treaties of 1842 and 1844.

The influence of the French revolution and the Declaration of Independence of North America in the sphere of law and humanitarian science soon affected the legislation of the European nations, who hastily began to reconstruct their legal systems so as to be able to meet the growing requirements of the new state of affairs, created not only by political events, but also by revolution in the system of production.

These new legal systems, which alone were able to ensure the enormous economical progress of the Occident, were absolutely strange to the Chinese law, and if the Sino-European and Sino-American wars before the conclusion of the first Treaties were caused by egoistic motives on the part of Europe and America, the clauses of the conventions relating to the extraterritorial rights of foreigners were the natural consequences of the new principles of jurisprudence adopted by them at the beginning of the XIXth century.

Backed by political might, which the Powers of Western culture possessed as a result of economical and social stability, Europe and America tried to establish in China the same conditions for their trade as prevailed in their countries. It is not wilful contempt that the foreigners have insisted on every convenience for extending and defining their privileges, but it is an immutable law of logic which has forced the Chinese nation to give up a part of its sovereign right in favour of more progressive ideas.

It was obvious that, in order to compete successfully with Western traders, the Chinese business men had to adopt new methods of production, but the development of the latter was a thing almost inconceivable under the operation of the old legal system. This soon was realized by even the most conservative Chinese merchants, who openly declared that the foreign concerns were placed in more favourable conditions owing to the existence of a specific commercial legislation protecting them, whereas the Chinese firms were hampered in their progress by an anachronic judicial system.

The Imperial Government was compelled to give in, and to display a certain readiness to introduce modern laws in order to silence the loud demands of the powerful commercial bodies. It abolished, in 1905, corporal punishment and instituted a Com-

mittee for the drafting of criminal, civil, commercial and procedural codes, but the outbreak of the Chinese Revolution put an end to these belated efforts of the Manchu dynasty and even interrupted for the time all exercise of justice in the country.

The confusion which reigned in such large places of international trade as Shanghai was beyond any description. It was quite natural that the Consular authorities of the Powers, in whom, by virtue of the Treaties, there had been vested the obligation of maintaining order and good government within the boundaries of the Foreign Settlement of Shanghai, should have assumed supreme control over the judicial institutions situated within the territory of the Settlement, thus placing these institutions under the direct influence of Western principles.

The mere fact of the presence of foreign Assessors on the bench, and foreign lawyers at the bar, and Europeans amongst the members of the staff of an old Chinese Court, and their psychology of modern European jurists, without any further action on their part intervening in the administration of the Chinese law, transformed this Court to a unique institution, which succeeded, as stated, in reconciling the conflicting principles of the European and Chinese psychologies and establishing workable machinery for the administration of justice.

The Great War brought along with it a new era in the mutual relations between Europe, America, Japan and China, the latter, at the instance of the Allies, taking part in the general struggle. The Central Powers were crushed, but the results of the strain during the war in Europe were almost catastrophic, having provoked an enormous social movement which weakened the political potency of the Treaty Powers.

Meanwhile, China, though still weak politically, preserved her social stability and soundness, which at the time of the conclusion of the peace caused a comprehensible rise of her national feeling. It enabled her to put forward at the Conference the well-known Memorandum, which fully set out her aspirations in respect to extraterritoriality in general and the position of the International Mixed Court in particular.

It is not our present task to deal with the arguments set forth in that Memorandum, persuading the Treaty Powers to renounce their privileges, nor to criticize China's achievements in remodelling her judicial system, nor to dispute the ability of the new Chinese law to govern the cosmopolitan population of one of the greatest ports in the world. But it is clear that China, in her aspiration to recover at any cost jurisdiction over the territories of the Foreign Concessions, overlooks the results of the historic process which gave birth to many issues of great value, just as people in Europe and America overlook the imminence of the abrogation of extraterritoriality as a consequence of the economical and social weakness now prevailing in Europe and Japan.

The number of nations enjoying Treaty privileges is gradually decreasing. As a rule, China, in concluding all her agreements after the Versailles Treaty, invariably refused to embody the right for the foreign contracting parties to be exempted from local jurisdiction. The principle *lex loci rei* is laid down as an essential

condition in all her contemporary legislation, even if the latter openly violates the Treaty rights of the Powers. The discontented may make all sorts of diplomatic representations and send their men-of-war to all Chinese ports, demonstrating their naval strength, but it seems that China, realizing the social weakness of the Powers, cannot be shaken in her firm belief that beyond these steps the foreigners are unable to undertake anything.

The policy on the part of China of curtailing gradually the privileges of the foreigners enlarges at the same time the extent of the competence of the International Mixed Court, which as a Chinese institution automatically assumes jurisdiction over a number of new cases of a purely Western nature. These cases scarcely can be dealt with, in the absence of a complete modern code, according to Chinese Law, or be placed under the operation of such an indefinite principle as that recently formulated by the Supreme Court of China: "*Civil cases are to be decided in the absence of express provisions, according to customs; and, in the absence of customs, then according to legal principles.*"

The task before the International Mixed Court during the last seven years has been of extreme importance and gravity, and has been successfully accomplished owing to the very same peculiarity of constitution and methods of working which have shown the ability of the Court to solve the complicated problems of the present critical moment.

The object of this work is to present from an unbiassed point of view the functions and the achievements of the Shanghai Municipal Council and the International Mixed Court in the way of fostering the welfare of the foreign and native communities by defending their legal rights and improving the native administration of justice in the Settlement.

It is also hoped that the publication of documents and material relating to the history, practice and statistics of these two institutions in many respects will illuminate the entangled issue of the International Mixed Court and form at the same time a Handbook for legal practitioners and businessmen. For this particular purpose the book is expressly supplemented with the Laws and Regulations of the Republic of China and Shanghai Municipal Bye-Laws and Regulations.

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