Chapter II – ‘No Law Behind the Great Wall’
Chapter II – ‘No Law Behind the Great Wall’

In 1999, a book entitled *China Joins the World* by Professors Elizabeth Economy and Michel Oksenberg was published by a ‘non-profit, non-partisan organization’ (as the Council on Foreign Relations defines itself in the preface to the work). Through the provision of a number of case studies in the fields of arms control, human rights, international trade, international investment, and environmental and intellectual property law, the authors stated that their goal was to answer the question ‘How do we advance U.S. priorities?’ through an exploration of ‘those strategies most likely to elicit cooperative behaviour on the part of the Chinese’. After praising the increasing Chinese engagement in the implementation of international standards, the preface nevertheless highlights some of the perceived structural shortcomings in China’s process of opening towards the international community. More specifically, not only do Chinese leaders continue to promote a sense of insecurity among their neighbours, but also ‘claim to seek the rule of law while resisting establishment of the basic conditions for it’. Furthermore, the monograph argues, because they are ‘unconstrained by law at home’, Chinese politicians are prone to domestic corruption and arbitrary action. Hence, in order to avoid an apocalyptic China becoming ‘an assertive and disruptive force’, the piece suggests a number of practical prescriptions for U.S. foreign policy makers. Starting with a general exhortation to proceed with caution and not to lose the sense of American priorities, the authors advocate the retention of a considerable military presence in Asia and the consolidation of unofficial relations with Taiwan. They conclude categorically that ‘we cannot allow our national and analytical capabilities to become dependent on China and Taiwan’.

Now, what is the discursive message that such a book may transmit to an average reader casually leafing through it? In other words, how does it contribute to shaping our perception of the political and territorial entity known as ‘China’?
Firstly, the title, *China Joins the World*, raises a number of puzzling ontological questions. Was China not in the world before? And if so, where was it? *Who* is the world? *And* who is China? Is it the Chinese delegation at the UN? Is it the Chinese Premier? Civil society? And what about the Chinese expatriate community who have been living abroad for decades? What are the criteria for rendering China a global outsider/insider? And, most importantly, according to whose perspective? That of the Chinese? Such questions are not intended to directly critique current or past U.S. foreign policy towards Asia, nor are they intended to send the reader into hermeneutic labyrinths without Ariadne’s thread to mark the exit. Instead, they simply aim to demonstrate how a sentence that, at a first glance, appears to be deeply normalized may actually hide a number of *a priori* conceptual and political assumptions that contribute to shaping and perpetuating our understanding of a certain notion of geo-political reality.

By presenting ‘China’ and ‘The World’ as a mutually exclusive dichotomy, the book reinforces the idea that they are ontologically independent, antithetical and irreconcilable categories. The general reference to ‘China’ implies the perception of an internally coherent and homogeneous political society suffering from some kind of overall value deficiency compared to the rest of the world it seeks to eventually enter. Moreover, since the book is written in English, one may fairly suppose that its intended audience is primarily Western readers. Given the implicit dichotomy in the title, reasoning by exclusion would arguably lead the average reader to conclude that, as she is not Chinese, she must belong to ‘the world’, thus reinforcing the conceptual overlap between ‘the world’ and ‘the West’, and corresponding marginalization of ‘the Rest’. Lastly, the suggestion that China joins the world is founded upon the underlying assumption that, before this major shift, China was fluctuating in a sort of onto-normative vacuum. Such an assumption is further reinforced by later statements, such as ‘they are unconstrained by law at home’ and ‘without the rule of law’. It is extremely unlikely that the average reader will realize that as far back as the Tang dynasty, China had developed a sophisticated system of legal codes. More likely, such allegations will confirm and strengthen the perception of a present and past ‘lawless’ China.

Considering the enormous power of graphics in the instant communication of messages, as well as empirical evidence that many readers actually do judge and buy a book by its cover, the monograph’s frontispiece also bears an overview. The abnormally large font of ‘CHINA’, written in capital letters and surrounded by a vivid red background, suggests that ‘CHINA’ is something threatening and incumbent. At the same time, ‘CHINA’ and ‘THE WORLD’ also constitute an ontological unity. Not only do the title’s three lines form the shape of a single rectangle, but one can also see that the word ‘CHINA’ is slowly slipping down from the red zone to the yellow, where ‘THE WORLD’ belongs. This creates a contrast between a static and accomplished ‘WORLD’, on the one hand, and a dynamic, changing ‘CHINA’, on the other. Most importantly, the red zone is not simply a coloured half page, but represents the Chinese flag. Such graphic choice may actually suggest that, by joining the golden ‘WORLD’ underneath, communist ‘CHINA’ is gradually leaving behind its old identity in order to reach the West and its subtitled promise of ‘PROGRESS AND PROSPECTS’.

Again, these are scattered thoughts of a personal nature and they do not aim at contributing to the contemporary debate on American geo-political strategies in Asia, or at demonizing the recent trends towards the internationalization and institutionalization of the Chinese domestic legal system. Moreover, asserting that ‘The intrinsically pluralistic...
political, social and geographical entity that English speakers usually refer to as “China” started implementing legal reforms that will bring it closer to the current Euro-American majoritarian ideal of a proper normative system. And that’s good (don’t question why!), in 12 point Times New Romans font on a white cover page, would be slightly ridiculous. Surely, this quotation would not help market the publication.

