THE SHANGHAI MIXED COURT 1863-1880—COLONIAL INSTITUTION BUILDING AND THE CREATION OF LEGAL KNOWLEDGE AS A PROCESS OF INTERACTION AND MEDIATION BETWEEN THE CHINESE AND THE BRITISH.

by

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ABSTRACT

The Shanghai Mixed Court was established in 1863 amongst protests from both the Chinese and the British. The court was originally intended to deal with criminal cases that arose between Chinese and British who were living in close proximity but quickly expanded its scope to encompass civil cases. Shortly afterwards, the court also began litigating both civil and criminal between Chinese who operated in the foreign settlement. This occurred in part because there were no other effective institutions to perform these functions and in part because as people learned to operate within its loosely defined structure, the Mixed Court provided an alternative to adjudication for those who wished to operate outside the formal auspices of the Qing Imperial system. My aim is to grant agency and due credit to the Chinese in the development of one of the most enduring colonial institutions in Shanghai through an examination of the court.

Keywords: Colonialism; Shanghai; Legality; Shanghai Mixed Court; Qing Dynasty

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Introduction: Why study the Mixed Court of Shanghai?

As an institution, the Mixed Court (*huishen gongan*—会审公案） of Shanghai was used both by the Chinese and foreigners living in the International Concession. Although it was not novel as a colonial institution, the Mixed Court created a new legal space where actors in Shanghai became aware of their broadening legal options. It became a place where foreigners and Chinese from all parts China mingled and worked together in a semi-colonial environment on a daily basis. The Mixed Court not only provided another outlet for litigation, but also allowed all those who used it and wrote about it to come to terms with some of the changes that were happening in the city around them and discuss them in concrete ways.

From its inception in 1863 until it became an entrenched colonial institution in 1898 (with the rewriting of its constitution and the appointment of foreign trained Chinese judges), the Mixed Court was a highly contested but rather easily navigable arena. An examination of the court from its birth through its adolescence provides a glimpse of life in Shanghai, as it becomes a place where the Chinese and British jointly created a new colonial institution while trying to figure out how to navigate the terms of their new living arrangements. By conceiving of the Mixed Court in its early incarnation in these terms, we can begin to rethink pre-existing notions about the court which have long dominated colonial and treaty port historiography.

The aim of this thesis is threefold: to contribute to the growing body of literature on legal culture in Qing China by examining how people understood the Mixed Court; to outline the contentious nature of some of its early rulings through an examination of both English and Chinese and to give the reader a glimpse into some of the everyday interactions between

Chinese and foreigners. These aims will be met by providing an institutional history of the early years of one of the most influential colonial mechanisms in Shanghai.

Conceiving law and legitimacy:

If we conceive of law of as being pervasive in important aspects of human life and of collective human behaviour as being shaped directly or indirectly by law, we can begin to understand the impact of colonial legal institutions.[1] Colonial ventures sought legitimacy through action and their principal means of generating legitimacy involved the incorporation of people (rather than land).[2] Like other colonial institutions, the Mixed Court at Shanghai was created through a composite and ongoing process that relied on the incorporation of ideas and practices not only from the colonizing power, but from the Chinese officials and inhabitants of Shanghai who used the court. This depended not only on the establishment of the institution itself, but on the rhetorical ways the court was represented, on the learned behaviours exhibited at the court and, most importantly, on the experiences people living in the city brought with them to the court.

In her book *Social Power and Legal Culture, Litigation Masters in Late Imperial China,* Melissa Macauley, "explain[s] how legal practice (as understood in archival case studies) and popular culture coalesced into late imperial Chinese legal culture."[3] My aims with this thesis are similar, yet they are limited to understanding the forging of legal and cultural legitimacy at the Mixed Court. Throughout the thesis, I argue that the legitimacy which the court had acquired by 1902 was cultivated over forty-odd years rather than directly imposed.

Conceptualizing judicial space at the Mixed Court:

Among the literature on legal cultures and legality, Pierre Bourdieu's notion of a "judicial field" is particularly useful because it allows us to think of actors in legal fields as individuals or overlapping groups rather than as artificially ascribed categories. According to Bourdieu, a legal "field", like any other social field, is organized around a body of internal protocols and assumptions which produce characteristic behaviours and self-sustaining values of a type we might informally refer to as "legal culture".[4] The establishment of this judicial space (or field) implies a borderline that divides "those qualified to participate in the game, and those who, though they may find themselves in the middle of it, are in fact excluded by their inability to accomplish the conversion of [this new] space."[5] Thus, by thinking of everyone who used the Mixed Court as individual actors pursuing their own interests, rather than dividing them into false groupings of "Chinese" and "foreigners".

At the Mixed Court then, those who learned how to operate within the judicial field held an advantage over those who did not. This newly created legal field was based heavily on the amount of cultural capital[6] invested into it and which was created by appealing to the common sense of the groups involved.[7] In the case of the Mixed Court, the creation of cultural capital required finding a mutual ground of understanding for the various groups that had a vested interest in it. However, for Bourdieu, consent of everyone using this space was needed in order to create new categories of operation—or regulations—and in his words: "[t]he capacity to make entities exist in the explicit state, to publish, make public (i.e. render objectified, visible, and even official) what had not previously attained objective and

collective existence...represents a formidable social power, the power to make groups by the making of common sense, the explicit consensus of the whole group."[8]

On the one hand, this new legal culture was inextricably linked to the British presence in Shanghai, but on the other hand it cannot be separated from the Chinese whose acceptance of the laws, regulations and precedents by which judicial decisions were structured was a prerequisite for the functioning of the system.[9] Here, Bourdieu provides a wider and more approachable way to theorize about legality. He avoids the limiting constraints of the instrumentalist view of law (which envisions it as a tool of the dominant groups and a direct reflection of existing social power relations), and the formalist view (which asserts the absolute autonomy of the juridical form in relation to the social world). Both of these approaches fail to acknowledge the interaction between the law and the social world. For Bourdieu, this social world cannot be ignored because it is within it that judicial legitimacy is cultivated and exercised.[10]

Envisioning Chinese and Westerners as individual actors learning to moderate their behaviours in a semi-unknown, quasi-legal and foreign (to both groups) field, allows for a clearer understanding of how people interacted on a daily basis at the Shanghai Mixed Court. Since interaction in the legal field reflects the shaping influences of social, economic and psychological factors, the law and legal institutions form a sort of microcosm of the society in which they operate. Patterns within legal fields are colored by tradition, education and the daily experiences of previous legal practices and institutions. This means that the learned structures of a legal system exhibit their own particular forms of habitus.[11]

Through the creation of this legal habitus, Bourdieu wants us to envision legal culture as a "quintessential instrument of normalization"[12] by which traditional norms could be displaced. Bourdieu rightly says that this process of normalization is often facilitated through enforcement and coercion. However, this should not lead us to overlook the fact that law cannot function unless it is at least tacitly accepted by those in a dominated position. To some extent then, we have to accept that law, in order to function, must "work by the light of local knowledge."[13] The Mixed Court was readily acknowledged as imperfect, but its creation and the function of its laws did initially serve an important purpose: by allowing all actors to partake in the formation and procedures of the court, it necessarily reflected the needs of those who used it which indicates that the court had a firm grounding in the legal traditions which already existed in the city.

Conceptualizing legitimacy and legality at the Mixed Court:

Legitimacy in a colonial context is produced through monitoring, the imposition of regulations and repeated reaffirmation of those regulations.[14] If we think of legitimacy in these terms, we can see that Chinese people played a large role in the creation and reaffirmation and consequently the acceptance, of colonial legitimacy. Through the creation and maintenance of legal structures and regulations, we see how the British operating in Shanghai envisioned their stakes in these institutions. The initial British contempt for the Chinese legal system was often based in misunderstanding and led the British to yearn for a firmly rooted colonial legal system founded on common law in Shanghai. However, the British quickly came to realize that this was not a feasible option and that they needed to

concede to the Chinese and adapt their British conceptions of legality to the local surroundings.

The Mixed Court tried to meet sufficiently the needs of those who had legal experiences within its jurisdiction and although its success in the early days is questionable, it did begin to address some of the societal complexities and intricacies of Shanghai in new and insightful ways. However, it was not enough for the court to be in operation; it also needed a working notion of legality. Here, the legal sociologist Nikolas Luhmann offers useful ways for thinking about the law. For Luhmann, legality can be expressed as the "[c]ollective social life that embodies normative rules which exclude other possibilities and lay claim to be binding with a degree of success."[15]

According to Luhmann, trials represent the "paradigmatic staging of the symbolic struggle inherent in the social world: a struggle in which different, indeed antagonistic world-views confront each other."[16] In the judicial field, a decision is 'black' or 'white'—guilty or not guilty, liable or not liable.[17] This dichotomous construction of the outcome of confrontations in courts is right, but somewhat limiting. To avoid these narrow confines, trials at the Mixed Court should not be understood in the constricted specifications of East versus West because rulings were never so simple. Rather, highly nuanced judgments often clouded with ethical judgments and contingent on the moral reasoning of the judges involved were often handed down. Because the codification of law was loose and therefore malleable, cases were sometimes based on the whim of a judge and the outcomes were highly dependant on whether he was sitting alone or overseeing a case with other judges and

assessors. Also, given the difference in legal training and traditions of each judge, their judgments were often not contingent on precedent (and sometimes seemingly on anything at all), but based heavily on individual cases.

Interestingly, early users of the court do not seem to have seen this unpredictability as a limitation. Both Chinese and Western litigants were often aware that the unfamiliarity and quirkiness of the court offered them a chance to get the decision that they wanted in court, especially for people who knew that they had no chances of winning their cases under Qing law. There were obviously deficiencies in the Qing legal code, especially in Shanghai, where the local character of the city gave rise to many unforeseeable problems that were not easily rectified through the local government apparatus that was in place. Understanding that Chinese people did have a sense of legality makes it easier to understand why they wanted a stake in the Mixed Court: for them, it was simply another avenue for litigation. Those who could afford it (or for those who felt they had no other options), readily used (and whenever possible, exploited) this new judicial field. Such "legal gambling" was risky, but resulted in the carving out of new legal paths in the settlement. The Mixed Court then, was not necessarily better than the Qing legal apparatus, it was simply another avenue for opportunistic users and those willing to take a chance with the law.

Conceiving and understanding legality in Imperial China:

It was long assumed in the West that China had no legal culture. However, Philip Huang's important work shows that the processes of mediation, arbitration and formal and informal forms of justice were embedded in the Chinese legal tradition, which helps to

understand how the Chinese in Shanghai adapted so easily to this new and seemingly foreign institution. If the Chinese played a role in contributing to the creation and acceptance of legitimacy of this colonial institution, and if, as Huang contends, the Chinese had a sense of legality, the Mixed Court becomes an arena where the Chinese contributed to the rules of this local system. Huang's claim that many cases did not actually make it to court because they were mediated or arbitrated at the local level by villagers, family members or magistrates shows that Chinese people had a deep and thorough understanding of how law operated in a local context. This understanding often translated into the desire and need to negotiate outside the formal boundaries set out for them by the state in order to save money and time. For Huang, the disjuncture between the formal law of the Qing and the informal avenues of mediation (*tiaojie*—调解) and arbitration (*duanding*—断定) allowed for the creation of a third realm of justice, where these two spheres met, overlapped and interacted.[18] Only when informal means of imposing justice failed were cases tried in court and this was most likely to occur when gross inequalities in power or status existed between the actors involved in the litigation process.[19]

Contextualizing the Mixed Court in Shanghai also necessitates a clear understanding of how some of the inherently Chinese legal concepts such as *qing* (情), manifested themselves at the court. *Qing* (like some other Chinese legal notions) has no equivalent in Western legal tradition, but played an important role in the way that law was envisioned and operated at the Mixed Court. *Qing* can be loosely translated as an appeal to others' feelings or a sense of common decency reflected through a common understanding of Confucian humanity (*ren*—

仁), as well as the moral principles governing both nature and society (*tianli*—天理). *Li* (理), another Chinese notion, refers to ideas of discursive reasoning and logic whereas *fa* (法) is in many ways similar to our Western conception of law.[20] In late imperial China, *qing*, *li*, and *fa* were conceived of as existing in symbiotic relation to each other: when conflicts arose one began with an appeal to *qing*, and only when all avenues were exhausted did one turn to *li*. If this proved unavailing, the last resort was to invoke *fa*. Therefore, traditionally, *fa* was believed to abide by the principles of *qing*.[21]

The Qing （清, not to be confused with the concept 情 described above） Courts' conceptualization of the law and 'civil' cases therefore stressed that ideally they should not occur at all because morally superior men would rectify their grievances before invoking the law. Explained another way, there were three types of civil cases—small, medium and large (*xiaoshi*—小事， *zhongshi*—中事, *dashi*—大事) —which were incrementally more severe in degree. The small, or petty cases, were seen as problems to be dealt with and rectified within the community. Through the *baojia* (保甲), a state-imposed system of mutual control and responsibility within society, the state successfully exonerated itself from judging many cases, leaving mediation and arbitration to the public.[22] The problem, as Huang points out, was that by the late Qing, a system designed for a peasant society was at odds with the increasingly complex and sophisticated interactions that were occurring in places like Shanghai, causing an increase not only in litigations, but also in litigation abuse.[23]

Chinese legal tradition and political discourse have had problems conceptualizing the opposition between state authority and individual rights because they often tried to show how

the state and society existed in harmony. This has been explained by some as the "Confucianization" of the legal system. Here, the legal system became concerned with the maintenance of the existing social hierarchy and compassionate representations of the state and therefore needed to be adapted to the practical realities of Qing China.[24] In other words, in a perfect Confucian state, the Qing government envisioned the need for litigation (and consequently for a legal apparatus) to be minimal. Thus, the proliferation of litigation was blamed either on endemic problems in society or, more typically, on "pettifoggers" (*songshi*—讼师, *songgun*—讼棍 and *yadu*—衙独[25]) who goaded people into litigating and sponged money from them.[26] Litigation masters were seen as enabling individuals to free themselves from these local power arenas by appealing to official avenues. This inevitably meant that the "pursuits of unwarranted appeals and circumventions of lower courts, even false or exaggerated accusations, were all part of the systematic order of formal dispute resolution in Qing China."[27]

By the time the Mixed Court was established, the Qing was crumbling under the impact of foreign aggression and internal unrest. In Shanghai, this problem was compounded by increasing commercialization, urbanization and dealings with non-kin strangers. These changes were occurring simultaneously and explain in part why the Chinese in the city were not completely afraid of this new system of litigation: not only did they understand legality to be part of the established social order and as a measure to restore *qing*, but it was also seen as a way to mitigate some of the transformations they were experiencing in the city.

Shanghai in the 1860s and 1870s was a unique city—a place where Chinese were

willing to accede to new forms of justice, which inadvertently created a new realm outside the auspices of the Qing legal system. Philip Huang's conception of "realms of justice" and his acknowledgment of the synchronic and diachronic changes within the Chinese legal system supports my contention that the Mixed Court had local characteristics and nuances. At the time, residents of Shanghai came from all over China, and variations in geography, economic development and population density from their sending areas meant that ideas among its inhabitants about what constituted legality were already diverse and fluid. Arriving in Shanghai already meant being faced with a new legal environment, so, although the Mixed Court was foreign, learning to navigate another legal system was one more step in a gradual process, rather than a complete rupture.

The Qing code also allowed for improvisation and judicial creativity that was common practice in Qing legal circles since it needed to be adaptable to local sensitivities and was not completely codified.[28] This judicial creativity allowed for local autonomy and interpretation of laws based on local customs, traditions and practices and gave judges the opportunity to foster the formation of legitimacy at the Mixed Court. Judges, who were not (at least at the beginning) bound by precedent, could create new ways of maneuvering the bureaucratic apparatus already in place.

Shanghai—meeting with the West and concepts of modernity:

The Mixed Court as a fluid, changing, improvised joint creation of Westerners and Chinese must be understood in the context of a city that was also fluid, improvised, and jointly created. In *Beyond the Neon Lights: Everyday Shanghai in the Twentieth Century*, Lu

Hanchao contends that we shortchange ourselves when we fail to try to understand and consider the rhythms of daily life. However, as Jeremy Wasserstrom correctly points out, Lu seems to define 'everyday Shanghai' as excluding it of foreign residents and as separate from political life.[29] Seen through the lens of the Mixed Court, Shanghai becomes a place where Chinese and foreigners interacted, associated and learned from each other by working through their cultural differences and conceptions of legality. As Lu attests, deeply contradictory compunctions of admiration and fear existed among the Chinese residents of Shanghai about the foreigners who lived amongst them. However, at the same time, most inhabitants of Shanghai were ready and willing to learn how to operate within the newly formed institutions in the settlement. Initial ambivalence turned to an appreciation and acknowledgement that these colonial institutional mechanisms were something to be used and possibly exploited.

