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978-0-521-76591-6 - Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China

Turan Kayaoglu

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Introduction

Extraterritoriality in British Legal Imperialism

Great powers have commonly used law as an imperial tool. During the late nineteenth and early twentieth centuries, Western powers imposed a system known as extraterritoriality in Japan, the Ottoman Empire, and China. Western extraterritorial courts – not local courts – had jurisdiction over Westerners in Japan (1856–1899), the Ottoman Empire/Turkey (1825–1923), and China (1842–1943). During the mid-1880s, for example, forty-four Western extraterritorial courts operated in Japan's treaty ports. In 1895, thirty-two British courts operated in the Ottoman Empire. Three decades later (circa 1926), twenty-six British, eighteen American, and eighteen French courts dotted China's ports and cities. Even though Japan, the Ottoman Empire/Turkey, and China were not formal colonies of the West, Western states used extraterritorial courts to extend their authority, making these countries, in Mao's term, semicolonies. In so doing, these states limited, and eventually eliminated in collaboration with groups in the local elite, the authority of indigenous legal systems. They replaced them with Western legal categories and practices. This book examines the emergence, function, and abolition of this system of extraterritoriality and offers a new perspective on the development of sovereignty in the nineteenth century. This historical perspective integrates Western colonial expansion and jurisprudence with non-Western political development and legal institutionalization.

Extraterritorial courts had jurisdiction over cases involving Western foreigners. Some cases became notorious examples of Western imperial

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injustices from the perspective of local people. For example, on October 24, 1886, a storm caught the British freighter *Normanton* off the coast of Oshima Island, Japan, whereupon the freighter hit a rock and sank. All of the Japanese passengers drowned, but the British officers and crew took the two lifeboats and survived. In the subsequent legal action, the British extraterritorial court, Her Britannic Majesty's Court at Hyogo, Japan acquitted the crew of any misconduct even though similar cases involving European passengers frequently resulted in convictions for murder or manslaughter.¹

Two decades later, while passing through a village in China's Yunan Province, Henry Demenil, a U.S. citizen, killed a Tibetan Buddhist lama. District Attorney Arthur Bassett of the U.S. District Court for China brought the case to the court in Shanghai in December 1907 (*US v. Demenil*). Drawing on Demenil's diary, which described the incident as unintentional, the judge acquitted Demenil and concluded that the killing was due to the defendant's "nervous condition" and physical debilitation, brought on by "the rarefied mountain air of the locality, the loneliness of the place, and wilderness of surroundings."²

Extraterritorial courts were the organs of Western legal expansion in non-Western countries. As opposed to territoriality, where a state claims exclusive jurisdiction over all the people within its territorial boundaries regardless of their nationality, extraterritoriality refers to a legal regime whereby a state claims exclusive jurisdiction over its citizens in another state. In world politics, a state uses territorial jurisdiction within its boundaries, and extraterritorial jurisdiction within the boundaries of another state. Extraterritorial institutions like Her Britannic Majesty's Court in Hyogo and the U.S. District Court for China in Shanghai embodied the semicolonial status of these non-Western states.

Using their court systems, even small Western countries could evade non-Western jurisdiction over their citizens. On July 21, 1905, a bomb targeting the Sultan of the Ottoman Empire killed twenty-six people but missed the Sultan. Among the people arrested for the explosion was Charles Edouard Joris, a Belgian citizen who confessed that he had prepared and placed the bomb. Arguing that only Belgian consular courts

¹ Chang (1984: 81–98).

² Scully (2001: 129–130).

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could try Belgians in the Ottoman Empire, the Belgian government demanded that the Ottoman government surrender Joris. The Ottoman government initially refused, and tried and sentenced Joris to death. The Belgian government, however, rejected the Ottoman court's judgment as a violation of Belgian extraterritoriality. In a dramatic reversal, the Ottoman government subsequently yielded and released Joris.³ In this case, the Belgian claim rested on extraterritorial rights embedded in the larger system of Western extraterritoriality in the Ottoman Empire. These rights enabled Belgium and fourteen other Western states to claim jurisdiction over their citizens in the Ottoman Empire.