The purpose of the following discussion is simply to underline how the communication of even the simplest messages – such as China Joins the World – may not be neutral, and may obscure, to a greater or lesser extent, discursive, cultural and/or value presuppositions and desires. Admittedly, transmitting meanings from one actor to another always implies selecting a number of elements from an endlessly complex and chaotic reality, and rhetorically framing them in a more or less coherent and convincing discourse in orderto persuade the reader of their rationality, inherent truthfulness, and ‘normality’. However, when backed by a sufficient degree of authority, this natural argumentative tendency has the dangerous potential to raise a particular discourse to the status of a universalistic Grand-Narrative, which not only resists critique but renders the very exercise counter-intuitive and irrational.¹⁰

The narrative that must be considered before engaging in a substantial discussion of extraterritorial consular jurisdiction is an old, odd, but remarkably enduring story. It derives from the alleged intrinsic legality, rationality, justness and neutrality (i.e., superiority) of Western legal systems vis-à-vis a chronic lack of ‘real’ law in China and Asia and the Middle East more generally.¹¹ In other words, a considerable number of both historical and contemporary Western representations of Asian and Middle Eastern normative orders evince an a priori condemnation for their reliance on purportedly incomplete, corrupt or inadequate, if not entirely absent, internal legal orders, resulting in their marginalization as defective members of the international community.¹²

Whereas China Joins the World provides a recent example of the pejorative essentialization of China, similar trends can be identified in past political and philosophical discourses as well. If it is true that the ‘Germans have done in thought what the British have done in fact’,¹³ Hegel refers to China as a ‘dull half-conscious brooding spirit’.¹⁴ He even goes so far as to state that ‘it would have been better if Confucius had never been translated’, as all he offers is ‘a highly tasteless prescription of cult and manners’.¹⁵ It may be relevant to recall that the basis of Hegelian philosophy is the idea of a universal Spirit, or Geist, that leads history and dialectically ‘reveals’ itself to the world through some necessarily rational and unavoidable steps. Accordingly, within the Hegelian dialectic reasoning, the Western (i.e. highest) degree of civilization constitutes the thesis, or ‘steady state of the story’, with the static inferiority of non-Western cultures cast as the antithesis, and the imperative of progress, under European supervision, as the final synthesis and ultimate expression of freedom. Otherwise stated, it was necessary, unavoidable and rational that Chinese society would one day reach, and thus be freed by, the political and prescriptive order of Hegel’s Prussia.¹⁶ Similarly, John Stuart Mills, often referred to as the founding father of Western liberalism, also roots his thought in an epistemology of hierarchical values, of the pinnacle of which are the European notions of progress and civilization as both the sceptre and the stick.¹⁷ In a related vein, to account for China’s failure to develop a capitalist economy, Weber asserted negatively that ‘Chinese intellectual life remained completely static’, as Confucianism bridled its society in a self-referential and bigoted veneration of the status quo.¹⁸ Even Marx saw China as ‘vegetating in the teeth of time’ and, consequently, a poor candidate for the proletarian revolution.¹⁹ In sum, it is striking
to reflect upon the ways in which the giants of Western philosophy have produced work deeply permeated by cultural prejudices, Darwinian evolutionary speculations and, ultimately, racism.

I. Orientalizing Normativity in the Rest

10 Even before one can legitimately analyse Chinese legal history, it seems that one is compelled to demonstrate that such history actually existed. Accordingly – and as a remarkable exception to the dominant view of his times – in 1899, Sir Ernest Alabaster, the son of the British Consul-General to China and subsequently barrister at The Honourable Society of the Inner Temple in London, expressed his astonishment at the idea shared by many Europeans with regard to Chinese law:

‘To all intents and purposes foreigners are completely in the dark as to what and how law exists in China. Some persons whose reputation for scholarship stands high would deny the right of the Chinese to any law whatsoever – incredibly, but to my knowledge, a fact.’

11 The astonishment felt by Sir Alabaster survived in strikingly similar terms almost a century later. At that time, when Professor William Alford was beginning his graduate programme in Chinese studies, a renowned scholar posed as his first question: ‘Why I, as a young man of seeming intelligence, was intent on wasting my time on the study of Chinese legal history.’

However, China provides just one example among many of the dominant historical belief in the intrinsic ‘non- legality’ of the so-called ‘Orient’. A coherent illustration of this process of the discursive essentialization (or ‘Orientalizing’) of different (legal) cultures is elaborated by Edward Said, in his well-known monograph *Orientalism*. Said defines the concept as the set of discursive and rhetorical structures that Continental lawyers, novelists, statesmen, scientists and anthropologists, among others, have erected to frame an initially European but increasingly global understanding of the Orient. According to Said, for centuries European experts depicted the Orient as the dark land of exotic odalisques, sheiks, and wantonness, as well as a nest of brutality, corruption, irrationality and lawlessness. In other words, the Orient became a sort of relief valve for both romanticized Western fantasies and the cultural vilification of the ‘Other’. Through this process of epistemic imperialism, the Orient has been gradually reduced to a passive object of observation, to be analysed, categorised and ultimately judged by the purportedly cognitively-superior Western subject:

‘The Orient and Islam have a kind of extra-real, phenomenologically-reduced status that puts them out of reach of everyone except the Western expert. From the beginning of Western speculation about the Orient, the one thing the Orient could not do was to represent itself.’

12 Continuing this reasoning, neither the West nor the Orient have, nor have they ever had, in Said’s opinion, a ‘real’ ontological foundation, as both are the result of collectively-constructed and widely-perpetuated cognitive categories. Nevertheless, Orientalist scholars greatly contributed to the fictitious establishment of two separate and antithetically opposed epistemic worlds: the West and the Rest, We and They, the Self and the Other, China and the World. Most importantly, not only did Western academics share and propagate such meta-categorizations, but, through a gradual process of internationalization, those categorizations eventually became a constitutive part of the Oriental internal Self. Hence, particularly during the last century, Eastern societies began a sort of ‘Self-Orientalization’, whereby they came to perceive themselves as lustful,
brutal, corrupted, irrational and lawless, and began to aim at overcoming such self-conceptualizations by culturally and socially conforming to the West.  