In the minds of most of its contemporary observers, the Mixed Court was not only an archetypal "modern" institution, but it was also "Western." In fact, many observers failed to differentiate between the two. Yet, as much recent scholarship, especially in the field of colonial and postcolonial history, has shown, this equation is much too simplistic. The institutions that were impressed upon Shanghai were not originally British creations, but rather a mishmash of other institutional forms that existed in various manifestations throughout the British Empire and China. They were initially unsuited to the situation in Shanghai and were adapted in order to be effectively transplanted. Laura Ann Stoler conceives of colonies as "labs of modernity—genealogical trajectories mapping what

constitutes metropolitan versus colonial inventions that have precipitously shifted course."[30] Then, the contention is not that there are certain ingredients necessary to create modernity, but rather, that through this highly involved process of interaction in colonial spaces, modernity ascribed to its environs. For Stoler, modern ventures were instrumental in generating the conditions necessary for the creation of colonial spaces. Then, as she points out, there is the need to be skeptical about the tensions of empire which come across as dichotomous constructions of colonizer and colonized and which reduce historical experience to two ascribed categories because this process unhinges nuance from historical experience, as if these two ascribed categories fulfilled all the needs of the people described in the terms that they present.

When thinking about modernity in this way, a further interrogation of the ideas of what made a city "modern" is needed. Since the facts we associate with modernity began in the West, we easily attribute their appearance in other places to Western influence. In the same way, their non-appearance is seen as the failure to respond properly to Western influence. Yet, we know the modernity of such institutions as the Mixed Court did not lay solely in their "Britishness," but in the novel ways that British, Indian, Manchu and Chinese ideas (and many others) were synthesized. Focusing on how different people responded to colonization in different ways keeps the spectrum of possibilities open about how colonizers and colonized people envisioned modernity and recognizes that people reacted with varying mixtures of instrumentality and enthusiasm to these "modernization" projects.[31] If modernity had its origins in the "reticulations of exchange and production encircling the world,"[32] as

Timothy Mitchells suggests, then it was these precise interactions between the West and the non-West and how these were constructed in space and in time which are important for us.

Fredric Cooper usefully points out the logical fallacies in much Western scholarship of colonialism. Modernity, as Cooper shows, is envisioned by some as a powerful claim to singularity; at the same time, it is defined as a goal to which the non-Western world should aspire.[33] For Cooper then, conceiving of modernity as a condition or a representation depends heavily on who is representing it and what conditions it is operating in. The fact is that representations never match the original, especially when the original exists only as something promised by a multiplicity of other imitations and repetitions.[34] Stated simply, for colonized people there are two options: they are either conceived of as the polar opposite of what modernity embodies or, if they attempt to create their own modernities, they necessarily deviate from the original and are therefore inferior.[35] This idea is potentially useful for imagining the dilemma faced by those who represented the court—did they want to represent Shanghai as a "traditional failure" or a "modern copy" of a Western original? These tensions played out in the way that Chinese writers characterized some of the cases at the Mixed Court. They write with an apparent awe of foreign institutions and laws which often contrasts sharply with their empathy for tradition and their guarded skepticism towards these same things. Making sense of the "non-modern" and "modern" elements which existed together requires an acknowledgement that "modernity is constituted by tensions that relate to each other asymptomatically."[36] Thinking through these tensions and imagining how they were articulated in the creation and implementation of new laws and the ways that they were

represented more accurately represents the interactions witnessed at the court.

As Lu Hanchao points out, these new ways of envisioning modernity enable us to move beyond the modernization-is-equal-to-westernization-is-equal-to-urbanization triangular paradigm that functioned as the main catalyst for treaty port scholarship. Shanghai became a space where the interactions between the West and non-West took place on a daily basis and necessarily worked together in a symbiotic way. The ability of its citizens to adapt was what made Shanghai a truly cosmopolitan and unique city, as reflected in this quotation:

> "[p]erhaps one of the things making Shanghai one of the unique cities in the world is that it contains so many striking contrasts. There has been an evolution from former days to the modern period, but vestiges of the old China are apparent on every side. On some streets we may see at the same time the wheelbarrow crowded with passengers and the automobile, the old fashioned Chinese shop with its front open to the street, and the modern counterpart with its plate glass windows...."[37]

So, Shanghai was represented as modern by those who saw it, but these same people were also glaringly aware of its traditions. In this same way, different people experienced different embodiments of modernity and therefore it was represented in the city in dissonant ways.

It is because the development of Shanghai has often been linked in scholarly work to the emergence of modernity in China that we must be critical of this concept and how it was conceived by those experiencing everyday Shanghai in the mid-to-late nineteenth century. British merchants who visited Shanghai spoke of the city as being a Western one:

> "On my arrival in Shanghae [Shanghai] I was struck by the thoroughly European appearance of the place; the foreign settlement, with its goodly array of foreign vessels occupying the foreground of the picture; the junks and native town lying higher up the river... spacious houses, always well, and often sumptuously furnished; Europeans, ladies and gentlemen, strolling along the quays; English policemen habited as the London police; and a climate very much resembling that which I had experienced in London... In what is called the British portion of the settlement there is a sort of self-constituted municipal organization, under the authority of which certain wharfage or jetty dues are levied and applied to the maintenance of the roads and police."[38]

For sojourners, Shanghai did not represent the 'East', but embodied civilization and the 'West' exemplified by its consumption, electric lights, broad streets and technology.[39] It was exciting and exotic, yet it had all the amenities and comforts of home. However, for those who made their living and operated in the city on a daily basis, this conception was inevitably much more nuanced and complex, as illustrated in the minutes of the Municipal Council They dealt with an apparently endless stream of issues that ranged from problems relating to the exhumation of bodies in the settlement to the procedures used by police officers for identifying Japanese Samurais and debating whether they should be allowed to carry their Samurai swords in public. The issues raised at the Municipal Council did not stop there: they had to notify the public about rotten meat epidemics in English and Chinese and they were forced to place a temporary ban on pony riding in the settlement because a group of incensed Chinese stormed the Council office to protest a horse race, which had apparently taken place on the main street in the middle of the day. The Council also dealt with a notorious crime

team consisting of a Chinese and a foreigner who could not understand each other, but managed to work together to extort money from numerous people and an instance where a foreign constable was attacked and beaten by a gang of coolies.[40] This laundry list of events that transpired on a daily basis illustrates the complex types of problems the British and Chinese officials were forced to deal with. It was a place where old and new intertwined and people had to slowly develop a modicum of understanding of each other.

The cumulative effect of these economic forces, social changes, and acculturation worked together to produce complex and diversified communities in Shanghai. With this in mind, it seems much more theoretically useful and practical to examine how the old and the new operated together in Shanghai. Looking at how residents interacted with each other, not as "Chinese" and "foreigners", but as historical subjects helps to move beyond the construction of Shanghai and Shanghainese identity as a purely colonial endeavor. For many Chinese, the emergence of modern amenities in Shanghai slowly filtered out "like concentric circles, affecting the discourse and ways of life of most people [in the city]" as witnessed through the incursion of advertisements and other forms of cultural production.[41] These Western amenities, which made peoples' lives in Shanghai more pleasant, were instituted almost as quickly as they were in London. They also allowed for small, tentative steps in awareness and understanding to accrue, making cultural transactions between these historical subjects more familiar and therefore easier to accept.

Treaty obligations and the working outside the formal auspices of power:

There are lingering notions that after the signing of The Treaty of Nanjing, the British imposed their institutions onto the Chinese without resistance or large problems. However, in the 1860s and 1870s, these new institutions were highly contentious. By examining how the Mixed Court grew through the processes of meditation, interaction and accommodation with the Chinese, a better understanding of how and why it became such an influential institution fifty years later in Republican China is gained. The enlargement of this influential city owes much of its legacy to the British who instituted many important urban and developmental changes which were not novel to Shanghai but had already been tested in India.[42] It must, however, be acknowledged that the British operating in Shanghai were not working under the auspices of a formal colonial power, but in a sort of uneasy coexistence with a formally sovereign, though no longer fully independent, Qing China. Both sides were motivated by a necessity to operate effectively, which often meant instituting structures that went beyond those formalized in their treaty obligations. As well, many of these initiatives were responses to the pressures and problems faced by the consuls in Shanghai, who were often required to make quick and decisive decisions on the edge of empire and who, in most instances, could not wait for responses from London. At first sight, it appears as if the institutions in Shanghai were created through dialogue between two monolithic actors but neither of these actors was monolithic in their expressions of power. British officials living in Shanghai ultimately answered to London, but through the channels of Hong Kong or India. Likewise, for the Chinese, the Imperial Qing government was also not a monolithic actor as guilds, merchants

and individual Qing officials played a large role in formulating policy. This created an opening which allowed for a fair amount of leeway for maneuvering within the important port city.

Literature on the Mixed Court:

In the early 1960s Mark Elvin dedicated a short study to the Mixed Court in the pre-Republican period and concluded that the court was in essence a Chinese court.[43] Since then, scholars have neglected the court in its early stages, choosing instead to focus on the autonomy it exercised in the Republican Era.[44] The first of these studies on the Republican-era court is *Order and Discipline in China: The Shanghai Mixed Court 1911-1927*, written by Thomas B. Stevens. It contains less than a page on the Mixed Court before 1911 and it relies solely on English sources which became available in the 1980s. In this work, he expounds that the Chinese conception of legality was essentially at odds with the order and institutions imposed on them by the British.[45] The second study is an unpublished PhD dissertation by Tahirih V. Lee, titled *Law and Local Autonomy in the Mixed Court.* She, like Elvin, contends that the institution was a local one, operating with a great deal of autonomy in the International Concession. Like Stevens, Lee pays surprisingly little heed to the pre-Republican court, barely addressing how this institution came to exercise such independence in the settlement. Therefore, she failed to explain how these positions of power that were so deeply entrenched and accepted during the period of her study were often highly contested and whimsical when they were initiated. She accurately states that "[p]erhaps when an institution is in operation for many decades, its personnel become oblivious to what they

are perpetuating. The British in charge of the Court knew they were in charge of it. They jealously guarded their monopoly over prosecutorial discretion and formulating sentences. At the same time, they pushed beyond the territorial confines of their jurisdiction and found ways around the limitations on their power to punish. Yet, all the while, they used a legal procedure influenced by Chinese tradition. Even the jurisdiction of the Court was defined by a mixture of foreign notions of jurisdiction. And one of its written sources of law issued by foreigners, Municipal Council proclamations, used a traditional Chinese form."[46] Her assertion that procedure at the Mixed Court was heavily influenced by Chinese tradition and served the needs of prominent and wealthy Chinese and foreigners is accurate, yet she fails to account where the unique character of the Mixed Court evolved from.

Bearing this in mind, it seems imperative to point out that it was amidst much protestation and apprehension from the foreign residents in the International Concession that the Mixed Court was actually established in 1863 (rumblings of discontent were also heard from the Chinese). Its beginnings were humble and uncertain, owing in large part to the ambiguity surrounding its initial functions, proceedings and mechanisms. Yet, by 1902 the Mixed Court became a formidable and deeply embedded institution, exercising substantial influence over the Chinese and British who resided in the International Concession. The Mixed Court in Shanghai was at first a deficient institution through which those living under the auspices of British power came to operate within this partially codified system.

Sources:

Three main archival sources were consulted for this project. Most of the English

sources about the Mixed Court come from colonial records of the Foreign Office at the National Archives of the United Kingdom. In addition, many afternoons were spent at the Shanghai Municipal Archives and the Shanghai Library seeking out both English and Chinese sources on the Mixed Court. The majority of the Chinese sources are drawn from *Shenbao* (申报),[47] a Chinese language newspaper launched in Shanghai in 1872 as a commercial enterprise and printed daily until the Communists occupied the city in 1949 (it is still the longest continually printed daily newspaper in China). Although *Shenbao* did not reflect the street realities in Shanghai, "what it did mirror, and quite accurately, were the confused realities of the modern Chinese mind."[48] Those who were coming to terms with the changes in the city and learning to use new discursive tools would first write in *Shenbao.* Barbara Mittler chronicles the early years of the paper in *A Newspaper for China? Power, Identity, and Change in Shanghai's News Media, 1872-1912.* She states that the newspaper was a Western-looking broadsheet newspaper, created by cleverly borrowing from the style and tone of the officially published Qing government paper *Jingbao* (京报), and fusing it with Western-style journalistic writing. Editors of *Shenbao* also took great pains to distinguish the paper from the old-style Chinese press without alienating their readers.[49] The paper succeeded because it was able to "undergo a certain degree of sinicization"[50] or "cultural translation,"[51] making it more acceptable to its readers.

The paper was soon acknowledged as an important discursive outlet and Mittler points out that reformers like Liang Qichao (梁启超) noted that "[a]lthough public opinion arises from many sources, the most powerful among the organs that produce it are newspapers."[52]

Shenbao wanted to be an objective transmitter of news, but its writers quickly became characterized as the mouth of the citizenry (报纸为民之口)[53] offering highly critical editorials guised in Confucian idioms. This was a logical response given that the writers and readers of *Shenbao*, many of whom would have been out-of-work examination candidates, had access to "thousands of quotations perfectly familiar to the millions of scholars who have hidden the whole of the Thirteen Classics in their capacious memories."[54]

In its early days, *Shenbao* ran a relatively impartial daily column covering the events and proceedings at the Mixed Court. However, these daily announcements about the repeated arrests of the same notorious prostitutes and drunken, brawling sailors were soon replaced with less frequent and longer, more detailed articles outlining specific cases of interest and how they effected the settlement.[55] Their upbeat language (compared to *Jingbao*) is often entertaining and highly amusing. The editorials, usually in the form of a *lun* (论) or *shuo* (说), offer great insight into the ideas and thoughts of Chinese living in the International Concession. All the editorials used in this thesis were written anonymously and although it is impossible to verify who the authors were, it is likely that the same few people wrote most of the articles. These anonymous writers took on many of the concerns of late nineteenth century Chinese reformers ranging from suggesting ways to abolish prostitution to expounding concerns over carriages and bicycles to instituting new methods of disaster management. However, these articles were published long before Kang Youwei (康有为) and Liang Qichao broached these subjects.[56]

The editorials and reports in *Shenbao* are often told like stories, full of narrative detail

and concrete descriptions. Writing techniques such as the use of foreshadowing to create anticipation, long used in Chinese storytelling, were invoked. The editorials often dealt with subjects in the same stylistic way that would have been familiar to Chinese readers of "court-case stories" (*gongan xiaoshuo*—公安小说), which were extremely popular fictional narratives published from the second half of the sixteenth century.[57] *Shenbao* writers also often reflected an inherent dichotomy of Shanghai life: its simultaneous acceptance and rejection of the foreign seen through cultural transactions that were constantly taking place in the city. Shanghai was seen by its inhabitants as the test case for the foreign presence in China, which some viewed in a positive light, where more conservative imagined it contributing to the moral degeneration of the societal fabric of the city. The writers of *Shenbao* offered exciting editorials which are often filled with contradictions and tensions that they must have been trying to work through for themselves in their reporting.

Although the sources are delightful to read, they should be approached with a sense of guarded skepticism. Archival legal sources, notes Macauley, "...are structured by narratives that seek to convince the intended reader of the need for pardon or punishment."[58] Like the English colonial sources, each writer was vying for legitimacy and authority within the context that they were writing.[59] This skepticism is not meant to undermine the credibility of the sources, rather it is a cautionary warning that all writers in colonial contexts might have felt threatened by the systems and institutions that were new and confusing, and perhaps embellished the facts as a defensive response their experiences. Using both Chinese and English sources which covered the same institution does not guarantee a more balanced

approach, but it does lessen the degree of ambiguity surrounding what the actors thought about the court. In addition, *Shenbao* articles are not meant to be understood as the diametric opposite of the English sources, but they are to be understood and worked through together. This will hopefully produce a more balanced understanding of the court than previous histories.