Naturally, given such polarizing circumstances, increasing non-Western nationalism, and burgeoning press in these countries, extraterritoriality incited much resentment in non-Western states. Eventually, Japan, the Ottoman Empire, China, Iran, and Thailand gained jurisdiction over Western foreigners after a period of long and agonizing negotiations with Western states. Among these states, this book focuses on Japan, the Ottoman Empire, and China. Extraterritoriality negotiations offer rich observations to study how nineteenth-century positive law and Western colonial expansion constructed not only empires, but also the sovereign state system itself.

EXTRATERRITORIALITY IN THE NINETEENTH CENTURY

This book addresses three main questions: First, what does extraterritoriality reveal about the origins and nature of sovereignty? Second, why did Western states, in particular Great Britain, abolish extraterritoriality? Third, how do specific hegemonic powers and their legal regimes shape the way these powers extend their legal system into other countries?

Extraterritoriality and Nineteenth-Century Sovereignty

In addressing the first question, I propose that the story of the rise and decline of extraterritoriality is also a story about the origins and

³ For the Joris case, see the reports the *London Times* published in 1906 and 1907. *American Journal of International Law* (1907: 485) published an editorial comment on the case. Murat Bardakçı (1999) provides details of the case.

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nature of sovereignty. As I elaborate in the first two chapters, two nineteenth-century developments produced the modern conceptualization of sovereignty: the dominance of legal positivism and European colonial expansion. Mostly associated with the legal philosophy of English philosophers Jeremy Bentham and John Austin, legal positivism assumed a narrow definition of law: state (sovereign) legislated commands backed by state coercion. This approach to law had significant influence in shaping nineteenth-century legal episteme, or the collective understandings and discourses of law determining the scope, application, and underlying values of law. The nineteenth-century understanding of sovereignty and international law grew out of positivist legal episteme.

European colonial expansion was also important for the development of nineteenth-century sovereignty. In the process of this expansion, legal positivism became an imperial legal episteme in influencing initially British and later Western imperial ideas and policies. Western imperial, particularly British, encounters with Asian societies further developed and consolidated the norms and practices of sovereignty that first appeared in legal positivist understandings and discourses. Jurists and legal scholars as policymakers and advisers were integral to the development of agenda of imperial encounter. In these encounters, the practices of the British state and the ideas of British jurists clarified, crystallized, and consolidated the concept of sovereignty doctrine in part to exclude Asian entities from it. The rise and decline of British extraterritoriality illustrates how construction of positive law and nineteenth-century sovereignty severely limited the authority claims of non-Western states within their territorial domains.

The British extraterritorial empire was the most organized, extensive, and durable (Table 1). British courts operated in Japan (six around the mid-1880s), the Ottoman Empire (sixty-six in 1900), and China (twenty-six in 1926).⁴ In the early years, the courts had simple procedures, and British citizens in these countries were denied many of the legal rights British citizens enjoyed at domestic British courts. It was usually one man, the consul, who belonged to the executive branch rather than the judiciary, who rendered the decision. Throughout

⁴ I discuss the numbers of extraterritorial courts in China and Japan later. For the Ottoman Empire, see Kocabaşoğlu (2004: 158–159).