But how, one may wonder, does this relate to extraterritorial consular jurisdiction? In other words, why engage in a discussion on legal and cultural Orientalism while in the context of extraterritoriality? Put simply, substituting 'Chinese or Ottoman law' for the 'Orient' and 'Islam' in Said’s quotations presents a fairly accurate picture of how legality was Orientalised in Asia and the Middle East when extraterritorial consular jurisdiction was first established. Accordingly, in reference to the debate over whether the Ottoman Empire was ‘ready’ for the abolishment of capitulations, the Scottish lawyer and legal scholar James Lorimer stated: '[International lawyers] had bitter experience of the consequences of extending the rights of civilization to barbarians who have been incapable of performing their duties, and who possibly do not even belong to the progressive races of mankind.' The direct reference to notions such as ‘rights’ and ‘duties’ aside, which, one should not forget, are no natural institutions of every legal culture, the racial and culturally hegemonic assumptions behind Lorimer’s statement are clear. Similarly, with regard to the Chinese normative order, Sir Edward Harper Parker, her Majesty’s consul to Shanghai, argued that, ‘with the Chinese law, we are carried back to a position whence we can survey, so to speak, a living past, and converse with fossil men.’

The references discussed above provide direct evidence that when European consular officers and experts first came to study the Ottoman and the Chinese normative systems in significant numbers, they tended to dismiss such systems, comprehensively, for lacking ‘real’ law. Whatever structured the collective behaviour of those societies could perhaps have been qualified as religion, superstition or morality, but it certainly lacked the purity and inherent rationality of a positivist legal order. The diagnosis of such a fallacy usually involved symptoms such as: (1) the lack of a sovereign state, properly speaking; (2) the lack of a constitution; (3) a chronic confusion between law and morality; (4) the alleged nonexistence of the individual subject vis-à-vis the overall society; (5) a pathologic conflation of law and religion; (6) the lack of a clear division between administrative and judicial powers; (7) the failure to distinguish between civil and penal law; (8) the vagueness or compete nonexistence of tort law; (9) the deficiency of reliable property and succession rights; (10) the nonexistence of positive procedural and substantial codes of law; (11) the absence or inappropriate functioning of a territorially-diffused and hierarchical court system charged with the impartial application of the law; (12) the lack of educated judges and proper legal educational institutions more generally; (13) widespread corruption and inefficiency of the local functionaries; (14) the inadequacy or total absence of the appropriate infrastructure for physical detention; and, last but not least, (15) the brutality of indigenous substantive law, particularly in criminal cases involving foreigners. In sum, the great majority of Asian and Arab societies lacked ‘law’, as well as internal and external legal subjectivity.

It should be clear, however, that the purpose of the present chapter (and this thesis more generally) is not to persuade the reader of the existence of law in nineteenth-century China and Turkey. It is assumed that human societies always had one or more normative systems regulating and sanctioning social behaviour. Of course, such systems did not necessarily derive from a set of positive acts emanating from the will of a sovereign state, which is certainly a relatively recent political phenomenon. The Hobbesian assertion, however, that prior to the appearance of the Leviathan’s sword, human beings lived in a
perpetual, lawless ‘state of nature’, is a discursive fiction, propagated by a theoretical branch of Continental philosophy. Overall, then, the primary purpose of this discussion is to illustrate the ways in which legality in the so-called ‘Orient’ has been sublimated through Western majoritarian discourses.

II. Constructing the Legal Ego in the West

The allegation that China and the Ottoman Empire comprehensively lacked a positive legal system ultimately contributed to the persistent ‘Othering’ of those societies as ‘lacking something’. Such a conclusion affected the Western perceptions of normativity in the East, redoubling the white man’s burden of exporting redemption through (legal) civilization. At the same time, it also helped to consolidate the Euro-American self-perception of the West as the ultimate ideal-type and referential standard of legal subjectivity. As ‘Orientalism as a discourse entails the projection onto the Oriental Other of various sorts of factors that “we” are not, at the same time it contributes to define structurally what “we” are by identifying those elements that ultimately render us a legal subject’. Otherwise stated, we are what they are not, in a continuous, foundational relationship of absence and presence.

Hence, if the Chinese are irrational, we are rational; if the Ottomans are luxurious, we are sober and disciplined; if they are ‘backward’, we are modern; and if neither possesses a proper legal order, we do. On the dualistic nature of categories of the real, the Greek philosopher Anaximander wrote that the world is composed of an infinite number of reciprocally-constituting and mutually-exclusive cognitive categories, such as ‘ugly v. beautiful’, ‘cold v. hot’, ‘bad v. good’, ‘black v. white’. None of them, he claimed, could ever exist independently from its opposite. Similarly, one could hardly talk about legality without the parallel existence of the epistemic category of ‘non-legality’. Accordingly, in accusing the Asian and Arab societies of not only lacking sovereignty, but also legal subjectivity, positive codes of law and neutral judges reinforced the Western self-perception that we do possess such institutions, and that they are ultimately indispensable for making us ‘us’. Ascertaining the non-Western lack of legality and sovereignty was, arguably, like looking in a mirror to find one’s image reflected upside down.

Regarding international law more specifically, the process(es) surrounding its consolidation as a discipline and practice have followed a similar path. Sovereignty, statehood, the doctrine of territorial jurisdiction or the principle of non-intervention – to recall just a few examples – did not materialise out of thin air in Osnabrück and Münster in late 1648. As with any other social institution, they developed out of a gradual and osmotic process of clashes and encounters, in which the ‘discovery’ and perception of non-European societies played a key role. According to Horowitz, for instance, ‘Europe’s growing political engagement in Asia and Africa forced international lawyers to reconsider the intellectual underpinnings of their science’. More specifically, the author argues that the colonial experience contributed to the emergence of an epistemic shift from the Vattelian theories of universalistic natural law towards the positivist conception of international law as jurisprudential, based on the formal consent of civilized, Christian states. Consequently, the ‘standard of civilization’ began to play a primary role in the theoretical and substantial consolidation of international law.
Another major theorist of the mutually-constitutive relationship between colonialism and international law is Antony Anghie. Beginning with the sixteenth century’s epistemic confrontation between the Spanish and the American native populations, he argues that colonialism played an increasingly important role in the identification, as well as the global affirmation, of a considerable part of basic doctrines and principles of international law. Similarly, with regard to the ‘exportation’ of state sovereignty to China, Japan and the Ottoman Empire, Kayaoglu underlines the role that the imperialist encounter between Western and non-Western normative cultures had in the doctrine’s consolidation both in Europe and the ‘Orient’.