The character of Shanghai and its inhabitants:

An editorial about Shanghai published in the 1880s in *Shenbao* accurately noted: "[t]hose who have to come do not leave, and those who have to leave come back (必坐者不去必去者得坐)."[60] The undeniable dynamism of the city led to the establishment of the British settler community in Shanghai which was more than simply a diplomatic or political venture. Shanghai became part of the world that was opened up through empire and it offered new opportunities for migration, personal advancement and employment. The livelihood of British expatriates in Shanghai—or "the Shanghailanders," as they called themselves—lay largely in non-transferable jobs, unlike those of sojourners, who often returned to Britain after short stints in Shanghai.[61] The Shanghailanders arrived with assumptions about China and although they called the city home, many viewed it and experienced it from a distance, but also lived in it. Their experiences were heavily steeped in the discourses, and even the vocabulary of British India, which was adapted to Shanghai living. British India did set the standard for their imperial culture; its customs, argot, even the construction of its history, served as a model for real and aspirational colonialism alike.[62] A recurring theme conveyed by the Shanghailanders lay in the ways that they envisioned their place in the hierarchical

structures that they helped create in the city. The British settler community in Shanghai created an operating colonial outpost for itself with all the institutions and structures that were transplanted from India. However, in British India, the British often lived in segregated enclaves, whereas the Shanghailanders lived as a minority interspersed amongst those they sought to colonize.

The British were not the only group to create a distinctive identity for themselves in the city. Although the modern term used to describe people from Shanghai, or *Shanghairen* (上海人), was not used in a publication until 1911, it was expressed before that time in ways which inferred the same meaning. *Shenbao* referred to these people in numerous discursive ways—as someone who had long lived in Shanghai (久居上海者), as a resident of Shanghai (居上海者), as someone living in Shanghai (上海居人 or in idiomatic, colloquial Shanghainese 上洋者), or, my personal favorite, as a "civilized person" (文明者).[63] To be from Shanghai meant (and still means) that its citizens held an aura of superiority guised in civil behaviour paired with a knowledge (not to be confused with an understanding) and appreciation of foreign things.

"To act tastefully is to act according to the norm," notes Bourdieu in *La Distinction.* There were definitely operational norms within which those from Shanghai could distinguish those who were not from the city, allowing for the creation of a strong regionally based identity., As Bryna Goodman points out, a concept of place or locality was a quintessential part of the creation of local identity in China, which was constructed in opposition to those not from the locality.[64] To say this, however, is not to deny the importance of ethnic

differences between these native place groups, but rather to emphasize the shared "Chineseness" of sojourners in the semi-colonial city: where common cultural practice and common subjection to foreign institutions constituted a common "Chineseness", even as native place differences divided them into multiple communities.[65]

So, Shanghai functioned as the cultural experimental test-subject on whom the often painful transformations of Chinese civilization were preformed. It became the model as well as the warning, embodying both the negative and the positive aspects of this transformation, and *Shenbao* became one of the devises through which these changes and transitions were mediated.[66] *Shenbao* articles on the Mixed Court underlined these regional divisions by not only specifically stating if people were from Shanghai, but directly noting when people involved in crimes were not from the city. A tone of apprehension and suspicion was common in articles dealing with Cantonese pawn shop owners and crime syndicates, which all seem to have been run by Cantonese (or perhaps only Cantonese criminals had the misfortune of getting caught).

This construction of Shanghai identity as moral and righteous in opposition to the seedy Cantonese is exemplified in an article about a case at the Mixed Court in June 1872. The author states that the police had been working extremely hard to break a Cantonese crime ring operating in the settlement and finally succeeded in apprehending two known criminals. When they were arrested, the unnamed Cantonese couple pretended not to know each other. It was later discovered that they had been married for 14 years but no longer lived together (a further testament to their immorality, according to the author). The judge was offered proof of

their marriage in the form of some book or document. Working for a crime ring operating in Shanghai, the couple was caught burglarizing a house (it doesn't specify whether the house belonged to a local or a foreigner, but since the case was being tried at the Mixed Court, it must have been in the International Concession). The thieves were caught breaking into a chest and told the judge that they had intended to take the stolen goods to the county market to pawn them when they were startled by the police. With a tone of chagrin, the author noted that this type of incident was all too familiar in Shanghai, referring to two similar cases in the past two days where Cantonese were tried and convicted for stealing in the settlement. The police noted that they were satisfied with their efforts to break the crime ring, but they were still concerned with the growing number of Cantonese running elaborate and well-organized crime syndicates in Shanghai.[67]

This case illustrates the discrimination against Cantonese, who were seen as unscrupulous invaders by the residents of Shanghai. This permitted the creation of Shanghai identity in opposition to these outsiders from the South. It is possible that as many local Shanghai residents were burglarizing houses and appearing before the Mixed Court, but the choice of the editors of *Shenbao* to repeatedly report cases involving Cantonese is understandable given the importance of regional identities in China. The ability of people from Shanghai to see themselves as "civilized" hinged on the perception that crimes in the city were committed by those from other places. This animosity towards outsiders characterized many of the cases that were relayed in *Shenbao* from the 1870s. This creation of exclusionary identities adds another degree of complexity to the International Concession

and how it operated. Rather than thinking of Shanghai residents in terms of West and East, these categories have to be broken down. After all, although there was a common sense of "Chineseness," in actuality people from various regions often had little in common with each other.

Events leading up to the establishment of the Mixed Court:

Although they are fairly well documented in other sources, a brief outline of the British arrival and subsequent events in Shanghai will provide the context in which the history of the Mixed Court can be understood. Once the British defeated the Qing Empire in the first Opium War and achieved their goal of accessing trading ports in coastal areas, they wasted little time establishing settlements. The Treaty of Nanjing, ratified on June 26th 1843 as the first in a long line of unequal treaties inflicted on China in the nineteenth century, contains three main sections. The first deals with compensation of British property lost in the war, the second addresses redress of grievances for merchants operating in China and the third consists of British demands beyond their existing trade rights in China.[68] Primarily a commercial treaty, it made no explicit provisions for the establishment of the settlements that quickly began to take shape in Shanghai and other ports. The British considered the rights afforded to them by the treaty to include the establishment of enclaves in ports to function "as the medium of communication between the Chinese authorities and the British merchants."[69] These were considered to be the minimum tolerable conditions for the continuation and gradual acceleration of trade by the British. Behind the Treaty of Nanjing were over two hundred years of British treaty negotiation expertise, the most notable and relevant being the

experiences of the East India Company and its dealing with the Mughals in India, the negotiations by the British plenipotentiary were quickly revealed to be a rather amateurish effort which was also distinguished by several glaring omissions; notably the most-favoured -nation-clause and provisions for extraterritoriality.[70]

The British interpreted their rights as meaning that they were implicitly allowed to acquire land, build settlements and undertake 'modernization' and 'urbanization' projects, as they had in India.[71] But nowhere did the treaty stipulate that the British could carve out particular pieces of Chinese territory and establish their own virtually independent municipal government with powers to regulate and tax the foreigners who lived within their boundaries. Nor did it state that foreigners could build roads, provide their own water, light and power, establish their own police forces or call on outside military forces for protection. It also did not state that they could establish a court that operated outside the auspices of the Chinese Imperial legal system. In many instances, the British in Shanghai operated outside the *modus operandi*, starting their own policy initiatives outside the formal networks of diplomacy or circumventing previous policies that became quickly outdated. In other words, diplomacy responded too slowly to the needs of the British in Shanghai. They were often made to negotiate terms with the Chinese authorities before directives from Whitehall could arrive. Sometimes these arrangements worked to the benefit of both the Chinese and the British and sometimes, as A.M. Kotenev poignantly points out in *Shanghai: Its Municipality and the Chinese*, they failed miserably: "...sometimes these [institutions] work through and build up into systems and are able to withstand serious criticism, but sometimes they are very clumsy,

falling down at the first skeptical thought."[72] Repeated failures of the British attempts to supplant the traditional colonial order in Shanghai slowly translated into an understanding that in order to operate effectively they would need to negotiate with Chinese officials.

In 1843, the British consul, George Balfour, rented a plot of land from the administrative head of Shanghai, or the *Shanghai daotai*（上海道台）.[73] The *daotai* was an important administrative figure in Shanghai society as exemplified in his authoritative action of renting land to the British. He often acted as the intermediary between foreigners and the Qing government. Between 1843 and 1860, the role of the *daotai* was expanded to include trade negotiations and conduct of foreign affairs at the port. This made "Barbarian management" an institutional duty for him, adding tremendously to his previous workload which included military surveillance and the management of the customs board known as the *Jianghaiguan*（江海官）.[74] On the administrative scale of Jiangsu province, the *Shanghai daotai* ranked below the provincial Governor-General (who sat at Nanjing), the Governor (who sat at Suzhou) and the provincial treasurers and judges. However, he was responsible for overseeing 2 prefects, 1 sub-prefect and 20 magistrates who all resided in Shanghai.[75]

When pressed to concede more territory, the *daotai* was quick to raise the point that it was technically illegal to sell outright any land that belonged to His Imperial Majesty, but he quickly surmounted this obstacle by granting the British permission to rent in perpetuity. This provided certain privileges to the foreign residents whereby the British consul could grant land titles to the inhabitants of the settlement.[76] Agreements between the early British consuls and the *daotai* were rather informal and often verbal. Lord Balfour obtained verbal

agreements that roads and bridges should be the responsibility of the residents living in the settlements and also suggested that they create a committee to govern the roads. In doing so, he unwittingly laid the foundation for the foreign administration of the settlement at Shanghai. Balfour took a pragmatic and realistic approach to the problems that he faced and responded to the needs of British citizens as they arose. In 1848, it took an average of four months to get a response on a policy issue from the Foreign Office in Hong Kong. Therefore, it was necessary for the consul to have the scope for initiative and freedom of action on the ground. Balfour and the subsequent consuls needed leverage to deal with emergencies as they arose and had to act through their own volition on many occasions.[77]

In 1845, Balfour and the *daotai* formalized their understandings culminating in the first Land Agreement of 1845. In this agreement, the Qing government strictly forbade Chinese from living in the settlement without a permit for fear that their citizens would move to the Concession in order to evade taxes. The document formalized the perpetual lease on the settlement but since China "retained sovereignty over the settlement, there could be no true municipal self-government, for no rules for the governance of the community had ever been promulgated by the direct authority of the Chinese government."[78] However, the exercise of rights was unmistakably out of the hands of the Chinese government while the foreigners governed their community with implied powers. The document also gave the foreign residents the power to levy taxes and maintain roads.[79] Local self-government in the International Concession of Shanghai therefore stemmed from an informal agreement between the two plenipotentiaries. In theory, the Qing government retained sovereignty over

the settlement, yet in reality the exercise of the rights of the municipal government had escaped the hands of the Chinese government and the foreigners governed their community with informal powers.

In 1853, a group of rebels, known as the Small Swords, and who were made up mostly of Guangdong and Fujian residents, supported the Taiping and revolted in an attempt to seize Shanghai. The inability of the Qing government to quell the Small Swords Rebellion prompted the British to establish a militia in order to defend the settlement. The security offered by the militia caused many Chinese in and around Shanghai to flee their homes and seek refuge in the settlement. By the time the Qing suppressed the Small Swords, Shanghai had changed dramatically, swelling in size and beginning to take the form of an urban metropolis.

Opinions varied about the developing situation amongst the British: those who profited by building houses and renting them to the Chinese were naturally in favour of allowing them to reside in the settlement, but some saw the difficulties and dangers that might arise by departing from the terms of the 1845 Land Regulations. The steady flow of refugees saw the population of the settlement increase by approximately 19,000 residents in the course of one or two years meaning that regardless of their opinions on the situation, by 1854 the character of the Concession was altered by the acts of foreigners themselves.

This living situation alerted Rutherford Alcock, who was the British consul at the time and he brought the matter to the attention of the *daotai*. The *daotai* stated that the influx of

Chinese refugees into the settlement was due to the British protecting them and building tenements. He reacted with a proclamation prohibiting Chinese residents in the settlement without special permission of the British consul. As a result, the following regulation was drawn up and issued in the form of a proclamation from the *daotai*:

> Any native, before being admitted to the Settlement, must secure a license from the consular and local authorities and enter into securities, in his own name, if wealthy and of sufficient standing, or otherwise in the person of two well-known residents, for keeping the Land Regulations and contributing his share to any general assessment. Any native guilty of a breach of registration rules will be subject to a penalty of fifty dollars for the first offence and cancellation of his license in the case of a repetition thereof.[80]

The Chinese were not the only ones to realize that amendments were needed to the Land Regulations of 1845 in light of the influx of refugees into the settlements. The consuls for the treaty powers conferred and drew up a new set of Land Regulations and in July 1854, the foreign land renters adopted the new regulations and officially dissolved the Committee on Roads and Jetties, making way for the establishment of the Municipal Council. The council was to consist of "... not more than nine or less than five [members who were] elected annually by foreign land-renters and ratepayers."[81] One significant feature of the amendments was the definite acknowledgment of Chinese sovereign rights to the land—the Chinese government was to receive an annual land tax, and land deeds were to be sealed by

the Chinese authorities. The consuls agreed to this in order to secure an article of great importance to them: article X of the 1854 Land Regulations stipulates that:

> ...being expedient and necessary that some provision should be made for the making of roads, building public jetties and keeping them in repair; cleaning, lighting, and draining the Settlement generally, and establishing a watch or police force; the foreign consuls aforesaid shall at the beginning of each year convene a meeting of the renters of land within the said limits, to devise means of raising the requisite funds for these purposes... *The committee shall be empowered to sue all defaulters in the consular courts under whose jurisdiction they may be.*[82]

Though the *daotai* gave his approval, there was no reference to these regulations ever being approved by the government in Beijing. Yet, out of this code, the Shanghai Municipal Council was born and it was a foreign political authority on Chinese soil, which would govern the International Concession as an autonomous body until 1943, when it was disbanded.[83] From then on, the highest powers in all government were delegated to the British governing body of the settlement: those of taxing and policing the community.

Between 1851 and 1864, the Taiping Rebels attempted unsuccessfully to overthrow the Qing government, yet they managed to wreak havoc throughout the southern Yangzi basin and establish their capital at Nanjing.[84] "We were once more overrun with refugees... [from the Taiping Rebellion] camping out on the Bund in front of the house, and on the roads near the stone bridge. It is frightful to see the numbers of women, aged and children, lying and living out in the open air, and not over abundantly supplied with food."[85] However, this time

the Municipal Council had the mechanisms in place to deal with this influx of refugees. Once again, the militia was called into action to protect the city: "... [i]t is a subject of great satisfaction to me that our resolution to save Shanghae [Shanghai] from the destruction that menaced it at the hands of the Tae-ping [Taiping] hordes has not only been productive of great benefit to trade, but has afforded a safe asylum and an escape from ruin to, so large a body of the industrious and respectable native population."[86] It appears that the foreign residents in Shanghai began to realize the endless possibilities for urbanization schemes in the city and slowly began planning for its further development and modernization by imposing their Victorian cultural norms of sanitation, order and planning on the city.

All this led to certain problems, one of which was how to exercise legal jurisdiction over the Chinese as well as foreign residents living within International Concession. How were Chinese and foreign offenders to be dealt with? What system of law should be adhered to within the settlement? Could the British and the Chinese rectify some of the larger divergences between the Qing Code with Western legal traditions? Should the Chinese or the British set up a court in the settlement? Or both?

Chapter 2:

The Shanghai Mixed Court—carving out a space for itself in Shanghai society:

> It is evident that [the residents of the International Settlement] expected to see a full-grown and perfect institution started in our midst, which would at once give us a remedy for all our commercial grievances against the natives, and suddenly reveal to the Chinese some miraculous code which they would seize upon as a kind of

revelation, and at once accept. Unfortunately, some of us know that every human institution is a thing of growth. Perfect men are not born,—they must be raised from children..."[87]

Report on the Mixed Court, 1868.

"Sir Henry Parkes called the settlement an "Alsatian," the Duke of Somerset called it a "sink of iniquity," and the district magistrate of the Chinese city of Shanghai described it as "nothing but riot and debauch."