TABLE 1. *Rise and Decline of British Extraterritoriality*^a

Country	Establishment	Abolition	Method of the Abolition ^b
Algeria	1825	1830	Occupation (France)
Tunisia	1825	1881	Occupation (France)
Zanzibar	1886	1890	Protectorate (Britain)
Tonga	1879	1890	Protectorate (Britain)
Madagascar	1865	1896	Occupation (France)
Samoa	1879	1899	Occupation (Germany/United States)
Japan	1856	1899	Negotiations
Congo	1884	1908	Occupation (Belgium)
Korea	1883	1910	Occupation (Japan)
Morocco	1825	1912	Protectorate (France)
Tripoli	1825	1912	Protectorate (Italy)
Egypt	1825	1914	Protectorate (Britain)
Turkey	1825	1923	Negotiations
Iran	1825	1928	Negotiations
Thailand	1855	1937	Negotiations
China	1833	1943	Negotiations

^a In places where Levant Company operated (Algeria, Tunisia, Morocco, Turkey, Iran, Egypt) I use the abolition of the company and the transfer of its legal authority to the British government as the emergence date. For China, I use the Charter Act of 1833 in which the British government took over the East India Company's judicial authorities in China as indicative of the emergence of extraterritoriality in China. All other pre-1925 dates are from Liu 1925.

^b When a Western imperial power established de jure jurisdiction such as occupation and protectorate over a non-Western state where extraterritoriality existed, other extraterritorial states gave up their claims of extraterritorial jurisdiction. While the Ottoman Empire, China, and Japan were imperial powers themselves, they were traditional land-based empires with different types of rules and ideologies compared to European empires of the nineteenth century. (For comparisons of traditional and European empires, see Abernethy 2000.)

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the nineteenth century the courts and their procedures evolved and became more elaborate, in part to bridge the gap between justice rendered in the British domestic and extraterritorial courts. Eventually, the courts had their own substantial codes as well as codes for civil and criminal procedures, enforcement, and appeals.⁵ British jurists and bureaucrats at the Colonial Office prepared these rules. As the number of courts increased, the British government organized them in a legal hierarchy. For example, the British Supreme Court at Istanbul was the highest British court in the Ottoman Empire, and the British Supreme Court at Shanghai was the highest British court in China.⁶ These supreme courts acted as the first level of appellate courts in their respective geographical regions, in the Levant and East Asia. For example, appeals in cases from the British courts in Japan and Korea were heard at Shanghai. The Privy Council in London was the final appellate court of the British extraterritorial courts.⁷ With this extensive and organized presence, the British extraterritorial empire operated for most of the nineteenth and early twentieth centuries in those non-Western states lacking formal colonial governments.

Legal imperialism is the extension of a state's legal authority into another state and limitation of legal authority of the target state over issues that may affect people, commercial interest, and security of the imperial state. Extraterritoriality was quintessential legal imperialism; it extended Western legal authority into non-Western territories and limited non-Western legal authority over Western foreigners and their commercial interest. The production and maintenance of extraterritorial legal authority required both a legal framework to deny non-Western law and sovereignty and also the material capability to defend these extraterritorial court systems against the non-Western elites and populations who became increasingly uncooperative and even hostile to these courts.

⁵ For rules of the British Supreme Court for China, see Kennett (1918).

⁶ The Supreme Court at Constantinople was created in 1857. In 1858 the court had 22 personnel including a judge, two policemen, and two prison guards. Kocabaşoğlu (2004: 108).

⁷ For cases appealed from the British Supreme Court at Istanbul see Tarring (1887: 15–17). The U.S. Circuit Court in California acted as the appeals court for the U.S. Court for China, but no case from China reached the Supreme Court. For more about the U.S. District Court for China, see Ruskola (2005: 2008).

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Any analysis of legal imperialism requires a balancing of the relative roles of material power and ideas. This combination is difficult to sustain in the academic studies of international relations where the constructivists' power of ideas and realists' ideas of power divide the discipline's research agenda. Both of these reductionist positions are unable to explain fully the rise and fall of transnational legal structures, such as nineteenth-century extraterritoriality, in world politics. An argument based solely on power and self-interest is unable to explain the broad patterns of extraterritoriality. First, extraterritoriality was not imposed on the weaker European or on any Latin American states. In Latin America, as in Asia, in the mid-nineteenth century, economically and militarily powerful Europeans and Americans demanded legal immunity and jurisdictional protections based on claims of local injustice and lawlessness.⁸ British, French, and Spanish consular officials often lobbied for their citizens' legal immunity.⁹ For example, in Uruguay, foreigners demanded the right to invoke consular jurisdiction to create a separate legal system, similar to extraterritoriality. Yet, despite legal and economic conditions that resembled those of the Asian states, Western states never imposed extraterritoriality in Latin America.¹⁰