Hence, not only did ‘Orientalism’, as discursively applied to the majority of non-European societies, support the Western legal ego’s self-perception of legality, neutrality and normative superiority with regard to its domestic legal orders, but it also greatly influenced the development of international law in broader terms. Sovereignty was not created ex nihilo at Westphalia, but rather it resulted from a long, intercultural joint venture. Assessing whether or not non-European societies originally possessed a legal order, however, clearly depends on one’s general conception of what constitutes, or should constitute, a legal order. Whereas such a conception may seem to be intrinsically relative and subjective, the existence of dominant epistemic discourses that shape and are shaped by our notion of legality is hardly deniable today, as it was in the past. Therefore, rather than presumptuously wondering if China or Turkey had law before the Europeans arrived, we should instead attend to the question as to who sets the ultimate standards of what constitutes legality for the ‘progressive races of mankind’.

III. The Role of Legal Experts in Legitimizing Extraterritorial Consular Jurisdiction

Legal experts had, as they continue to have, enormous power in shaping our understanding of legality and of how the world works, or should work, more generally. After all, every barrister, lawyer and student of international law acquired a great amount of his or her knowledge from the ‘expert’, and the allegedly neutral and objective teachings of their professors and fellow practitioners. Someone without a background in legal studies, moreover, wondering whether a certain factual situation may be referred to as ‘legal’, tends to deduce intuitively that an expert would have the answer. An enormous variety of technical experts do increasingly hold a monopoly on knowledge of the law. Most importantly, such epistemic communities are more than simple groups of scholars, or professionals who seek knowledge for the mere sake of knowing. The apologetic and genealogic links that they often have to a dominant discursive and institutional apparatus should not be neglected.

Whereas today one has, possibly, greater scope for engaging in alternative epistemic discourses, facilitated by greater access to a variety of sources of information and the relative ease of moving around the globe, the situation was quite different in the nineteenth century. A trip to Asia and the Middle East could take months, if not years. Consequently, statesmen and foreign ministers of European and American states – i.e. those who ultimately decided upon Western consular institutions abroad – rarely engaged in long-distance journeys to the territories upon whose jurisdictional competences they deliberated. Instead, they tended to delegate the task of representing
and promoting the interests of their countries to their military, diplomatic and legal functionaries, going so far as to rely, in some cases, upon the testimony of third parties. An illustrative example occurred in 1833, when the House of Commons debated a bill establishing a new extraterritorial court in China, claiming exclusive jurisdiction over all cases involving a foreign element. Despite the fact that neither Lord Palmerstone nor the majority of his fellow parliamentarians had ever been to Asia, according to Shin Shun Liu, the arguments advanced in favour of the bill were mostly based upon ‘the indictments made by the British merchants against the legal System of China’. Although the bill was not passed during that particular parliamentary session, the example clearly illustrates the role that third parties, even merchants, had in filtering information and ultimately pushing statements towards concrete political decisions.

Hence, Continental policy makers’ initial perceptions of legality in Asia and the Levant were considerably influenced by the cognitive mediation of their compatriot merchants, diplomatic agents and legal experts. In a world where education and literacy were still primarily the purview of the upper class elite, the third-hand stereotyping of the “legality” and degree of civilization of the Far and Middle East was likely even more amplified when simplistically conveyed to the majority of the population. Most importantly, lawyers played an enormous role in the construction and further articulation of ‘legal orientalism’. Kayaoğlu argues that legal specialists often occupied senior positions in the Colonial and Foreign offices, and that the majority of the consular and colonial personnel received intense legal training. Consequently, the distinction between professional policy makers and legal experts was not always clear and, apparently, the competence of lawyers often shifted from the more indirect provision of technical expertise to active decision making.

Some authoritative scholars of the calibre of John Austin, John Stuart Mill and Jeremy Bentham, on the other hand, at one time worked for the East India Company, for which they travelled to the Ottoman Empire, India and, sometimes, Asia. Consequently, not only did the scholars’ experiences abroad contribute to the development of their own generally Eurocentric and culturally-exclusive conceptions of civilization and progress, but, through their work, went on to shape the cognitive perceptions entire generations of lawyers, economists, and future colonial officers. Moreover, because the academic work of European experts was often subject to the scrutiny of their governmental or university authorities, jurists and scholars writing on foreign law were obliged to frame their writings accordingly, and pre-emptively consider the political and legislative milieu in their assessments. Therefore, awareness of their primary audience was also extremely important to Western scholars in the construction of ‘Orientalizing’ discourses at the time of the first establishment of extraterritorial consular jurisdiction. Consequently, the theoretical framework they used to examine the Chinese and Ottoman normative systems was often a squarely positivist approach to law. John Austin stated this clearly in the opening of his essay on The Uses of the Study of Jurisprudence:

“The appropriate subject of Jurisprudence, in any of its different departments, is positive law: meaning by positive law (or law emphatically so called) law established or “positum”, in an independent political community, by the express or tacit authority of its sovereign or supreme government.”