Mark Elvin, *The Mixed Court of the International Settlement of Shanghai until 1911.*

In the only English-language scholarly work devoted solely to the Mixed Court in the period before the Republican Revolution, Mark Elvin states that soon after the enlargement of the International Concession in 1863, tentative steps were taken towards the establishment of the Mixed Court by the British consul. Sir Henry Parkes, who referred to the plan as "...a bold experiment to bring the native administration of justice close to the settlement without affecting its very nature..."[88] based his concepts for the Mixed Court on the sixteenth and seventeenth articles of the Treaty of Tianjin which stated that "...the accused, in criminal cases, shall be tried by the official of his own nationality and the law applied will be that of his own nationality," and that "if disputes take place of such a nature that the Consul cannot arrange them amicably, then he shall request the assistance of the Chinese authorities, that they may together examine into the merits of the case".[89] Prior to 1863, the consul had been responsible for cases involving foreigners and would sometimes attend to over 500 cases a year. This added tremendously to his already overburdened

workload. A police force was already functioning in Shanghai, but when Chinese were accused of crimes in the International Concession they were handed over to local Chinese officials for trial outside the settlement.[90]

As well, the close proximity of the French Concession, International Concession and the Chinese city, which all operated under separate regulations and jurisdictions made it easy for criminals to evade arrest. Because of the massive influx of Chinese into the city, foreign suits against Chinese soon became numerous. For these reasons, resorting to Chinese courts outside the settlement seems to have become a large inconvenience.[91]

In 1863, the consular body at Shanghai proposed that the Municipal Council be given jurisdiction over foreigners over whom no local consul was responsible. This was followed up with a proposition concerning the establishment of a Municipal Police Court. However, in lieu of this, the Mixed Court was established inside the British Consulate in May 1864 to deal with some of the predicaments mentioned above. Composed of a Chinese official of inferior rank and a British assessor,[92] the jurisdiction of the court was not clearly defined. The court acted at first as a police court, dealing with prosecutions against Chinese and foreigners for minor offenses, but soon expanded it jurisdiction to civil cases.

From the outset, the Mixed Court faced seemingly insurmountable obstacles. It lacked a constitution and when one was drafted, it consisted of a "draft signed by neither of the parties concerned and was framed on very indefinite lines."[93] This gave considerable leeway to the British assessor, who sat as an observer on most cases (regardless of their makeup) and to the Chinese who were operating at the court. There were several references to

the court closing for short periods because of arguments between the officials—persuasion and physical intimidation often being used to manipulate favorable decisions.[94] It was quickly acknowledged that the system was wholly unsatisfactory, and that justice was far from being secured. Members of the community questioned the legitimacy of the court, but no one seemed able to offer a veritable solution. "But why all the out-cry?" wrote an unnamed resident of the concession, "[w]e all admit the defects of the Mixed Court. They are very easily pointed out, but will some of our Shanghai Nestors suggest a remedy? After so much pulling down, will some one kindly build up?"[95] Although no one offered a viable alternative, it was felt that it was impossible to revert to the old system of administration in the settlement.

Antecedents of the Mixed Court:

The Mixed Court was the first of its kind under British authority in China, created out of the anomalously non-segregated residential situation in Shanghai. It was not, however, the first instance of mixed tribunals between the Chinese and foreigners in Shanghai. Until 1864, cases involving both foreigners and Chinese were dealt with at the British Consular Court. A trial book from the National Archives of the United Kingdom illustrate that the types of conflicts nor the proceedings tried at the Mixed Court were unheard of at the time of the inception of the court. In all three cases outlined below, foreigners acted as the defendants and were brought before the British consul on charges from Chinese residents in the settlement.

In the first case, dated July 1861, Si Kuai of Shanghai charged Mr. Ally, also of

Shanghai, with stealing seven fruits and assaulting him. The consul listened patiently as the defendant claimed that he acted in self-defense and that he stole because Si Kuai was trying to overcharge him. The consul then questioned Si Kuai and his witness who both refuted Mr. Ally's claims. Si Kuai and his witness stated that Mr. Ally entered the store and demanded an outrageously low price for peaches. When Si Kuai would not concede Mr. Ally threw peaches at the shop owner and beat him with a broom. Mr. Ally was charged five taels and sentenced to seven days in prison.[96]

In the second case, dated April 23, 1861, Wang Ah Tan of Shanghai charged Mr. Miguel of Shanghai with stealing his horse and extorting money from him. The defendant denied the charges and both sides offered their testimony to the consul. Upon interrogation, it was discovered that Mr. Wang had previously banned Mr. Miguel from his store for cheating him. He was admittedly unfamiliar with English numbers and Mr. Miguel had confused him resulting in undercharging. Apparently, Mr. Wang saw Mr. Miguel approaching his store and closed the front door so his shop appeared closed. When he opened the door again to see whether or not Mr. Miguel had passed, his "beloved horse" was missing. He told the consul that he knew Mr. Miguel had previously extorted money from him, but he was embarrassed and did not know who he should tell about the situation. The consul then called Chinese policeman #24 as a witness who swore under oath that he saw the foreigner leading Wang Ah Tan's horse through the Concession later the same day. He also stated that Mr. Miguel was well known to the police. Mr. Miguel was found guilty of extortion and also had to buy Mr. Wang a new horse (which he had presumably sold) and spend a month in jail.

The third, and most entertaining case, involved Chin San of Shanghai making a plaint against John Lawson of Shanghai in late 1861. Chin San angrily charged the defendant with cutting off his queue. Mr. Lawson did not deny the charges brought before him. He stated that he and the plaintiff had been good friends who were joking around with other sailors on the dock while waiting for their ship to arrive. He went on to say that he only realized the severity of his actions was when he saw how Chin San reacted. Lawson and some other sailors were horsing around when Chin San motioned that they should try to cut off his queue. Chin San provided Lawson's friend with a dull blade and he then pretended to slice it off while everyone laughed. Lawson pulled his own knife and intended to use the blunt edge to pretend to cut of Chin San's queue but inadvertently pulled the wrong side of his blade. Chin San put his hand on the back of his head and when he realized his queue was on the dock beside him, he screamed and ran off. Later that day Lawson was summoned to the consuls' office where he indicated that he was extremely remorseful for his actions. The consul decided that since his intent was not malicious he should only be fined three taels, which was used to cover the fees in the case. Chin San received no compensation for his lost queue.[97]

The British who moved to Shanghai seemed to be operating under the false assumption that the Chinese government had never encountered legal systems other than their own nor had an understanding of the concept of legal dualism. However, in his study of Sino-Manchu legal institutions, Pär Cassel draws our attention to the institutional genealogy of mixed tribunals and extraterritoriality that were established by the Qing in their interactions with their neighbours. Drawing from John Fairbank and Joseph Fletcher's previous work on

extraterritoriality in China, Cassel shows that notions of legal pluralism—or a place where more than one type of legal system is operating within the same jurisdiction and having both parallel and contradictory regulations governing their social, economic and political organization—were not foreign to the Chinese. They often adapted, interpreted and interwove the Qing Code with the legal practices of the numerous different social and ethnic groups and subjected certain groups (such as the Bannermen) to different jurisdictional limitations within the Qing Empire.[98] His work further shows that the system of extraterritoriality and jurisdictional preference designed by the British in Shanghai was in no way novel for the Qing Government, which helps explain their ability to adapt and integrate themselves relatively seamlessly into what the British assumed to be a totally new institutional form for them. Cassel offers a secondary-source synopsis of the works cited here by Elvin and Kotenev and suggests that there are a number of striking similarities between the procedures and terms defining the Mixed Court and the judicial sub-prefect (*lishi tongzhi,* 理事同知), especially in the Chinese version of the court regulations. Kotenev clearly points out that the treaties with Russia were of particular interest when the Qing was looking for a precedent for the Mixed Court. These treaties with Russia gave birth to the Mixed Tribunals which functioned in Eli and Tahcheng before the Mixed Court was established.[99] These courts were composed of two judges, one Chinese and one Russian, with equal rights in sentencing. The law administered was not of either nation, but of the customs of the locality in which a given case originated. The decisions of these tribunals were final and no appeal against their verdicts was allowed.[100] From this evidence, Cassel suggests that when the Qing tried to

accommodate the Western demands for extraterritoriality and involvement in legal affairs, it did so with clear precedents in mind.[101] By explaining that Qing officials were already receptive to ideas of extraterritoriality, Cassel helps to validate claims that they made significant contributions to the creation of the Mixed Court. He rightly pointing out that too much attention has been paid to the later years of this institution when it developed into "an instrument of foreign control." This "...[i]nevitably pays too much credence to foreign intentions and achievements, whereas little has been spent on the role of native institutions and concepts."[102]

The British made no indications that they were aware that the Chinese had previous experiences with extraterritorially, but they definitely came to Shanghai with preconceived notions about how consular courts in the East should operate. In their reports to Whitehall they made references to their experiences in Hong Kong, Turkey, Cairo and India where pluralistic legal systems were already in place. A report dating from 1868 entitled *Consular Jurisdiction in the East* dealt with the rising concern of Europeans who had connections with the East (defined in the report as "Turkey, China, Japan, etc"). The report stated that the precarious behavior of Europeans living away from their home countries was preposterous and needed to be addressed. In turn, the report noted that the legal needs of inhabitants of Eastern countries should be paid more heed. This grouping of China, Japan, Turkey and India is highly problematic given the differing conceptions of extraterritoriality in all of these places. For example, Turkey had a long established precedent of extraterritoriality dating from the early sixteenth century based on the capitulations, which entitled foreigners living in

Turkey to be exempted from Islamic law and allowed them to be subject to their own laws. This grouping may have worked in theory, but in practice there were many factors that made this completely impractical. The conclusion of the report extolled that differing ideas of how extraterritoriality worked in different places in the Empire greatly affected the ways that consular courts functioned. Critics rightly pointed to the differences between the political and social situations in Turkey and China, and yet they continued to try to use these examples as the basis for legitimization of their claims over the Mixed Court.

The British were not under the illusion that if they instituted their conception of legality in the settlement everything would fall into place and work seamlessly. In a letter defending Shanghai and the Mixed Court, E. Hornby noted that although the "Chinese element" was "eliminated" in the courts of Hong Kong, Macao and Singapore, crime and corruption were endemic in these cities, perhaps surpassing the levels of Shanghai:

> "We are as sensible as our contemporaries to the defects of the Chinese system, but it must have its own suitability to the Chinese...our leading men will do well to consider what Hong Kong, Macao and Singapore, so far as the management of their Chinese populations is concerned, have gained by the entire elimination of the Chinese element—Hong Kong, notorious for robberies by violence in open day in its streets, where solitary evening walk is taken at the risk of an attack—and gang robberies at night are of constant occurrence;—Macao where crimps carry off laboring men from the fields or enticing travelers convey them from tea-houses almost without concealment into barracoons, or Singapore with its recurrent insurrections that require to be quenched in blood. Let them enquire if the system introduced into these places is much superior to that of the Dutch in Java and the Spaniards in Manila, where

> Chinese affairs are managed by a Chinese magistracy chosen by the headmen, and only confirmed by the Foreign government, to whom it is responsible for its acts before they are led into wasting their strength in the vain attempt to create a system which could not fail to be prejudicial to the maintenance of order and the security of life and property in the settlement."[103]

And so, the British were weary of dismantling the Chinese system and replacing it with a British one since they had witnessed the types of problems this caused (or acknowledged that it did not fix the problems that already existed) in other parts of Asia. They were also aware that the legal actions taken in Hong Kong, Singapore and Macao had not remedied the crime that plagued these port cities.

The complete dismantling of the Chinese system was not a workable solution in Shanghai and contributed to the ability of the Chinese to aid in the development of the Mixed Court. Then, the inclination that the Chinese had a lot of influence at the Mixed Court meshes with what I feel is Elvin's main contention that from the outset the court was in essence a Chinese court. This argument is further substantiated by Kotenev's claim that "[p]ractically, the Court, under the moral guidance of the Assessors, [at first] sought to adopt only those European principles in the administration of justice which either were familiar to the Chinese conception of law or could be accepted by the Chinese without bringing any pressure on their mind."[104]

The composition of the Mixed Court:

The Mixed Court varied in composition depending on who was being tried, often resulting in confusion about who was in charge. There were often disagreements between

assessors, translators and Chinese officials who worked at the court and Chinese officials who represented the Qing's foreign relations department known as the *Zongli Yamen* (总理衙门). Boundaries of jurisdiction were also blurred, causing more confusion. Originally, the Chinese designated a *tongzhi* (同知) to oversee criminal matters at the Mixed Court. He was sub-prefect who was responsible to the *daotai* and whose duty in Shanghai it was to oversee the policing and sentencing of certain types of offenders.[105] The *tongzhi* resided in the settlement and "decided all civil and commercial suits between Chinese residents within the Settlement and also between Chinese and foreign residents in cases where Chinese are defendants, by Chinese law."[106] In mixed cases, the British consul or his deputy was theoretically supposed to sit with the *tongzhi*. However, "[t]he extension of the jurisdiction of the Court [to include civil cases] necessitated the appointment of an additional officer, and the *haifang* (海防) was dispatched for the purpose."[107] The *haifang* also held the rank of sub-prefect and his jurisdiction was originally created to meet the bureaucratic requirements dealing with import and export taxes for the maritime population.

The powers of deputies or assessors named by the consul were only vaguely defined and caused a great deal of confusion for the Chinese. Disputes arose and often caused confusion regarding subordination and ranking of officials. Because the powers and duties were not clearly laid out, side-stepping, insubordination and avoidance of responsibilities amongst the Mixed Court officials was common. Describing the process of passing the regulations at the Mixed Court, a British writer noted the frustration experienced by the British consul: "[t]he great obstacle to the effective working of the present Mixed Court was

found to be the narrowness of its powers and its subordination to the Che-hsien's [*zhixian* (知县)] jurisdiction."[108] He went on to explain that the British and American consuls were anxious to enlarge the powers of the Mixed Court and create a position of Mixed Court Magistrate who would circumvent the authority of the *haifang* and *tongzhi* and be directly responsible to the *daotai*. Even though the British had managed to get a prefecture-level official into the court they had hopes of elevating the court to a higher level and making it independent of the county administration. However, the Chinese insisted in seeing it as part of the lowest level of the three-tiered system (province, prefecture, county) of the provincial administration. Then, the British complaints were not about the *haifang* or *tongzhi*'s subordination under the county magistrate, but about the court's lack of autonomy as an institution. "We understand that very considerable changes were made here in the original project during its discussion by the *daotai* and consuls. The former throughout displayed the very conciliatory spirit which has distinguished his official relations to foreigners. For example, the original draft contemplated the reference of a certain class of cases to the Che-hsien [*zhixian*] and he consented to substitute the Haefong [*haifang*] for that officer."[109] The ambiguity surrounding who was actually in charge was exhausting and confusing, but it also allowed for leeway in negotiations and proceedings. Misunderstanding and miscommunications between the British and the Chinese, and between the Chinese themselves, left an area of negotiation where all these different authorities were able to navigate their way through the Mixed Court.

Theoretically then, in the early stages of the Mixed Court, civil matters were left to

the *haifang*. This contributed to the confusion in the early years since the judicial hearings of mercantile disputes were typically enforced by the heads of larger guilds operating in the area and as noted by Rutherford Alcock "...so entirely are such matters tried according to the principle of natural equity as varied by local custom, that great is the variety of occupational work in Chinese society, that neither treatise or monograph on the law of contracts is known to exist. The intervention of a superior officer, who is the *Haifang* in the settlement of civil disputes [in the concession], does not therefore interfere with customary routine of Chinese administration, [but represents] a class of cases always presumed to be arranged extra judicially."[110]

On the criminal side decisions were left to the *weiyuan* (委员) who reported to the *tongzhi*. The *weiyuan* was a deputy or commissioner who usually possessed an academic title but was not yet firmly established in the bureaucratic hierarchy. However, problems arose because all three positions were essentially on equal bureaucratic and they were all theoretically responsible to the *daotai*. Concern was eventually raised by the Chinese, who finally agreed that a new position should be created specifically for the Mixed Court, rather than using officials whose roles within Shanghai were already clearly established. This new position was in essence a combination of two Chinese positions: *weiyuan* and *tongzhi*. In English, the position was simply referred to as the "Mixed Court Magistrate" and in Chinese it was known as *gonghui tong*—公会同. The Mixed Court Magistrate, who was in essence a judge, was also commonly referred to in *Shenbao* articles by his last name followed by the term *sima* (司马), an official title closely relating to what we would imagine as a modern

judge (so "judge" Chen—陈 would be known as Chen sima—陈司马).