Second, not all the Western states benefiting from extraterritoriality were great powers. The rational, self-interested application of material power alone cannot explain how minor Western powers like Belgium, Greece, and Switzerland acquired extraterritorial rights in the Ottoman Empire or China.¹¹ Even if one considers minor powers' alliances with a great power, this cannot explain the extraterritorial rights of these states. Why would a great power use its military leverage to undertake the costs to substantiate a minor power's extraterritorial rights in non-Western states? This is especially the case when the citizens of a great power and a minor power were in direct economic

⁸ Benton (2002, 211).

⁹ Benton (2002, 214).

¹⁰ The only exception is that for a brief period, the government of Uruguay established a Comisión Mixta (made up of one Frenchman, one Englishman, and two Uruguayans) to consider claims by British and French subjects in 1857. See Benton (2002: 215–216). These complaints, however, sometimes triggered Western intervention for debt collection in these countries. Also see Benton (2002: 236–251), Keene (2007), Finnemore (2004), and Obregon (2006).

¹¹ Sousa (1933).

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competition with one another in a non-Western state, as in the Greek-British commercial competition in the Ottoman Empire during which both states had extraterritorial rights in the Ottoman Empire. One may argue that it was in Britain's self-interest to present itself as, and carry the responsibilities of, the representative of the entire "civilized" world in imposing extraterritoriality. While this might be true, it demands an ideational framework, rather than material factors, to establish extraterritoriality with civilizational differences.

The relations between great powers on extraterritoriality also defy the predictions of power politics. Surprisingly, there is little evidence that the great powers used extraterritoriality for geopolitical competition. On the contrary, they often collaborated with each other to sustain extraterritoriality in non-Western states. Extraterritoriality never became a tool for strategic competition among European imperialists. British Foreign Office documents concerning Japanese extraterritoriality contain ample correspondence with the other great powers regarding the likely responses of these powers to Japanese demands for the revision of extraterritoriality. In major international conferences, such as at the Tokyo Conference (1882), the Washington Conference (1921), and the Lausanne Conference (1923), Western extraterritorial states always presented a united front on extraterritoriality.

Third, while minor Western powers had extraterritoriality, that right was denied to major non-Western powers. For example, the Ottoman Empire had interests (substantial Muslim minorities existed in the small Balkan states), religious authority (Ottoman Sultans with their claim to the Muslim Caliphate), and power, but this never translated into an Ottoman legal claim, or even an attempt, of extraterritoriality even in the small Balkan states. Japan is the only exception to the non-Western states not claiming extraterritoriality: It effectively imposed its jurisdiction over Japanese citizens in China and Korea only after the abolition of extraterritoriality in Japan. The abolition of extraterritoriality in Japan indicated that Japan had been admitted into the group of "civilized sovereign" states, and thus Japan was granted the rights of civilized sovereign states, including extraterritoriality.¹²

¹² For a similar argument, see Suzuki (2009). For a history of Japan's "legal colonization" in Korea, see Kim (2009).