When looking for positum codes of law, expressed by the authority of a sovereign, in the above-mentioned territories, the majority of Western lawyers could not find much, given that the sources of their legal orders were of a radically different, often unwritten, nature. Until proven otherwise, for instance, one can hardly understand Mohammed as a
‘sovereign or supreme government’ in the positivist sense of the term. Otherwise stated, Western legal experts, in failing to realise the depth of the normative differences between non-Western cultures and their own, examined them for typically Western legal categories and logic systems. And, when, to their astonishment, they discovered their absence, they immediately concluded that those cultures ‘lacked’ something. Hence, such a ‘lack’ had to be addressed, gradually, through the establishment of extraterritorial consular jurisdiction and, subsequently, through the structural reform of the Chinese and Ottoman legal systems in their entirety. An excellent and recent illustration of this process of a priori cognitive framing of Chinese legality is provided by an anecdote of Janet Ainsworth. During a lecture on the Imperial China’s ‘contract law’, a student suddenly raised his hand and asked Ainsworth whether the Chinese had also developed promissory estoppel:

‘Apparently [the student] regarded the development of the concept of promissory estoppel as a natural evolutionary outgrowth of the law of contracts, such that any civilization possessing a jurisprudence of contract doctrine would eventually produce the functional equivalent of Section 90 of the Restatement of Contracts.’

Although relatively funny, the example illustrates what may be a natural temptation to categorize reality according to the epistemic categories that are directly familiar to the observer. Arguably, beliefs too often hold us, rather than the contrary. Hence, it is hardly surprising that the general nineteenth-century belief in the devoir-être of a positivist legal order eventually led to the conclusion that the Chinese and Ottoman legal cultures represented a ‘defective legality’. Legal experts played a primary role in this process, as they frequently acted as the first ‘evaluators’ of those standardizing orders, and constituted major channels of diffusion of such evaluations to the public. And, once non-Western lawlessness had been demonstrated, extraterritoriality, together with the subsequent imperatives for massive internal legal reforms, emerged as a natural solution.

IV. ‘Tradurre è Tradire’: On the Role of Language in the Establishment of Extraterritorial Consular Jurisdiction

A famous Italian aphorism states that translation is betrayal. Not only is language arguably the centre of gravity around which legal studies turn but, most importantly, it also comprises a certain understanding of the world, a society’s system of values, and its general perception of how reality works or should work. Whereas, today, this is certainly still true, the enormous importance language assumed in the colonial encounter between Westerners and Asian and Arab societies is hardly imaginable in the contemporary context. It is for this reason that, in partial apology to the alleged epistemic sin of Western legal experts, it is important to briefly discuss the role linguistic understanding (and, often, misunderstanding) had in the establishment and early articulations of extraterritorial consular jurisdiction.

In the case of the Ottoman Empire, linguistic, cultural and legal exchanges with the Continent were, comparatively, more frequent and intense within the Mediterranean basin. Beginning in the early Middle Ages, a considerable number of Arab scholars engaged in the translation of major Greek classics of philosophy, thereby becoming accustomed to the Ancient Greek language. Moreover, for centuries, Europeans engaged in long-term commercial, diplomatic, military and other sorts of encounters with the
Sublime Porte, gradually developing the basic tools for ensuring mutual communication. Hence, while certainly not absent, cognitive misunderstandings between Europeans and the rulers of the Ottoman Empire were arguably less evident than those in Asia at the time extraterritorial consular jurisdiction was established.

However, the pictorial and descriptive nature of Chinese writing, the unfamiliar sound of its phonetics, as well as the different pantomimic expressions of its speakers transformed language into a nearly insurmountable barrier when Europeans first arrived in the Qing Empire. According to Kristoffer Cassel, in the mid-nineteenth century, very few Chinese officials in East Asia had even a rudimentary understanding of English or French, and most official and diplomatic correspondence had to be conducted either in Chinese or through an intermediary language, such as Dutch or Portuguese. Similarly, in his 1810 pioneering translation of the Qing Code, Sir George Thomas Staunton emphasized how hard it was to study a legal system that was 'buried in a language by far the least accessible to a foreign student of any that was ever invented by man'. Similarly, the American missionary Peter Parker began the logbook of a pioneering expedition to Japan and the Ryukyu Islands by telling the odd story of how they eventually acquired their misfortunate translators.

Hence, translating Asian languages into French and English and vice versa during the nineteenth century was an arduous task. This was particularly true when trying to communicate conceptual constructions such as ‘state’, ‘territoriality’, ‘sovereignty’, ‘nation’, ‘citizenship’, and ‘jurisdiction’ that, for their intrinsically abstract and fictitious nature, could not be drawn, mimed or directly transmitted by any other form of immediate communication. With regard to ‘nationality’, for instance, Chinese contemporary historian Immanuel Hsu described how, shortly before the outbreak of the Opium War, the British superintendent of trade to China urged the Viceroy of Canton to settle the differences between the ‘two nations’ peacefully. The Chinese viceroy, according to Hsu, was puzzled by the term ‘two nations’, which he took to mean England and the United States. Cassel provides an example more directly connected to the establishment of extraterritoriality. At the conclusion of the Opium war, the Chinese Emperor was forced to sign the 1843 General Regulations of Trade with the United Kingdom, prescribing the opening of five Chinese city-ports to foreign trade. A complementary protocol containing the so-called ‘most favoured nation clause’ was added just few months later. Article 8 of the latter instrument, known as The Supplementary Treaty of the Bogue, stated that all Western nations were allowed to conduct business in the new city-ports ‘on the same terms as the British’, adding that, if China granted any sort of additional ‘immunities and privileges’ to other foreign states, British subjects could enjoy the same immunities. Interestingly, Cassel highlights that while the British talked about immunities and privileges, the Chinese version of the text used a translation corresponding rather to our ideas of grace or kindness.

Admittedly, the present thesis is limited to the consideration of primary and secondary sources primarily, though not exclusively, in English. Regrettably, it would be far beyond my linguistic skills to engage in an in-depth examination of how the Chinese and Ottomans themselves perceived extraterritorial consular jurisdiction and, more broadly, Western legal systems. Most likely, as the West ‘Orientalised’ the Orient, so did the societies of the Far and Middle East ‘Westernize’, or ‘barbarize’, the West. Be that as it may, while readers consider the following chapters, they should keep in mind that language and its translation had an enormous impact on colonial (mis)perceptions and,
consequently, on the development of extraterritorial consular jurisdiction in China and the Ottoman Empire.