The extension of the jurisdiction of the court to civil matters was marked by a change in the attitude of the native authorities towards the newly-born institution. Once it took on civil cases, the court took on a new importance in their eyes because it exercised a larger degree of power over all the citizens living in the concession (rather than just those who committed crimes). This was seen as detrimental because it affected material interests of the native residents of the settlement. More importantly, it meant that a certain amount of income in the shape of court fees was lost at the Yamen Office to the Mixed Court. An imperial edict from October 1866 tried to explain that some of the powers vested in numerous Mixed Court officials were growing and outweighing some of the yamen officers. The Imperial Government felt that:

> "...it would be necessary to make certain regulations such as that in every case in which foreigners must be brought before the court the Consul should be empowered to investigate the case in conjunction with the Chinese official but that to avoid any clashing of authority in cases where only Chinese are concerned the decision should be left entirely to the Chinese and no interference on the part of the foreign consul should take place; that the Consul should have no right to adjudicate in law cases [solely affecting] Chinese who may act as servants or in any other capacity in the employment of foreigners..."[111]

In a follow up Edict, Prince Gong related his ambiguous sentiments about the appointment of the new Chinese official at the court, but acknowledged that the creation of this new official position was necessary. This Edict laid the boundaries within which this new

official would operate:

> "...But that inasmuch as the establishment proposed by his Excellency involves nothing more than bestowing additional powers on an officer to be specially commissioned for the purpose and as an increase of good feeling between Chinese and foreigners is the hoped result, the Yamen, although they have not yet received the reply of the high officers at Shanghai have considered the question on its merits, and [are of opinion] that it would be decidedly better for the future to select an officer of the rank of deputy, sub-prefect, or district magistrate to reside at Shanghai, and to establish a public office in some respects different from that already existing; an office to be provided with the necessary implements of justice, with provision for the officers meals and cells for prisoners, to give this officer the power of trying cases by the question and detaining the accused during the investigation and to carry out any sentence that shall not be more severe than the bamboo and the cangue."[112]

Here it become clear that the Chinese were aware of the British intentions of turning the Mixed Court into a powerful institution with a clearly defined position in the Qing administrative system which would have been independent, but equal in power to the county Magistrate for Shanghai and environs. The Qing were unwilling to change the established system, perhaps because they did not want to privilege Shanghai any further than they already had, or perhaps they were conscious that this move would allow the Mixed Court to operate outside of the standard administrative hierarchy.

These sentiments about the jurisdiction and positioning of the Mixed Court are echoed in a report restating the opinions of an early judge about some of its problems: "I concur with the opinion of Sir E. Hornby that it is undesirable to encumber the court with written rules.

Indeed such a proposal would be fatal to its working. It will indeed be the intent of the foreign judges to collate the decisions as to impart uniformity and authority on their decisions and the result will no doubt be the formula of a valuable code, sufficient to regulate all the ordinary transactions which take place between foreign and Chinese merchants. The fees received were therefore more than sufficient to cover the expenses of the establishment of the salaries of the Chinese officials which are paid in respect of their duties. This was a point of great importance as it is desirable there should be no need for resorting to irregular methods of pay."[113] The acknowledgment by both the Chinese and foreigners that there was a high level of ambiguity surrounding the responsibilities of Chinese officers who oversaw the court often led to misunderstandings and the possible appropriation of power by officials who were not meant to exert power at the Mixed Court. They were able to do so out of default, because unclear competences left a vacuum that was filed in an *ad hoc* manner, rather than by design.

Proceedings at the Mixed Court:

In a report from 1864 on the functions and principal duties of the British Consulate in Shanghai, a small section is devoted to the Mixed Court. The comments note that in the last quarter of the year, over 2,194 cases involving Chinese suing other Chinese and 32 civil suits where British sued Chinese were brought before the court (of these, only 17 were heard, meaning the rest were either dropped or settled out of court).[114] However, it is an unsigned note in the margin of the source that is more revealing than these quantitative facts: dated June 24, 1865, the barely legible scribble stated: "[i]ts proceedings are largely guided by these Rules, yet have not been formally recognized by the Governor of the Province and

certain alterations that treaties proved to be desirable have been introduced. These rules," continued the note, "have never been formally approved but are the general workings of the court at this time. There are difficulties publishing them and difficulties have been raised in the general effect of the departures being to appellate the procedure of the court to that of Chinese courts already existing."[115] In other words, the procedures and rules of the court not only lacked a firm legal basis but were found to be impractical, despite the fact that they had been kept deliberately short and simple. [For a complete listing of the Mixed Court regulations, please see *Appendix 1.*]

These inconsistencies and ambiguities proved problematic for the Mixed Court. The lack of clarity in the system allowed both the British and the Chinese, who understood how malleable the rules of the court were, to weave their way through the system. It especially allowed the Chinese who lived in the Concession two avenues with which to pursue legal claims. If they were sure that the Chinese court would not serve them well, they were inclined to try their luck with the Mixed Court, where the rules were not so firmly bound by local tradition.

In 1867, a concerted effort by the British tried to place the court on firmer legal and practical foundations. It was removed from the British Consulate in 1868 and in 1869 an agreement was reached for the proper establishment of the Mixed Court in a separate and newly constructed building.[116] The new regulations were agreed upon by the *daotai*, the diplomatic representatives of the United States, Great Britain, France, Russia and Germany and were published by the British consul at Shanghai on April 24, 1869. The rules were

declared to be in force for one year, but were destined to have a much longer history: they were not officially amended until 1898 when the court underwent a serious reconfiguration.

The new rules constituted merely a skeleton for the organization of the Mixed Court and provided an outline of its jurisdiction. Although they were an effort at codification, they caused serious reservations because in the six years between the inception of the court and the time that they were instituted, judges and assessors had already carved out their own distinct course at the court and felt threatened by the rules. The very foundation upon which the court was being built was shaken at first by the promulgation of these new regulations. These regulations also seem to be a response by the British who felt that the court was beginning to have a "Chinese feel". However, these British criticisms were unfounded since they had not taken the time to teach the Chinese judges the ways in which they hoped judgments would be passed down (i.e. according to British law). As Bourdieu notes, the status of a judicial judgment often owes more to the ethical dispositions of the actors than to the pure norms of the law.[117]

In fact, bringing the legitimacy of the Mixed Court into question by drawing up new regulations began to strengthen the base on which it rested. The early working of the court were often wildly debated amongst the inhabitants of the Concession: "[i]ts friends apologized for the weakness of its constitution, and its foes have demanded its destruction; and yet very little has been said with regard to the true condition of this institution," noted a commentator on the court in 1869.[118] Most admitted openly that the Mixed Court suffered from serious defects, one of them being that the foreign assessors rarely stayed long enough

to establish any sort of continuity. As noted by chief assessor Alabaster in 1869, "the third point in which I think the Mixed Court is deficient is in the want of permanence in the foreign assessors: constantly changed, they have neither time to learn their business or gain the influence they should exercise over the Chinese Magistrate, much less acquire that acquaintance with the conditions of the place and people which can alone show them what is just and what is expedient. With the exception of myself, I do not know a single English Assessor who has sat in the Court two years and I can remember when four succeeded each other in rapid succession in a month..."[119] Although British officials were happy to point out problems, few offered suggestions about how to rectify some of the procedural issues and inconsistencies of the court. Most of them simply noted that time would inevitably work out some of the larger kinks in the proceedings.[120]

Another defect the British felt affected the court was that the Chinese judge lacked power when dealing with cases specifically between Chinese: "[t]here is also a necessity of making the Chinese Magistrate more independent than he is at present, and giving him more extensive powers, than he at present possesses, there is no doubt that it is most desirable that the present conflict of jurisdiction between the Magistrate of the Mixed Court and the District Magistrate of Shanghai should be set definitely at rest and this it would appear can only be done by erecting the settlements into a distinct Chinese jurisdiction, and for many reasons it would be better that there should be machinery within the settlement for dealing with all cases arising within it, which could only be done by giving the Mixed Court Magistrate more extensive powers."[121] According to the British, this was the most glaringly obvious

deficiency which plagued the Mixed Court. In their eyes, for the court to be legitimate this issue needed to be rectified.

By October 1866, Rutherford Alcock suggested enlarging the sphere of jurisdiction of the court and acknowledged that the more serious an offence or crime, the more uncertain the chances of conviction.[122] This suggestion intended to broaden the scope of power of the Mixed Court and through an extension of its jurisdiction allowing the British to cultivate the legitimacy they felt it deserved. One point that numerous commentators on the court agreed upon was that the court should not, in fact, establish an actual code of laws. The British felt that because of their position in China, they could not impel the Chinese to accept a legal code and argued that it was "undesirable to encumber the court with written rules." Instead they opted to "patiently and consistently urge[e] the native judge to adopt some of our better known and marked laws."[123] Others pointed to the incredibly wide discrepancy between the written rules (considering there were hardly any) and the actual practice of the court, noting that the few written rules there were rarely followed. "The fact is that the court has grown out of necessity," wrote chief assessor Alabaster in 1869, "...and the rules which work pretty fairly on paper, are respected when it suits the judges to respect them and are disregarded when they present practical or imaginary inconveniences. Still," he continued, "the court fulfills its mission—not perfectly— but at the same time, not *too* imperfectly. My advice is to leave it alone until we have something better to put in place."[124] For all its allies and enemies, the problem still remained that those expecting a full grown and perfect institution within a few years were mildly delusional and by 1869, there was already a nostalgic longing

for the simplicity of the earlier days before the court. In a report published in the *Supreme Court and Consular Gazette,* dated July 6th 1869, the unnamed author states that "[t]he legacy which Mr. vice-consul Alabaster has left behind him in the shape of a memorandum on the Mixed Court is not without its usefulness. Here we have at a glance the reasons why this court was established; the object that its founders had in view; the rules by which its procedure was to be governed...This jurisdiction has grown not only out of proportion with the means and appliances of the Court or its officers, but far beyond, we venture to think, the intention or wish of its founders. It is now called upon to decide cases of great commercial importance, to investigate accounts, to unravel questions arising out of trading partnerships, and generally to perform the duties which devolve on superior Courts..."[125]

Crimes at the Mixed Court:

The court did keep records outlining the numbers of apprehensions, arrests and charges laid on Chinese and foreigners in the settlement in the early years. The tables included below outline the propensity of crimes and their punishments and show that certain types of crimes, such as "furious riding" were only committed by foreigners while other crimes, such as "servant larceny" were only committed by Chinese (see second table). The first table also lists whether Chinese apprehended were punished according to Chinese law or simply referred to the Yamen Office, where this was obviously not an option for apprehended foreigners. The differing treatment of Chinese and foreigners at the court is not surprising, but it is noteworthy that so many Chinese (over a fifth of those apprehended) were dismissed.

Table 1: List of Prisoners apprehended in the English and American Settlements by the Municipal Police Force, during the months of September, October and November, 1866

	Chinese								Foreigners				
Crime	number apprehended	Dismissed	hard labour	punished according to Chinese law	Fined	Referred to Yamen	Imprisonment	deported from settlement	Number Apprehended	Dismissed	Fined	Imprisonment	sent on board ship
Assault	43	10	7	7	15	4	0	0	11	0	1	10	0
Burglary	33	3	17	10	0	3	0	0	0	0	0	0	0
selling fake/ substandard goods	2	0	0	0	1	1	0	0	2	0	0	2	7
Drunkenness	18	10	2	0	6	0	0	0	115	3	93	12	0
Tax Evasion	5	1	0	0	4	0	0	0	0	0	0	0	0
Gambling	21	3	0	1	16	1	0	0	0	0	0	0	0
Kidnapping	9	2	1	0	0	16	0	0	0	0	0	0	0
Larceny	225	51	122	25	10	13	2	2	17	0	2	15	0
Larceny by Servants	12	3	9	0	0	0	0	0	0	0	0	0	0
Misdemeanors	90	35	18	14	25	6	0	0	12	2	2	8	0
Receiving Stolen property	20	7	6	2	4	1	0	0	0	0	0	0	0
Robbery	15	1	11	3	1	0	0	0	0	0	0	1	0
Forgery	7	7	0	0	0	0	0	0	0	0	0	0	0
Vagrancy	0	0	0	0	0	0	0	0	2	2	0	0	0
Total		133	193	62	82	45	2	2		7	98	48	7

Table 1. Foreign Record Office, Kew, FO 233/96.

Table 2 Comparative Statement of the number of Prisoners apprehended in the English and Municipal Settlements by the Municipal Police Force, during the Months of September, October and November 1865 and 1866

	Chinese														
Crime	Assault	Burglary	Horse Stealing	Drunkenness	Forgery	Dubious Dealings	Gambling	Kidnapping	Larceny	Larceny by servants	misdemeanors	receiving stolen property	Robbery	Vagrancy	Total
1865	29	27	4	12	2	7	9	6	229	47	196	5	22	8	603
1866	43	39	2	18	0	21	9	9	231	112	98	20	15	7	624

	Foreigners										
Crime	Assault	Burglary	Horse Stealing	Drunkenness	Forgery	Furious riding	Larceny	Abandonment	Misdemeanors	Robbery	Vagrancy	Total
1865	4	8	0	95	2	1	4	13	23	0	7	157
1866	11	0	2	115	0	7	7	12	12	2	1	169

Table 2. Foreign Record Office, Kew, FO 233/96.

An interpretation of these tables clearly shows that the Chinese and the British were punished differently according to the crimes that they committed, and the chart below offers a summary of these differences.

Chinese Punishments	**Type of Crime**	**Foreign Punishments**
Hard Labour	Property Crimes	Imprisonment
Fines	Body Crimes	Imprisonment
Fines	Money Crimes	Fines
Dismissal	Drunkenness	Fines
Not applicable	Vagrancy	Dismissal

Punishments at the Mixed Court:

In a reply by Alabaster about the deficiencies of the court, he listed the absence of a definite code of law, the continued need for permanent officials attached to the court and the nature of its punishments as its largest problems. "So long as the law to be administered is left entirely to the judges as in the Mixed Court is practically the case, there must be too glaring inequality in the sentences for satisfactory results. No judge can carry in his head the exact punishment he meted out in the hundred previous similar cases he has dealt with. The readiest mode of meeting the difficulty would appear to be to direct the judges of the Mixed Court to administer the provision of the elaborate Penal Code the Chinese Government have published, save in those cases where to remedy the differences between Eastern and Western habits of thought and manner of viewing crime,." In his commentary on the Mixed Court, he went on to say that "...it is hopeless to expect that such a well organized system could be at once established; it needs an enthusiast to take the matter in hand, and only through repeated failure could the necessary experience be attained; but it might be held in view, and waiting until the time comes when it could be carried out, steps might be taken to substitute imprisonment and hard labor for the brutal punishments of bambooing and the cangue and unsatisfactory machinery of the chain-gang."[126]

In the early stages, it was also readily acknowledged that the power of the court was limited by the Chinese trying to curb the judicial and administrative powers of the Chinese magistrate. He "had no independent seal...and the maximum punishment which [he] could inflict was 100 blows of bamboo, the cangue for not exceeding 14 days, hard labor also not

exceeding 14 days, imprisonment, fine and deportation."[127] Compared to the District Court of Shanghai (which was under the jurisdiction of the Qing) could impart sentences of banishment and canguing for much longer than two weeks, making the Mixed seem lax and lenient. It was readily acknowledged that the punishments at the Mixed Court were often less severe than those at the prefecture court: at the Yamen Office the cangue was rumored to weigh 75 pounds and was forced upon its wearer 24 hours a day, whereas at the Mixed Court it was between 4-8 pounds and only worn for 6-7 hours a day.[128]

These issues about the types of punishments at the Mixed Court did not end after the first few years. In February 1875, George Seward, the consul-general at the time, addressed a letter to Arthur Davenport, Joseph Haas (the consul for Austria-Hungary) and Dr. Yates (the American consul) attesting to the deficiency in the system of punishments at the Mixed Court and inquiring into the adequacy of the powers of the court. Seeking guidance from the other consuls on how to address these problems, he received a strongly worded reply from Dr. Yates: "I have no hesitation in saying that the powers of the Magistrate are inadequate...This inadequacy is heightened by the lacking presence of foreign prosecutors and the fact that many of those who have been sent to trial, and against whom the evidence has seemed clear, have often been seen in the streets two or three days later. In my opinion the Mixed Court should be made a Foo Mong Tong Chi Yamen, with jurisdiction over the three settlements and be called the Shanghai Tsuchieh Hui Foo Tong Chi Yamen (上海租界会抚民同知衙门) [the translation, which is not provided in the document, would be something like "The Shanghai International Concession Office of the Sub-prefect for the Pacification of

People"]... The system of punishment at the court is essentially Chinese. I do not see how it can be readily changed, and I am not sure that any change which could be proposed would be beneficial."[129] Essentially calling for the amalgamation of the Mixed Court and the Yamen Office, Yates's proposal was probably not realistic, but it shows that there were still massive deficiencies in the working of the court and the ways in which it administered punishments over ten years after its establishment.