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The absence of extraterritoriality in Latin America and small European states, the minor European powers' of extraterritoriality in the Ottoman Empire and China, and the absence of non-Western claims for extraterritoriality all support the arguments of international relations scholars who offer an ideational and cultural perspective such as constructivists and English School scholars. They argue that power and material self-interest alone cannot explain the patterns of legal imperialism. The categories of extraterritoriality were the categories of civilization: Western versus non-Western. Western jurists, statesmen, and diplomats perceived extraterritoriality to be a Western right in non-Western states. Constructivists argue that sovereignty norms have changed over time – most notably in the transformation from the medieval to the modern international system of Westphalian sovereignty.¹³ Constructivists as well as English School scholars differ on which ideas are most relevant in explaining the consolidation of Westphalian sovereignty.¹⁴ Yet, they agree that the consolidation of Westphalian sovereignty, as well as other types of systemwide normative changes, is a two-step process: the emergence of norms in Europe and their subsequent diffusion to non-European entities through state socialization. Sovereignty norms emerge from the norm-generating European core, and then diffuse into the norm-receiving non-European periphery.

This two-step approach limits the emergence of sovereignty geographically (to Europe) and normatively (European ideas and practices of equality, recognition, and territoriality). In addition to being Eurocentric in its invocation of non-Western examples, only to illustrate their incompatibility with European ideas and practices,¹⁵ this two-step approach allows scholars to ignore the systematic sovereignty-violating and oppressive practices such as Western colonization and extraterritoriality. This tendency often exists in constructivist studies' neglecting the implications of the role of power asymmetry in norm-construction. Most constructivists emphasize *shared* ideas, thereby suggesting that norm-construction is a benign process leading to normatively better

¹³ Ruggie (1993), Biersteker and Weber (1996).

¹⁴ Spruyt (1994), Reus-Smit (1999), Philpott (2001).

¹⁵ Such as the Chinese "suzerainty system," or the Ottomans' alleged "house of war" versus "house of peace" Islamic worldview. For example, see Spruyt (1994: 16–17) and Philpott (2004: 15–20); also see Acharya (2004).

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outcomes.¹⁶ They thus fail to adequately theorize the role of structural power dynamics in norm-construction.¹⁷ Norm-construction emerges simultaneously with categories of norm-exclusion. In the nineteenth century, Western jurists, statesmen, and diplomats reformulated the sovereignty doctrine during Europe's imperial encounter with non-European states. Non-Western states became the nonsovereign "other" and were excluded from the realm of sovereignty. On the one hand, this process systematically marginalized, excluded, and disempowered non-European entities and enabled and justified European intervention, coercion, and imperialism in these entities.¹⁸ On the other, this European-led process triggered non-Western reforms and modernization by setting the terms by which previously excluded players could (and eventually did) join the system of sovereign states and benefit from it.

Connected to the last point, extraterritoriality also reveals how the sovereign state system extended into Asia. Absolute territorial jurisdiction is a unique feature of the modern international system. Various international relations scholars have suggested that territorial jurisdiction is constructed through the interactions of various state, nonstate, and international actors.¹⁹ The authority claims of Western and non-Western rulers over Western foreigners in Asia waxed and waned before Western rulers recognized the non-Western states' exclusive territorial jurisdiction. The variation in the timing of the abolition of extraterritoriality shows that the diffusion of territorial sovereignty into non-Western countries occurred from the end of the nineteenth century to the middle of the twentieth century.

¹⁶ For this teleological logic, see Wendt (1999).

¹⁷ Kurki-Sinclair (2007).

¹⁸ Lake (2003: 303).

¹⁹ In the last two decades, a significant literature has emerged to explore the constructed nature of territorial sovereignty. Jackson (1990) examines how the territorial sovereignty of African states is constructed through external legitimization. Ashley (1984, 1989) and Thomson (1994) examine how rulers came to legitimize foreign rulers' rights to domestic violence in the international system. Ruggie (1983, 1993) and Spruyt (1994) explore how modern states with mutually exclusive territorial jurisdiction came to dominate the modern international system. Bartelson (1995), Walker (1993), and Weber (1995) focus on discursive practices in the construction of territorial sovereignty. Wendt (1999) emphasizes ideas about the "self" and "other"; Onuf (1998) and Philpott (2001) highlight, respectively, the roles of secular and religious ideas about political authority in the construction of territorial sovereignty in the international system.