NOTES

2. Ibid: viii.
4. ‘Without the rule of law, China’s commerce will continue to rest on poorly regulated and insecure ground; corruption will flourish; and human rights abuses will continue. Moreover, unconstrained by law at home, rulers are more able to behave arbitrarily abroad.’ Ibid: vii.
5. ‘Finally, we stress that a forthcoming posture towards China cannot be a guaranteed success. China could emerge as an assertive and disruptive force or it could disintegrate.’ Ibid: viii.
6. ‘The United States must therefore take precautionary measures. First and foremost, as we have outlined above, we must ensure that our policies flow from a sense of American priorities; each American initiative must stand on its own merits. China will seize generous offers of cooperation that only serve Chinese interests, but it will give little in return. In addition, the United States must retain a robust military presence in Asia and maintain strong relations with other nations in the Asia-Pacific region. This includes a full range of unofficial relations with Taiwan. We must also ensure that China enters international regimes on terms that protect the core purpose of the regime – this is particularly true for China’s current negotiations to join the World Trade Organization. Finally, the United States must retain an independent capacity to understand Chinese domestic and foreign affairs by cultivating and rewarding its foreign service officers, commercial counsellors, military officers, and intelligence analysts who have expertise on China. We can not allow our national and analytical capabilities to become dependent from China and Taiwan.’ Ibid: viii.
7. For further instances of academic semantic choices antithetically opposing China to the World, see Samuel S. Kim, China and the World: Chinese Foreign Policy Faces the New Millennium. (Westview Press, 1998); Allen Carlson, Unifying China, Integrating with the World: Securing Chinese Sovereignty in the Reform Era. (NUS Press, 2008); Thomas G Otte, The China Question: Great Power Rivalry and British Isolation, 1894-1905. (Oxford: Oxford University Press, 2007) suggests that China became a question to be answered by the cognitively superior West, i.e. Britain and the other European Great Powers. For illustrations of the recent discursive shift from China conceived as a
global outsider in favour of a conception of China as an uncomfortable world leader, see Jack Belden and Owen Lattimore, *China Shakes the World*. (NY: Monthly Review Press, 1970); Martin Jacques, *When China Rules the World: The End of the Western World and the Birth of a New Global Order*. (Penguin, 2009); James Kyenge, *China Shakes the World: A Titan's Rise and Troubled Future-and the Challenge for America*. (Houghton Mifflin Harcourt, 2007). For yet another perspective opposing China to the developing world, see Joshua Eisenman, Eric Heginbotham, and Derek Mitchell, *China and the Developing World: Beijing's Strategy for the Twenty-First Century*. (ME Sharpe, 2007). Although all these scholars present different perspectives on China's role within contemporary international relations, interestingly, they all share the common feature of ontologically opposing 'China' with 'the World'. China may be a un-institutionalized actor gradually joining the international community, a threatening superpower struggling for its hegemony over the twenty-first century, or an economically powerful actor intervening and shaping development policies within Africa. However, it remains discursively presented as separate, distinct and almost ontologically independent from the rest of the world.


9. I thank Melina Wilson and Manon Roland, graphic design specialists (and friends) working in the field of illustration and editorial publishing for sharing their ideas and discussing Oksenberg and Economy’s work. Needless to say, the above-discussed graphic arrangements are best paired with a close, first-hand examination of the book’s cover.


11. This statement, however, clearly does not aim at generalizing ‘the West’ as a homogeneous entity, as it is admittedly constituted by a pluralist and complex set of political and legal entities. Expressions such as ‘the West’ or ‘Europe’ will be used for the purposes of the present thesis to reference the majoritarian legal culture developed over the course of the nineteenth century, i.e.
legal positivism. Nevertheless, this shall not be interpreted as prejudicial towards the intrinsic normative variety parallel and transversal to legal positivism both on the Continent and in the United States.


13. See Uday Singh Mehta, Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought. (University of Chicago Press, 1999): 90. This is without prejudice to the plurality and worth of German philosophical thought as such and only refers to some few proponents of the Idealist current, in recognition of their undeniable influence on Western Imperialism.


21. ‘The first substantive question posed to me as I commenced my graduate work in Chinese studies during the autumn of 1972 was by the late Professor Arthur Wright, who inquired why I, as a young man of seeming intelligence, was intent on wasting my time on the study of Chinese legal history. While reasonable people may differ as to the accuracy of the kindly Professor Wright’s personal assessment, there was no mistaking his query. The question posed was a revealing one, mirroring a view, long prevalent in American scholarship, as to the relative unimportance of law in Chinese civilization.” In William P. Alford, ‘Law, Law, What Law?: Why Western Scholars of Chinese History and Society Have Not Had More to Say about Its Law’, Modern China 23, no. 4 (1997): 398.


Exporting Legality


25. ‘…[B]y Orientalism I mean several things, all of them, in my opinion, interdependent. The most readily accepted designation for Orientalism is an academic one, and indeed the label still serves in a number of academic institutions. Anyone who teaches, writes about, or researches the Orient – and this applies whether the person is an anthropologist, sociologist, historian, or philologist – either in its specific or its general aspects, is an Orientalist, and what he or she says or does is Orientalism… Related to this academic tradition, whose fortunes, transmigrations, specializations, and transmissions are in part the subject of this study, is a more general meaning for Orientalism. Orientalism is a style of thought based upon ontological and epistemological distinction made between "the Orient" and (most of the time) “the Occident.” Thus a very large mass of writers, among who are poet, novelists, philosophers, political theorists, economists, and imperial administrators, have accepted the basic distinction between East and West as the starting point for elaborate accounts concerning the Orient, its people, customs, "mind," destiny, and so on…the phenomenon of Orientalism as I study it here deals principally, not with a correspondence between Orientalism and Orient, but with the internal consistency of Orientalism and its ideas about the Orient…despite or beyond any correspondence, or lack thereof, with a “real” Orient.’ See Said, Ibid: 1–3.