The Qing state also raised concerns about the Mixed Court, its operation and methods of punishment in the early stages, which was a contentious component in the relationship between the Chinese and British authorities. The Mixed Court never decided on grave offences such as those which were punishable by death or by perpetual banishment, which according to Chinese law could not be decided by a sub-prefect, deputy sub-prefect or district magistrate and needed to be reported to the provincial governor (*xunfu*—巡抚) for investigation.[130] The Chinese were weary of transferring power concerning methods of punishments and an Imperial Edict outlining the acceptable procedure for punishment against Chinese living in the settlement concluded with a word of caution: changes to the regulations put in place in 1869 were to be made with much consideration and hasty decisions at the court regarding how to deal with Chinese criminals should be avoided.[131] These words of caution were the Qing's way of asserting authority over the types of punishments that it allowed foreign nationals to mete out on its citizens.

Two characters at the Mixed Court:

One of the problems often mentioned by commentators on the Mixed Court was that

British and Chinese officials rarely lasted at the court. This inevitably caused inconsistencies in rulings as judges and assessors did not have the time to learn how the court worked. However, there were two personalities that did serve for an extended period of time through the 1860s and 1870s and added greatly to the local character and atmosphere of the Mixed Court.

The British assessor who served the Mixed Court the longest and who was also a key figure in its establishment was Chaloner Alabaster. His obituary, published in 1898 in the *North China Daily Herald,* noted that: "[i]f Alabaster had been blessed with a physical constitution to match his mental endowments he would have risen very high in the world." These sentiments were echoed throughout the obituary: "so marked a personality as once known he could never be forgotten; and he was so good and true a friend to those he liked, while he was as good an enemy of those he did not like, that the impression he made on all those with whom he came in contact was ineffaceable." The obituary concluded that: "[i]t is only the colourless people that we forget when they have passed out of our circle,"[132] attesting to his colourful personality that would not soon be forgotten by those who knew him.

Alabaster spoke fluent Chinese and had a deep appreciation for Chinese philosophy, although he was often considered to be more "anti-Chinese" than some of his superiors. He was appointed to Shanghai as an interpreter in 1861 after serving in Hong Kong for seven years. Alabaster was affectionately known amongst his peers as "the Buster", because he often went beyond the authority granted to him by the British government (and for that he

was popular amongst the British community in Shanghai). Apparently, he sanctified a Church on his own authority making it a Cathedral, in turn imparting the title of "Dean" on his good friend who had previously been a simple Chaplain.[133]

These anecdotal stories coupled with his correspondence and his letters on the Mixed Court illustrate his lively nature. But he was not alone: one Chinese Mixed Court Magistrate, who is simply referred to as "Chen sima" (陈司马) or "Chen gonghuitong" (陈公会同) is repeatedly mentioned in *Shenbao* articles throughout the 1870s. Although I was unable to find any sources stating the exact dates that he served the Mixed Court, he was mentioned in correspondence and *Shenbao* articles covering at least a nine year period.

An editorial in *Shenbao* noted that some Chinese officials quickly learned how to manipulate the system into which they were thrust. It stated that a low ranking official named Chen became one of the only judges to keep his position at the Mixed Court for a prolonged period of time and managed to negotiate a niche for himself where he was able to assert power within the community based not on his bureaucratic ranking within the Chinese Imperial system, but on the fact that he had adequately learned how to maneuver the Mixed Court.[134] He often offered colourful and exciting comments and judgments on cases which involved foreigners and Chinese and also seems to have added tremendously to the local character of the court.

Fees and process at the Mixed Court:

The image of corruption of the yamen runners was often juxtaposed with that of Mixed Court officials. However, unlike the Mixed Court officials, exerting control over the yamen

runners was the personal responsibility of the *daotai*. Bradly W. Reed notes that: "although they [yamen runners] operated outside the statutory system, and often in direct violation of the legal code, yamen clerks and runners exhibited a remarkably consistent degree of organization and rationalization in the form of internally formulated and enforced rules and procedures."[135] In other words, the yamen runners were not terribly concerned with how government was supposed to work, but with what government actually did. This meant that they often went beyond the formal structures and provisions of the Qing legal code. It is because they did this that *Shenbao* writers frequently complained about their abuses of power and the corruptibility of the yamen runners in Shanghai.

In a *Shenbao* editorial dated July 3, 1879, the author voiced concern as well as praise for the Mixed Court. The author felt that, although not without their faults, the Mixed Court officers were not nearly as unscrupulous as the yamen runners. From the outset the author acknowledged the difference in the work between the Yamen Office and the Mixed Court and clarified that he felt it was suitable for the yamen runners to charge a certain amount for their work: yamen runners subsisted on a very basic income which they compensated with small earnings. If they were unable to depend on this extra income, the author felt that they would never be able to progress in their work. He also considered that the yamen runners needed to travel for their work which incurred costs that were not covered by the office.

The fees collected by yamen runners were used to write testimonies and try cases, and the author explained depending on whether people could afford the fees lawsuits may or may not be brought before the Prefecture court. Because their incomes depended on goading

people into litigating, the author felt this explained why the yamen runners were often insistent, arrogant and forceful. The problem, for him, lay in the fact that even though there were good, clean and incorruptible officials at the Yamen Office, there are also bad ones who tainted the office for all those associated with it. But, according to the author, the Shanghai Mixed Court served as an exemplary institution, with honest and well serving officials who were able to establish their own traditions and who were not as unscrupulous as the yamen runners. (虽有清廉之官强项之令有不能裁革者盖其积习相沿历久不变固亦无可如何也独上海租界会审公廨则向无此例).[136]

He continued that "whenever a report was processed at the Shanghai Mixed Court, there is no waiting period and people were not made to pay any sort of fee until the case was tried before the court. And, although the court is in China, it has the clean and simple style of a foreign country's court" (虽在中国地内而已有外国清简之风). He also felt that the Mixed Court's adherence to a standard fee freed inhabitants of the settlement from negotiating and haggling with officers since they knew beforehand how much it would cost to have their case tried.

The author noted that by comparing the circumstances in Western countries and how they handled court cases, Chinese officials could learn valuable lessons. He did not advocate acting according to foreign rules, because foreigners also had problems. It was his idea that Western officials often held dual roles—such as judges who also served as officials in government, which he saw as a conflict of interest. Pondering rhetorically he wondered: "How can you show fairness and justice by doing this?" Chinese people knew that lawsuits

were troublesome because the International Concession had so many different people from different places mingling and living in one area and only one official (interestingly, not the *daotai,* but the *weiyuan*) to deal with their affairs (因租界五方杂处而设立一委员以理其事). Since the French and International Concessions operated under different regulations, the author felt that there was a need to establish one group (or commission) to supervise and to submit to the problems of jurisdiction and governance in the area. "But it is not that simple!" he extolled. The petty officials in Shanghai changed often and were frequently moved and therefore they needed to use Western judges at the Mixed Court to sit and try cases. He felt that this could possibly provide the consistency that the court needed, but did not allow for Chinese judges to adequately learn the workings of the Mixed Court. Moreover, according to the author, through their seeming indifference, the Western judges had not been able to fully understand the ways that the Chinese officials were able to manipulate their positions at the Mixed Court for political purposes. He felt that rules were needed when dealing with lawsuits in the International Concession and that the Occident had an honest and simple style (而泰西行清正简之风). He ended his commentary with another rhetorical question: "Should we not learn from them to benefit all the Chinese people?"[137] These concerns over fees and proceedings at the Court were of high importance because many Chinese were looking at ways to reform and change the yamen system. Acknowledging that the Yamen Office and the Mixed Court were different, the author drew on some of the benefits of the Mixed Court, such as its standardized fees and short waiting times, to illustrate that he understood how the court operated and that he felt that Chinese people could learn from this institution.

However, there were still problems with the administration of fees. In 1864, Alcock was aware that the current fees for the proceedings at the court were relatively low and that he felt it was appropriate to charge a nominal fee in order to raise the funds to build a jail:

> "I beg to forward a memorandum prepared at my request by Mr. Alabaster, showing the amount of Fines and Fees received by the Mixed Court from which its expenditure has heretofore been entirely defrayed....At present only an extremely small portion of purely Chinese cases occurring in the Settlement are brought before it, the remainder being taken to the Che-hsien's tribunal. Moreover, owing to the very narrow criminal and police jurisdiction, the heavier cases on that side, which the extended jurisdiction of the new court would enable it to deal with by way of fine, have now to be remitted to the city. The providing of a separate jail, attached to the magistrate is an essential part of the scheme. The difficulty will be to meet the first expense of building, but I think the proposed enlargement of magisterial powers ought to precede and not follow its establishment. The corrective resources at the disposal of the present court will be still available and as the necessity of a jail makes itself evident to the public, the proposal of a rate to cover its erection will, I think, be accepted by the community."[138]

Yet, until 1867, no fees were collected in civil cases as the fines from criminal cases more than covered the costs incurred by the court. Whenever their costs increased, the system of fines was extended and the expenses were easily met. The salaries of the Chinese officials who sat at the court were not paid out of the collected fines (as they were paid by the *daotai*) and the consular officers and the expenses of the Chinese runners were met by the Municipal Council. As well, the court had no jail in the first few years. All of these factors contributed to a relatively low managing budget, allowing the Mixed Court to waive fees for civil litigation

at first. However, this slowly changed as Chinese litigants learned that at the Mixed Court (unlike the Yamen Office) fees for civil cases were non-existent or nominal. This led to an increase in civil cases in the settlement being tried at the Mixed Court rather than through the traditional outlet of the Yamen Office. Subsequently, this increased the case load of the court which instituted fixed fees for civil cases in 1867.

Proceedings and cases at the Mixed Court:

Many unsuccessful attempts were made to modify the rules of 1869, which had been adopted only provisionally. Kotenev notes that up until the court was completely reorganized the Mixed Court was undergoing the process of construction and it was not until after 1897 that the "crystallization of local administration of justice and the importance of [the court was] fully realized by the residents [of Shanghai]."[139] Questions were often raised about whether the Mixed Court was at any time during this period a satisfactory tribunal, but nonetheless it administered justice in the settlement. The proceedings of the Mixed Court follow a similar pattern of most courts where litigants present their cases in front of one or two presiding judges. Large crowds were often attracted to the proceedings, which was not uncommon for courts in China. Kotenev states that the "sittings of the court were public and were always attended by a big crowd of Chinese watching the proceedings with interest," and that "the accused was at liberty to interrogate the witnesses and cross-examine them, and his own statements were taken as evidence."[140]

On March 17, 1872, a case related in *Shenbao* was brought before the court and was of such interest to the Chinese that the Mixed Court was filled to capacity. According to the

author, anxious onlookers waited patiently in the street to hear the announcement of the verdict. Apparently, the sight of a dog and his owner bowing before the assessor and Judge Chen caused quite a stir. Intrigued Chinese folks came to see why a dog and a "black man (黑人[141])" were pleading their case before the court. As word of the case spread through the settlement, curiosity overtook many people who were desperate to see a pet dog appear before the Mixed Court.

It turned out that a child surnamed Sun was using the latrine outside his family home when he was frightened by the dog that had entered the room to eat his excrement. He screamed, called for his mother and ran back into his house. His mother grew enraged and afraid. She threw a brick at the dog to scare it and this action unintentionally broke the dogs' leg. The owner of the dog (狗主似系黑人) brought the Sun family to court and was seeking compensation for the injury caused to his dog. He had originally brought the entire family to the Yamen Office, where they were promptly redirected to the Mixed Court. According to *Shenbao*, the court translator offered his opinion on the case during the proceedings and stated that the family should be severely punished. He felt that a member of the Sun family should be charged with 100 lashes. Judge Chen disagreed with the translator, stating that the action was unintentional. He charged the Sun family a small fine to cover the costs for the recovery of the dog.

The commentary on the case is insightful. Noting the absurdity of comparing an injury inflicted on a person to one on an animal, the author felt that the fact that the owner had the audacity to bring the case before the court was utterly outlandish. The reported noted

that Chen stated: "Why should a person have to get 100 lashings for an injury caused to a dog? If the dog was killed by accident in the case, would this person be killed to compensate for the life of a pet?" (陈司马断云不能不偿论令　赔洋价抵夏翻译云定要重仗一百) He stated that he had examined foreign law and could not find a precedent for the opinion of the translator. He further stated that "foreign people love their pets" (外国人喜畜狗) and if this incident had been punished heavily, it would have set an unreasonable precedent in China. In his concluding remarks, he laid blame for the incident on the dog, which had entered the Sun house without permission.[142] This is seemingly contradictory because he was adamantly attesting to the absurdity of allowing the case to be tried before the court, but ends up laying blame on the dog for the incident.

Although this case may seem somewhat absurd, it demonstrates numerous things. As Kotenev attests, people were obviously interested in the proceedings of the court, especially when they involved new and intriguing cases. The reference of the case to the Mixed Court by the Yamen Office is also telling since the case was clearly not within the jurisdiction of the Yamen Office because it involved a case between a foreigner and a Chinese family. They were probably also not interested in dealing with such a high profile and ludicrous case which was sure to attract a lot of attention.

In another case editorialized in *Shenbao* dating from March 1872, a Westerner (西人) brought a Cantonese man before the Mixed Court for firing his gun at him. When Judge Chen probed the Cantonese man about why he opened fire on the Westerner, the man replied that a group of rowdy foreigners were lodging at the same inn as him and were being noisy, which

prevented him from sleeping. After politely asking them to keep the noise down, the Westerners insulted and mocked him. So, he went back to his room in the inn and tried to sleep. According to the Cantonese man, he repeated this polite gesture numerous times until he finally "asked them to be quiet again but they threw bricks upstairs to try to hit me and scare me. I was afraid that they would break the windows or the ledge on the window. So, I took out my foreign gun to scare him but I didn't want to hurt him, just to scare him." (他便拿砖头往楼上掷我怕动坏窗栏什物因拿洋枪呵他不粹就把他打伤了). After questioning the defendant about how and where he acquired a foreign gun, Judge Chen reprimanded him for his actions, noting that he should have called the police rather than shoot at the Westerners. He then asked the man: "Why did you shoot your gun?" to which the man offered no reply. Judge Chen delivered his sentence of 48 lashes and two months in prison. The Cantonese man protested and stated that according to precedent he should be made to pay a fine but the judge replied that he was a Chinese person and he was administering this sentence to set and example to other Chinese people by giving him a serious punishment. （尔是中国人，我不罚你定要打了枷者敬观两岁).[143] Here, Judge Chen assumed it was his moral obligation to ensure that all Chinese people (regardless of their native-place) living in the settlement acted according to what he believed to be the proper moral standards and imposed a strict sentence on the Cantonese man with no regard for precedent in the case. This type of ethical judgment was reflected in numerous cases, especially in those that dealt with the seeming degeneration of the moral fabric of the city.

This expounding of morality by editorial writers was exemplified in cases dealing with

prostitution. A young prostitute named Zhao Qinxian was apparently treated poorly by a man named Wang Fengqi. Zhao tried to extort money from him, but she worked at a notoriously disreputable brothel. The brothel was qualified as such by the number of carriages always parked outside the entrance, obviously indicating that business was always thriving. "Who didn't know how long this has been going on?" inquired the author rhetorically in a vexed tone. (查琴仙在青楼中已有历有年兼之声名藉藉车马盈门，无不知其久?) Offering a vivid commentary, the author states that cases of a similar nature were all too frequent and they all seemed to be ending up before the Mixed Court. He felt that the case could not be judged impartially and compared Zhao metaphorically to a deep valley, stating that even a lifetime of proper moral behaviour could never refill her. This idiomatically implied that she has been consumed by greed and would always be empty and seeking fulfillment (彼真可谓欲壑难填矣).[144]

As mentioned in the introduction, the tone of *Shenbao* articles shifted from reporting the daily proceedings of cases brought before the court to assuming a more moralistic, editorial tone. In a sense, the author used the proceedings of the court as a way to voice his disdain and opposition to the flagrant practice of prostitution that was rampant in Shanghai. The readers could have interpreted Zhao to be a metaphorical representation of Shanghai society exemplified by the moral decrepitude that many of its inhabitants felt was increasing. Then, the Mixed Court became a place where these moral battles played out. Interestingly, the author does not single out foreigners for the lowering levels of morality, but speaks of how the problems affected all inhabitants of the settlement. The proceedings of the Court

were used as examples and warnings for the inhabitants of the city against the moral degeneration which came to characterize the city in the first half of the twentieth century.

In another case, an English businessman sued a comprador named Wu Zixiang for stealing a copper tea pot and selling it to a pawn shop. The out-of-work comprador had no money to repay the businessman, so he was taken to the Mixed Court. There it was decided that Wu Zixiang should be sentenced to 40 lashes and three months in prison, referring to Chinese and foreign laws and legal proceedings (系参用中外律例，亦免羁人犯清理绩案之妥善法也). As the author points out, not only was this case similar to many others tried at the Mixed Court, but its sentence was based on a precedent established in the settlement where thieves were not made to reimburse the monetary value of what they stole (which was not customary in Chinese law). He also noted that in cases of this nature, there are really two criminals—the one who stole the goods and the one who received the stolen merchandise—indicating that he felt both are equally morally deplorable. The author noted that the decision on the case was delayed for a week to seek out more evidence and it was decided that Mr. Wu, should be made to serve time in jail in order to protect foreigners from being cheated by unsavory characters like him.[145] He then refers to another case with a similar outcome where a local man surnamed Xia stole 70 buttons of cotton from his place of employment and took them to a pawn shop owned by a Cantonese man. The Cantonese man paid him in part for the cotton and Mr. Xia was to receive the rest of his money once the cotton was sold. An Englishman bought the cotton, but returned it claiming it was of inferior quality. The pawn shop owner and the Englishman sued Mr. Xia, who claimed in court that he

was being scammed by two non-Shanghai residents.[146] Apparently, Mr. Xia felt that the Cantonese man was collaborating with the English businessman to scam the native Shanghai man.

Another anomalous theft case was covered in 1878. A man surnamed Wu stole a boat with five expensive telescopes (*qianlijing*—千里镜, or translated literally, "thousand mile glasses") on board and sold them to a pawn shop. Three of them were retrieved by police officers from the shop which was owned by a Cantonese man named Mr. Xia, but two telescopes had already been sold. The judge on the case (who was not named) and a man surnamed Zhang discussed the matter at length and it was decided that Mr. Wu should be banished from the settlement for his transgressions. The judge and the assessor deliberated and decided that Mr. Xia must have known the telescopes were stolen because he tried to unload them quickly at a much reduced price. The author stated that the case was tried at the Mixed Court because the goods were bought and sold at pawn shops in the settlement. In the opinion of the author, Mr. Wu's sentence was too severe. He noted that the Mixed Court had an informal policy about stolen goods that were retrieved and three of the five telescopes had been located, so this should have been taken into account when the decision meted down. He also felt that the pawn shop owner was aware of his transgressions and willing paid a fine for knowingly trying to unload stolen goods. Apparently, a large kerfuffle transpired and it was finally decided that the fine would be allocated to the Tianjin Flood relief (夏编译随商之张公议将此案罚款洋钱一百元拨充天津水灾赈济). The reasoning for this decision, noted the author, was that under the "old laws" which were in place before the Mixed Court was

established, the pawn shop owner would not have been liable for the crime. However, he had agreed to pay a substantial fine so the judge decided the funds would be best allocated to a public service. A large flood had recently occurred in Tianjin, which the inhabitants of Shanghai had heard about from Beijing. The author stated that although some of Mr. Xia's dealings were unscrupulous, he showed the members of the court that he was essentially a good man by allowing his fine to be donated to the relief effort. The editorial ends with a reference to a Confucian idiom reminding readers that the merciful side of humans will often overtake their guilt and lead them to do kind acts (侧隐之心).[147]

This article gives no further indication of what happened to Mr. Wu, who was sentenced to be banished from the settlement. Instead, the editorial shifts gears and focuses on Mr. Xia, his disreputable business practices and the flood relief in Tianjin. The tone in the article undergoes a dramatic shift: it starts off by explaining the case against Mr. Wu and ends with a reference to classical Chinese idiom showing how mercifulness can overtake guilt. As noted earlier, *Shenbao* was not only a source of news, but it was also an outlet for some of the early ideas of the reformers. This reference to the flood in Tianjin was a way for the editors to cultivate sympathy and donations of well-meaning business-people in Shanghai without overtly asking for money. If the unscrupulous Mr. Xia was willing to contribute to the Tianjin relief fund, then all businessmen should feel some sort of moral obligation to donate money. By appealing to the Confucian sense of morality and invoking a classical Chinese idiom, the author shows how this modern institution and ideas about how reform were heavily steeped in the traditional discourse of Confucian obligation.

Modern amenities also posed problems and raised concerns for the journalists who covered the cases at the Mixed Court. The following case about a carriage collision between a foreigner and a Chinese illustrates that writers were not only interested in passing on amusing details, but also wanted to use cases as models to extol some of the virtues and vices of foreign amenities. The article covers the events of the case and also offers a colorful commentary on why Chinese drivers of Western style carriages were so frequently involved in accidents. A local person (*bendiren*—本地人) surnamed Zhen was driving his brand new Western style horse carriage (*ximache*—西马车) through the settlement when he collided with a Westerner who was also driving a carriage. Although both of the carriages sustained substantial damage, the drivers argued about how the collision occurred and it was difficult for the judge to ascertain who was at fault. The author commented that since new-style carriages arrived in Shanghai, Chinese people were trying to imitate Western ways of driving their carriages. The author states: "there is no need for us Chinese to ape the foreigners," referring to the ways which they drove their carriages (是中国人之何必效颦). The foreigner, who could not speak Chinese, drew a diagram of the intersection and his version of how the accident had transpired. He also stated that Chinese people were not good drivers because they were often involved in accidents. The court then heard Zhen's side of the story and concluded that the accident was his fault. He was charged a fine that would cover the cost of the proceedings as well as the costs of the repairs to the foreigners' carriage.

The article shows apprehension and concern about the recent increase in the number of carriages being driven in Shanghai. The writer felt that Chinese people in Shanghai had

become lazy and indulgent which resulted in a dramatic increase in traffic accidents. There is subtlety to his argument because it does not implicitly blame Chinese drivers but rather the increase in new, Western-style carriages were faulted for the problems caused on the roads. The author also insinuated that whenever an accident involving Chinese and foreigners, the judge sided with foreigners. "The horse carriage is for recreation and it is not good for Chinese people to be driving them around on the roads because they cause traffic accidents and subsequently Chinese people are punished. This is not the first time that a Chinese person has been punished for a traffic violation involving a foreigner. Passengers should also be more alert when riding in carriages so that they can alert the drivers about crashes before they occur" (马车为游戏之物戏无益其斯之谓与中国人因马车而肇事受罚而已经不次坐车者尽临请前辙耶).[148]

A few days later, an incident occurred which illustrated the often inconsistent way cases were reviewed by Chinese officials. A small gunboat was moored in the Suzhou Creek and remained there, obstructing navigation of the creek for some days. A local sampan-man (舢舨人) was employed by the gunboat to bring members of the crew ashore and take them on board again. Hearing that the gunboat was about to leave, the sampan-man went on board and asked for his fees whereupon several members of the crew seized him, beat him severely and fastened a chain around his neck which they locked to a beam overhead. The man cried out for help alerting some locals who summoned a constable. The Chinese constable went on board the gunboat and found the sampan-man in the position described. He demanded the release of the man which he obtained after some demur. One of the crew who seemed most

forward in the affair was asked to go to the Mixed Court to explain the matters but he refused. The constable then went ashore and reported the matter to the Louza (a district in Shanghai] Police Station.

Inspector Wilson proceeded to the gunboat and persuaded the most forward crewman to go quietly to the Mixed Court where the case was presided over by Judge Chen and Davenport. The crewman was charged with assault within the settlement. The facts were proved and after numerous objections, Chen ordered him punished with 100 bamboo blows, to be administered by the end of the day in the presence of the police. In the meantime, the captain of the gunboat had come to the court at once interfering. He noted that it was not usual to flog gunboat crew with bamboo, but with a sort of cudgel, which he then had fetched from his boat. Before the time came for the punishment to be inflicted, Mr. Davenport was called away from the court by other business.

According to the reporter relaying the details of this case, when the defendant was brought forward for punishment, an extraordinary scene was witnessed. Chen invited the gunboat captain to sit beside him on the bench and an earnest conversation took place between them. Then, the captain harangued the defendant for some time while Chen remained quiet. The captain ordered one of his crew to come forward and inflict the punishment and the culprit, objecting to the proceedings altogether, resisted violently. The difficulty did not end here as it required the efforts of nearly a dozen men to throw him into the position necessary for the execution of the punishment. All the while, the captain was shrieking loudly, "Take him out—beat him!" The uproar outside the court was tremendous.

Chen remained quiet, having apparently resigned all authority of the court to the gunboat captain. His shipmate advanced with the cudgel and prepared with great ceremony to administer the blows. Flourishing it round his head some ten times in a formidable manner, he was about to inflict a very heavy blow, but brought the cudgel down with the slightest possible tap, scarcely sufficient to stir the recipient's clothes. Several other taps were administered in this same pantomimic manner and the police officers who observed the scene protested wildly. Inspector Wilson screamed at Chen and the captain that it was not the type of punishment meant to be inflicted and after considerable argument, surrounded by an ever-growing and curious crowd, Chen left the bench and proceeded to where the policemen were standing, held out his hands, and said something to the effect that everyone present "had been friends for a long time, so why should they quarrel now?" Chen tried to appeal to the incensed police officers and excited crowd by allowing the "punishment" to be inflicted in the manner directed by the gunboat captain.

However, the police officers were inexorable and one of them threatened to drive to Mr. Davenport and inform him that the sentence was not being carried out in the manner which it was supposed to be. Chen immediately acknowledged him, and politely asked him not to say anything about it. He then returned to his seat, and presided over the mock punishment. Both the captain and Chen were then told again by the police officers that the 100 blows would have to be administered in accordance with the sentence. Chen entered into another animated conversation with the captain, and afterwards asked the culprit if he would consent to being flogged with bamboo in the ordinary manner. The man, of course, objected. It was arranged

between Chen and the captain that 50 blows should be administered with bamboo in the usual fashion, which led to more resistance on the part of the recipient, and the scene of chaos renewed. The fifty blows, or rather "pats", having been given, Chen asked if they would do, to which Wilson promptly replied a stern "no!" The remaining 50 blows were lightly administered and during the operation, the captain looked on sullenly and when the affair was over, he left his seat in haste. He was followed by Chen, who overtook him at the side of the court where they entered into a brief but animated conversation. The captain then left and was followed by his men including the defendant, who did not seem any the worse for the bambooing he had just received.[149]

This article was unusual in that it did not offer any sort of strong moral or Confucian judgments, but rather relayed the details of the case in a way that allowed the reader to infer the misuse of power by Chen in the absence of Mr. Davenport. The scene must have been incredible, with a Chinese captain presiding over the court and the haranguing that inevitably ensued during the proceedings. Almost no mention was made of the plaintiff after the police inspector appeared, and the article relays the power struggle between Inspector Wilson, Judge Chen and the gunboat captain. From the description offered of the captain approaching the bench and the animated discussions between himself and Chen, they might have been previously acquainted. However, it is more likely that Chen feared antagonizing a military commander. Naval cases were also often arbitrated outside the jurisdiction of the courts, by the naval commanders and Chen, well aware of this fact, probably knew that he should intervene. Kotenev supports this contention when he notes that: "...some Magistrates went

too far in playing the role of interceders for their countrymen. They openly declared in court that they were anxious to assist the Chinese defendants against the foreigners suing them. In fact, they were marionettes in the hands of their superiors and powerful merchant guilds that used them as a tool to regain lost positions and to get a firm footing in the Settlement."[150]

The Chinese magistrates were not the only ones who were willing to make concessions for their citizens. Numerous cases attest to preferential treatment of British nationals by their consul. In some cases, like the one outlined below, the consul exercised his authority well beyond the confines of the settlement, much to the dismay of the Chinese officials. The following editorial outlines a case that dealt with a British citizen whose name I believe to be Anthony (*Anduone*—安多呢). The events unfolded near the floating bridge in Ningbo, which is well outside the jurisdiction of the court. Anthony allegedly beat a boat person to death and when the British consul in Ningbo got wind of this, he sent a representative to the Mixed Court to inquire about jurisdiction. All the while, Anthony denied the allegations against him but several Chinese witnesses came forth against him. However, another witness claimed that she saw a Chinese man surnamed Zhang commit the murder. This ambiguity allowed some leeway and gave the consul a chance to get Anthony to Shanghai, where the author felt he would never be tried for the murder. Mr. Zhang was called to the police station in Ningbo, but would not confess to the murder. The author stated that since no one conceded, readers should not make judgments about the case. As rumors about the case made their way through Ningbo and Shanghai, there was more uncertainly about whether Anthony was actually the murderer.[151]

In a follow-up article, it was noted that Anthony was taken to Shanghai to meet with the consul where he described his version of the events. This was the last mention of the case so it is likely that the author of the article was correct when he stated that once Anthony made it to Shanghai, the consul would probably protect him and not allow him to be tried for the murder.

In a similar case, Judge Alabaster sought advice from the Supreme Court of China and Japan[152] about a British national who was arrested for helping the Taiping close to Nanjing. The Chinese wanted him tried for treason in the imperial court system. The Supreme Court was completely at a loss about how to proceed, but suggested that Alabaster ask the Chinese authorities to provide evidence that justified his arrest and detention. The case picked up a month later when Alabaster replied that he inquired about the evidence concerning the arrest, but that he felt that the Chinese were being evasive. He added that he "had no intention of letting the Chinese authorities keep a British subject in confinement and then when they can no longer do so without the facts coming to the knowledge of the consular officer and requested that they send him to the consular jail in Shanghai."[153]

Cases contesting the jurisdiction of the court were not limited to the British. In March 1876, the Municipal Council sued a Chinese entrepreneur named Souji for evading carriage taxes in the International Concession. Souji kept his stable outside the jurisdiction of the settlement, but he rented carriages and horses within and outside it. The Municipal Council won the case, and Souji was made to pay taxes when his carriages entered the settlement and acquire licenses for his carriages that operated within the boundaries of the settlement. Judge

Chen declared that this case was unfair because it would set a precedent and that from now on cases of this manner would refer to the Souji case. Because there was no precedent for the Municipal Council receiving taxes on activities outside the boundaries of the settlement, Judge Chen was rather apprehensive about allowing the British to collect fees, noting that there were Chinese stables within the boundaries of the French Concession and they did not collect taxes on the horses or charge licensing fees. When the *daotai* got wind of the case, he wrote a letter to the Municipal Council and tried to have it overturned. The *daotai* was also worried that the case would set an unreasonable precedent but he appealed to the Municipal Council to no avail. The Municipal Council expressed concern that if they gave in to the *daotai*, it would create the appearance that he had extra-juridical powers and an ex-parte opinion.[154] This could be understood in the settlement as meaning that unfavorable cases at the Mixed Court could be appealed to the *daotai*, in essence giving him the power of a court of appeal.[155]

Here, as in many other cases, it was clear that some sort of mechanism was needed to deal with the determination of cases not provided for by any existing law. Twelve years before this case Alabaster wrote that: "[f]rom the impracticability of providing for every possible contingency, there may be cases to which no laws or statutes are precisely applicable; such cases may then be determined, by an accurate comparison with others which are already provided, and which approach most nearly to those under investigation, in order to ascertain afterwards to what extent an aggravation or instigation of the punishment would be equitable." He continued, "[a] provisional sentence comfortable thereto shall be laid before

the superior Magistrates, and after receiving their approbation, be submitted to the Emperor's final decision. Any erroneous judgment which may be pronounced in consequence of adopting a more summary mode of proceeding, in cases of doubtful nature, shall be punished as a willful deviation from justice."[156] These cases that arose out of the anomalous situations in the settlement often caused confusion and anger, but also paved the way for new legal knowledge to be created.