World Order’, *Chinese Journal of International law*, 1 (2002): at 41 – ‘Relying on legal orientalist knowledge, Western states discredited Chinese laws on a categorical basis. China lacked positive law, the only type of law acceptable to Western states. Chinese laws did not fulfil the positive standards of law for three main reasons. First, until 1911, the Chinese codes were not publicly accessible. Without knowing the legal codes, the public, particularly foreigners, had little idea of their legal and property rights. Second, the traditional Chinese Codes were not provisions to clarify the legal and property rights of individuals, but were administrative regulations sent by the central government to provincial authorities to solve disputes. Chinese codes covered criminal issues extensively, but remained notably incomplete on issues about commercial and civil interactions. Third, China did not have a judicial system separate from its administrative structure. Magistrates who were both administrators and judges in their districts conflated their judicial and administrative roles. With the dual role of magistrates and the lack of appeal mechanisms, it was impossible for the public to gain reliable knowledge about their legal and property rights. For these three reasons, the traditional Chinese codes, as a prominent American legal scholar observed, were “not a code of law in a modern sense but rather a compilation of ethical precepts as to the relations of individuals to the family and to the government.” In this modern understanding and discourse of law, in large part shaped by nineteenth-century legal positivism, law cannot provide the utilitarian benefits that are a hallmark of positivist law if law is not clearly specified.


31. ‘What the West had that China did not, what in the end seduced China into passive acquiescence (made it Other) was Law. Or, to put it slightly differently, the universalist Law of treaty, human rights, science, and so on clarified the difference between China and the West as a relation of absence and presence, by pointing out the anarchic, ever multiplying, seething differences within China; China, alas, stood to Western Law as the particular stands to Universal.’ (Emphasis added). In Tani Barlow, ‘Colonialism’s Career in China Studies,’ in *Formations of Colonial Modernity in East Asia*, ed. Tani Barlow. (Durham: Duke University Press, 1997). 389–930.

32. ‘Take up the White Man’s burden. The savage wars of peace. Fill full the mouth of Famine. And bid the sickness cease;And when your goal is nearestThe end for others sought,Watch sloth and heathen Folly.Bring all your hopes to nought...’ Rudyard Kipling and Thomas James Wise. *The White Man’s Burden*. (London, 1899).


35. ‘Claims of the putative absence of law in China have become part of the observer’s cultural identity and, in turn, contribute to the content of the observations themselves’. Teemu Ruskola, ‘Legal Orientalism,’ supra: 185.

36. I am hereby referring to the 1648 treaties of Osnabrück and Münster, formally establishing the peace of Westphalia. Available at: http://fletcher.archive.tusm-oit.org/multilaterals/texts/historical/westphalia.txt.


Press, 1972). 35–46: ‘The law of nations or international law, as understood among civilized, Christian nations, may be defined of consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent’. (Emphasis added).

39. On the increasing role that the standard of civilization had in the consolidation of international law, see Gerrit W. Gong, The Standard of Civilization in International Society. (Oxford: Oxford University Press, 1984). 14: ‘A standard of “civilization” had emerged as an explicit legal principle and an integral part of the doctrines of international law, and a non-Christian state needed to meet that standard to be considered a full participant in international society and fully subject to the rights granted under international law. The standard for a civilized state included guarantees of basic rights of property and person, an organized political system with a capacity for self-defense, adherence to international law, maintenance of a system for diplomatic interchange, and a state conforming to the accepted norms and practices of the “civilized” international society.’

40. ‘My broad argument is that colonialism was central to the constitution of international law in that many of the basic doctrines of international law – including, most importantly, sovereignty doctrine – were forged out of the attempt to create a legal system that could account for relations between the European and non-European worlds in the colonial confrontation.’ Antony Anghie, Imperialism, sovereignty and the making of international law. (Cambridge: Cambridge University Press, 2007). 3.

41. ‘In these encounters, Western state practices and judicial discourses clarified, crystallized and consolidated the elements of sovereignty doctrine. In particular, jurists defined, identified, and categorized sovereign and non-sovereign entities.’. Turan Kayaoğlu, Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China. (Cambridge University Press, 2010). 17.


44. David Kennedy, whose scholarly work is considerably focused on legal experts and the production of knowledge in international law, states: ‘I have become convinced the role of experts is drastically understudied. We focus on statesmen and public opinion and not enough on the ways in which their choices, their beliefs, are shaped by background players e often overestimate their capacity and influence. We imagine that development economists know how to bring about development or that lawyers know how to build an institution or draft a statute to bring about a desired result. What holds them back is the friction and resistance of context—or incompetence. At the same time, we rarely have a good picture of the blind spots and biases introduced by expertise, along the lines of the old adage that to a man with a hammer, everything looks like a nail. Indeed, experts rarely know what they don't know and know a great deal that is fashion, that is borrowed, misunderstood, reduced to a slogan, or simply too contradictory to be “applied” or “implemented” straightforwardly.’ In David Kennedy, The Mystery of Global Governance’, Ohio Northern University Law Review, 34 (2008): 846–847.


45. On the mutually constitutive relationship between knowledge and power, Michel Foucault stated: 'The apparatus [i.e. established discursive and social order] is thus always inscribed in a play of power, but it is also always linked to certain co-ordinates of knowledge... This is what the apparatus consists in: strategies of forces supporting and supported by types of knowledge.' See Michel Foucault, Power/knowledge: Selected Interviews and Other Writings, 1972–1977. (Random House Digital, Inc., 1980). 194–196.

46. On the appointment of governmental experts to China and to the Ottoman Empire, see generally Turan Kayaoğlu, Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China. (Cambridge University Press, 2010).


48. On the reasons why the bill failed to pass, Mr. Hawes of the House of Commons asserted that he had '...[C]arefully looked over the papers, the noble Lord [Palmerston] had laid before the House, and he could not discover in them the smallest trace of the smallest consent on the part of the authorities of China to the jurisdiction proposed to be given by the noble Lord. He wished to ask the noble Lord, whether the authorities of China recognized this interference with their laws?' See Hansard, Thomas Carson. The parliamentary debates. 3rd ser., Vol. xviii. London: Cornelius Buck & Son, 1834: 744.


50. 'Legal scholars and jurists acted as professional norm developers, propagating their ideas and ideals about law, justice and sovereignty. With their claims to legal expertise, lawyers, jurists and legal advisers often moved from the production and maintenance of the legal episteme to political decision making.' Kayaoğlu (2010), ibid: 31.


52. For a similar argument with regard to international lawyers today, see Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument. (Cambridge University Press, 2005). For a critical approach to the development of legal professionalism in the People’s Republic of China and its gradual epistemic convergence with the Western culture of professional managerialism, see William P. Alford, ‘Of Lawyers Lost and Found: Searching for Legal Professionalism in the People’s Republic of China’, East Asian Law: Universal Norms and Local Cultures (2002): 182 – ‘American scholars and policy makers concerned with legal development in the People’s Republic of China share a deep faith in the value of China developing a legal profession that operates as we would like to think our own does. Indeed, this idea is so deeply ingrained that it is rarely broken out for critical examination, but instead is treated as an obvious good, the attainment of which is essentially a matter of time. Virtually all such observers seem to assume that lawyers, whether out of idealism or self-interest or some blend thereof, will prove to be a principal force leading the PRC toward the rule of law and a market economy, while some go so far as to treat the development of an indigenous legal profession as crucial to the promotion in China of a more liberal polity. The hidden assumptions regarding the Chinese legal profession found in both US academic writing and policy papers warrant a scrutiny they have yet to receive here or abroad. Lurking not too far underneath the surface of such portrayals are further
assumptions about the inexorability of convergence along a common path, remarkably (surprise) similar to our own.’


54. The author continues: ‘Instead of answering the question directly, I asked the student why he assumed that the imperial Chinese legal system at some point would have developed a doctrine similar to promissory estoppel. Upon reflection, the student recognized he had erroneously assumed that any legal order with a law of obligations would inevitably face the question of whether to give legal effect to promises that induce detrimental reliance. As we talked, however, he began to appreciate the extent to which promissory estoppel in our own legal system was inextricably connected to problems created by the requirement in classical Anglo-American law that enforceable contracts be predicated upon consideration. What had seemed at first to him a natural and obvious question common to any system of jurisprudence now began to look more like a parochial concern of one particular legal system that had chosen to predicate its law of obligation upon the doctrine of consideration’ In See Janet E. Ainsworth, ‘Categories and Culture: On the Rectification of Names in Comparative Law’, Cornell L. Rev. 82 (1996): 19–42.

55. As Professor Andrea Bianchi once told his students during a class in International Law Theories (IHEID: 2012–2013).

56. As will be extensively discussed, the 1926 Commission on Extraterritorial Jurisdiction in China arguably provides the best example in this sense. See Report of the Commission on Extraterritoriality in China, Peking, September 16, 1926: Being the Report to the Governments of the Commission Appointed in Pursuance to Resolution V of the Conference on the Limitation of Armaments. Govt. Print. Off., 1926.

57. Koskenniemi argues that the ‘lack’ of international law in European colonies was first compensated by the expansion of natural law: “For early nineteenth-century lawyers, native communities remained outside international law in the technical sense that the Droit public de l’Europe did not regulate their relations wit Europeans. It sufficed that the individuals – Europeans and natives – would receive the protection of a natural law that would treat them as equal traders or travellers, equally obliged to show courtesy and to remain from violence against each other. For the situation in the colonies, this was for a long time quite sufficient. The extension of natural law – in particular that concerning property – explained why the natives were bound to honour the lives and possessions of Europeans moving beyond the reach of European legal principles and on what basis the commercial relations between Europeans and natives would be conducted.’ In Martti Koskenniemi, The Gentle Civilizer of Nations. (Cambridge University Press, 2002). 115. More specifically on extraterritoriality see Turan Kayaoğlu, Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China. (Cambridge University Press), 34.


59. For an excellent account of language and postcolonialism, see Bill Ashcroft, Gareth Griffiths and Helen Tiffin, *The Empire Writes Back: Theory and Practice in Post-Colonial Literatures*. (Routledge, 2002).


62. With reference to the Italian version of the Prussian capitulatory treaty of 1761, an example of the difficulty of translating capitulatory treaties into Western languages is provided by Noradounghian in a comment on his Ottoman Empire’s Treaties Collection: ‘La traduction de ces capitulations, ainsi que de beaucoup d’autres, n’est pas littéralement conforme au texte turc. L’Epilogue, en particulier, qui constitue les ratifications, est tout à fait différent dans l’original turc.’ See Gabriel Noradounghian, *Recueil d’actes internationaux de l’Empire ottoman: 1300–1789*. Vol. 1 (Paris : F. Pichon, 1897). 308, N. 34.


65. 'Three Japanese, the only survivors of a junk’s crew of fourteen men, landed on Queen Charlotte’s Island, and were captured by Indians, and afterwards redeemed by an English gentleman at the Columbia River settlement, and by him sent to England, and thence to Macao, where they were under the direction of H. M. chief Superintendent, who placed them in the family of the Rev. C. Gutzlaf F. Here they were employed in teaching him their language...’ In Peter Parker, *Journal of an Expedition from Singapore to Japan: With a Visit to Loo-Choo, Descriptive of These Islands and Their Inhabitants, in an Attempt with the Aid of Natives Educated in England to Create an Opening for Missionary Labours in Japan*. (London: Smith & Elder, 183). 1.