Although procedures were not crystallized, by July 1883, Judge Chen and the other Mixed Court officials worked within more established confines and cases that arose where jurisdiction came into question were dealt with in a more coherent way. A case described in the minutes of Municipal Council covered the events surrounding the alleged murder of a local by a Chinese detective named Zhao Ziyun, who was a member of the Municipal Police. He was charged by the city authorities for having caused the death of one Wang A'an. The death was reported to have occurred outside the settlement, but as the accused was in the municipal service as well as a resident of the settlement, he was brought before the Mixed Court (his superiors were probably aware that if they managed to have the case tried at the Mixed Court, and he was found guilty, his sentence would not be as severe). The case served to establish firm precedents for the future practice of the court and to further clarify some of the ambiguities surrounding jurisdiction and process. The bench was occupied by Judge Chen and he decided that before sending the accused into the Chinese city, they would hear evidence in support of the prosecution as well as the defense. Upon doing so, Chen rendered a judgment which ran as follows: "[t]he decision of the court is that a charge of murder has

been preferred against Zhao Siyun before the proper Chinese authorities, in accordance with Chinese law, and that, while the evidence submitted to the court does not prove that the defendant is guilty, it is the opinion of the court that the case is one which cannot be properly determined before the Mixed Court, and that the accused must stand his trial before the Shanghai Magistrate, in accordance with Rule IV of the Regulations..."[157] Chen realized that the jurisdictional boundaries were not so fuzzy as they had once been and had the case sent to the Chinese city, where Zhao Siyun was found guilty of murder (there is no indication of what sentence he received).[158]

Conclusion:

This paper has shown that both the Chinese and the British were receptive and adaptive to each others needs in the early years at the Mixed Court and that it became a place where actors were able to fashion a new legal field because of the fluidity and looseness afforded to them by the system. This legal field exhibited the characteristic processes which Pittman Potter described regarding the incorporation of foreign legal concepts into Qing China. He states that "...in China, compliance with imported law norms may depend not only on their accommodation of traditional norms and practices but also, paradoxically, on their displacing traditional relational norms with norms of formality and objectivity in response to new socio-economic conditions and the perceived needs of members of society that result."[159] The dislodging of traditional norms and the incorporation of new ways of thinking about law, then, was not the complete rupture for the Chinese, as previous scholarship might have emphasized.

Rather, there was, as we have seen, a firm and clear understanding of legality in Qing China, which was adapted and interwoven with Western notions of law through processes of incorporation and negotiation.

At the Mixed Court, boundaries were at first malleable as historical subjects navigated their way in this new arena. In this way, an institutional history of the early years of the Mixed Court provides another way for re-thinking some of the pre-existing notions about how Chinese and Westerners mediated their relationships in treaty-port cities and contributes to the insightful ways that scholars are now conceiving of legality in late Imperial China. This new legal field fashioned by the court gave Chinese and Westerners a concrete outlet where they could voice some of their anxieties about the changes they were experiencing around them. It also allowed them to work out some of the contradictions and tensions they witnessed in their daily lives in numerous discursive outlets, such as *Shenbao* and reports on the Mixed Court. As we have seen, these tensions were expressed in both the Chinese and English representations of the court as frustration, misunderstanding, ambiguity, hopelessness and even anger.

By highlighting some of the pressures that existed for all those who were trying to learn to live together in a dynamic and changing place, we can begin to imagine how people living in Shanghai were coming to terms with the changes that were occurring around them. As new ideas filtered in from the West and other colonial outposts, they were adapted in order to be effectively transplanted to meet the needs of the local character of Shanghai. For this reason, the modernity experienced in Shanghai must be seen as a fluid and changing concept,

whose malleability was heavily dependent on its surroundings and who was experiencing it. Thus, by acknowledging that history can not be unitary and that there are numerous, fluid conceptions of what embodies modernity existing and co-existing with non-modern entities in the city.[160] It also shows the distinct nature of the interactions that were occurring between Chinese, Westerners and how these people envisioned their interactions with each other through the lens of the Mixed Court.

Then, when the Mixed Court is seen through the eyes of all the actors who used it, it is clear that everyone understood the city around them in a multitude of ways. This dissonance in experience required that all the actors worked through problems together in order to find a mutual ground of understanding. This process created "a system of symbols, language, and diffusely shared attitudes that produced a common set of legal assumptions and beliefs,"[161] which contributed to the creation of a distinctive culture at the Mixed Court. In turn, this functioned as one of the catalysts for the reception and incorporation of new ideas about legality and law in Qing China.

Appendix 1:
Foreign Office Records, *National Archives of the United Kingdom* FO 233/96.

The present procedures of the Mixed Court, 1864.

Rule 1: Composition of the court:

- The *daotai* has appointed a *weiyuan* and a district magistrate to preside over the Police Court which sits daily with one or more foreigner appears the general rule being that the British acting consul sits with him on four days out of the weeks with interpreter two days out of the week a representative of the other consulate and whenever an suitable case in which their nationals are concerned comes before it. The consul generally sits also on the days when the observation of the court is taken by the US interpreter. The civil court sits in the afternoon once or twice a week and is presided over by the *haifang bing* who is generally appointed by the consular court *weiyuan* and as a rule by at least two appointed foreign consulates generally leave cases between their subjects and Chinese to be watched by the English.

Rule 2: Record and Interpretation:

- Minutes are taken in Chinese by the writer of the first draft and a note of the procedure is made in English. The directly appealed judgments in civil cases are submitted with the seal of the Court and signed by the *Haifang*. There is no interpreter attached to the court at the time.

Rule 3 Consular jurisdiction:

- The court hears all consular cases for sentence or further communication as the case may require to the District Inspector. Whenever the jurisdiction conflicts with the authorized to the conflict is insufficient, copies of the evidence being forwarded appeal be in every case to the Chinese but the *daotai* is notified for important cases.

Rule 4: Civil jurisdiction:

- The court hears and decides on cases subject to review by the *daotai* and civil cases irrespective of the amount in dispute. Wherever the Chinese Officer and the *weiyuan* differ resolved to be given the case as adjourned and given reference to the respective superiors.

Rule 5: Criminal Jurisdiction for Foreign Offenders:

- The court hears all cases brought against the represented foreigners referring to their superiors when the gravity of the cases or dependant relative to the guest of the prisoner assesses to require it. In the cases of this nature requiring reference that has as yet been brought before the court the prisoner was after committal accused by his consul.

Rule 6: Civil Jurisdiction suits brought against foreigners:

- The court hears a subject to appeal all cases irrespective of the accusations against the defendant. The provision that two consular officers shall successfully sit as appraisers on these cases has been disregarded. In all cases of discrepancies reference is made to either the *daotai* or the consul.

Rule 7: Appeals:

- There has been but one appeal in which the *daotai* and the consul approved the judgment of the court of the minutes without hearing the case.

Rule 8: Compulsory attendance of witnesses:

- Where witnesses refuse to attend and their testimony becomes necessary a warrant is offered by the court which is presented to the witness and the Municipal police or Chinese police resolve it as necessary.

Rule 9: Enforcement of Civil Decisions:

- The enforcement of decisions is left entirely to the Chinese authorities who when necessary are called to do so by the consul.

Rule 10: Rule of defraying expenses:

- The salary of the *weiyuan* is paid by the *daotai* and the *haifang* receives no salary. The writers of the court are paid out of the fines.

Rule 11: Jail:

- No jail has been erected. Sentences are carried out by the Chinese in his own prison.

Endnotes:

[1] Amy E. Den Ouden, *Beyond Conquest: Native Peoples and the Struggle for History in New England* (Nebraska: University of Nebraska Press, 2005), 209.

[2] Fredrick Cooper, *Colonialism in Question: Theory, Knowledge* (Berkeley: University of California Press, 2005), 27.

[3] Melissa Macauley, *Social Power and Legal Culture, Litigation Masters in Late Imperial China* (Stanford: Stanford University Press), 1998, 14.

[4] Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field," translated by Richard Terdiman, *Hastings Law Journal* 38, no. 805 (1987), 1-7. As well as in: Pierre Bourdieu, "The Social Space and the Genesis of Groups," *Theory and Society* 14, no. 6 (November 1985), http://www.jstor.org/. In *Social Space and the Genesis of Groups,* Bourdieu describes a social field as "a multi-dimensional space of positions such that every actual position can be defined in terms of a multi-dimensional system of co-ordinates whose values correspond to the values of the different pertinent variables. Thus, agents are distributed within it, in the first dimension, according to the overall volume of the capital they possess, and in the second dimension, according to the composition of their capital—i.e. according to the relative weight of the different kinds of assets within their total assets." (724).

[5] Bourdieu, *The Force of Law*, 12 .

[6] Bourdieu first used the term cultural capital in his 1973 work *Cultural Reproduction and Social Reproduction* to explain the differences in educational outcomes in France during the 1960s. He elaborated and developed the term with the intention that capital would be understood as an actor in social relations which operated within a system of exchange. The term can be extended to mean all the material and symbolic goods that present themselves as worthy of being sought by a particular social field. Cultural capital then acts as a social relation within a system of exchange that includes the accumulated cultural knowledge of an individual or group and confers power and status.

[7] Bourdieu, *The Social Space and the Genesis of Groups*, 725-729.

[8] Bourdieu, *The Social Space and the Genesis of Groups*. 730.

[9] Pierre Bourdieu, "Social Space and Symbolic Power," *Sociological Theory* 7, no. 1 (Spring 1998), 159.

[10] Bourdieu, *The Force of Law*, 12.

[11] Bourdieu, *The Force of Law,* introduction. Habitus is a term often used by Bourdieu to explain some of the habitual and patterned ways of understanding, judging, and acting which arise from a particular position as a member of one or several social 'fields.'

[12] Bourdieu, *The Force of Law*, 17.

[13] Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), 167.

[14] Den Ouden, *Beyond Conquest,* 48-49.

[15] Niklas Luhmann, *A sociological theory of law,* translated by Elizabeth King and Martin Albrow, (London: Routledge, 1985), *17.*

[16] Bourdieu, *The Force of Law*. Sin Waiman and Chu Yiuwai also use some of these concepts proposed by Bourdieu to advance their thoughts on colonial legal culture in Hong Kong in the article

"Whose rule of Law? Rethinking (Post-)Colonial Legal Culture in Hong Kong," *Social Legal Studies* 7, no. 2 (1998): 157-169. Their contention being that in postcolonial Hong Kong, the rule of law inherited from the British acquired the status of a grand narrative capable of masking its own injustices which was made possible by the occidentalization strategies employed by those in power, namely the legal profession and the government. They argue that the principle of *qing* (情) is marginalized through the culture-biased structures imposed by Western legal systems and this marginalization has become so deeply engrained in Hong Kong legal culture that it now extends beyond legal discourse into what they define as the public sphere. The fundamental problem being that *qing* is marginalized because *fa* (法) is represented as the way—or the *dao* (道)—of modern society.

[17] Bourdieu, *The Force of Law, 27.*

[18] Philip C. Huang, "Between Informal Mediation and Formal Adjudication: The Third Realm of Qing Civil Justice," *Modern China* 19, no. 3 (July 1993), 256.

[19] Philip C. Huang, *Civil Justice in China: Representation and Practice in the Qing.* (Berkeley: University of California Press, 1995), 75-76.

[20] In some ways, it is also dissimilar: no notion of law in China being natural or god-given and law was never seen as a method of monarchical rule.

[21] Sin and Chu, *Whose rule of law,* 152-153.

[22] Huang, *Civil Justice in China,* 147. Prasenjit Duara also examines the role of the *baojia* system in *Culture, Power and the State: Rural North China, 1900-1942* (Stanford University Press, Stanford, 1988). Duara calls the *baojia* (along with the *lijia)* system "[t]he most ambitious administrative means by which the Qing sought to control society during its vigorous early years..." (page 42). But he also acknowledges that the "administrative nomenclature varied greatly from county to county," (page 47) indicating that within localities the effectiveness of this means of administration varied greatly.

[23] Huang, *Civil Justice in China,* 163-165.

[24] Huang, *Civil Justice in China,* 99.

[25] A *songshi* (讼师) is translated in my dictionary as " a legal pettifogger who made a living by writing plaints for others." (以给打官司的人出主意，写状纸为职业的人). *Songgun* (讼棍) also carries a derogatory connotation, defined as "a legal pettifogger; shyster; one who is professionally unscrupulous, especially in the practice of law" (唆使别人打官司自己从中耳利的坏人). *Yadu* (衙独) refers to the Yamen runners (or worm runners) denoting their unscrupulous and selfish nature for which they seem to be renowned. This claim is substantiated by Melissa Macauley on page 16 of her work *Social Power and Legal Culture* where she states that "[t]he metaphors of pettifoggery in literature and popular performance derived from the most scandalous historical cases of litigation mastery...They often involved exhumations of corpses, false accusations (of murder, philandering, and lesser crimes), and often mob violence.

Interestingly, in the *Shenbao* sources that I reviewed and in Elvin's article about the Mixed Court before 1911, Western lawyers are most commonly referred to as *songshi*, not as *lüshi* (律师), which is the contemporary translation for a lawyer, or "someone who studies law". Macauley states that *songshi* is the less pejorative of the three terms, when used in connotation (Macauley, 21). Although western legal terminology was introduced to China in 1863 by W.A.P. Martin's *Elements of International Law*, I am unclear whether the *Shenbao* authors were familiar with the term *lüshi* and simply dismissed it. The authors could have also been unfamiliar with it and therefore used terms within their vocabulary that were

the closest articulation of how and what they envisioned these foreign lawyers to be.

[26] Huang, *Between Informal Mediation and Formal Adjudication,* 252.

[27] Macauley, *Social Power and Legal Culture,* 4-5.

[28] Derk Bodde and Clarence Morris, *Law in Imperial China* (Cambridge: Harvard University Press, 1967), Conclusion.

[29] Jeffery N. Wassertorm, "New Approaches to Old Shanghai," *Journal of Interdisciplinary History* 32, no. 2 (Autumn 2001), 263-279.

[30] Laura Ann Stoler, *Race and the Education of Desire: Foucault's History of Sexuality and the colonial order of things* (North Carolina: Duke University Press, 1999), 24-26.

[31] Cooper, *Colonialism in Question,* 137.

[32] Timothy Mitchell, "Introduction to the Stages of Modernity," in *Questions of Modernity*, ed. By Timothy Mitchell (University of Minnesota Press, Minneapolis, 2000), XIV-XVI.

[33] Cooper, *Colonialism in Question,* 113-114. Modernity, for Cooper can be a bundle of social, ideological, and political phenomenon whose historical origins lie in the West, "but which is condemned itself as an imperial construct, a global imposition of specifically Western social, economic, and political forms that tames and sterilizes the rich diversity of human experience and the sustaining power of diverse forms of community." In another incarnation, modernity is the "European project and a European accomplishment, to be defended against others who may knock at the gate but whose cultural baggage renders the mastery of modernity unattainable." Modernity can also be conceived of as a plurality; we have "multiple modernities" and "alternative modernities," bringing out the way in which non-Western peoples develop cultural forms that are not mere repetitions of tradition but bring their own perspectives to progress.

[34] Mitchell, *Questions of Modernity, XV.*

[35] Cooper, *Colonialism in Question,* 117.

[36] Mitchell, *Questions of Modernity*, XIV-XVI.

[37] F.L. Hawks Pott, *A short history of Shanghai, being an account of the growth and development of the international settlement* (New York: AMS Press, 1973 [reprint of 1928 edition]), 222.

[38] British House of Commons, Parliamentary Papers, Dublin: *Irish University Press Series, 1977: Correspondence relative to the Earl of Elgin's Special Missions to China and Japan, 1857-1859.* From aboard *Furious,* April 15, 1858 (Received July 15, 1858).

[39] Robert Bickers, *Britain in China: community, culture and colonialism 1900-1949* (New York: Manchester University Press, 1999), 86.

[40] Shanghai Municipal Archives, UI-1-1 thru UI-1-12.

[41] Fredrick Wakeman and Richard Louis Edmonds, eds. *Remapping Republican China,* (New York: Oxford University Press, 2000), conclusion.

[42] Mariam Dossal, *Imperial Designs and Indian Realities, The Planning of Bombay City 1845-1875* (Bombay: Oxford University Press, 1991). Explaining that urban topography in Bombay was socially created through the use of space, but determined by political considerations, Dossal explores the expansion of the British Empire and the institutions which they implanted on Bombay in the years just prior to the establishment of the settlement in Shanghai. Her contention is that colonial port cities were to serve as intermediate cites, or submetropoles. This was coupled with the Victorian concern for order, civic

improvements and the extension of British hegemony required intervention by the state, but also meant that many colonial ventures followed patterns established in India.

[43] Mark Elvin, "The Mixed Court of the International Settlement at Shanghai until 1911," *Papers on China* 17 (1963), 138.

[44] Elvin's study, although useful, was severely limited by the lack of accessible sources, which he readily acknowledges. Many of the colonial records from Shanghai were put in a warehouse where they were left to rot after the Communist takeover. After becoming available in the early 1980s, they are partly housed at the British National Archives, and partly at the Shanghai Municipal Archives.

[45] In the sources from the 1860s and 1870s that I used for my project there were numerous Chinese and English accounts of the court, but when I looked at some of the later sources from 1902 onward at the British National Archives they were predominantly in English with the odd Chinese reference.

[46] Tahirah Lee, *Law and Local Autonomy at the International Mixed Court of Shanghai.* (New Haven: Yale University, unpublished PhD Dissertation, 1990), 346.

[47] Translated to "*Shanghai Newspaper*", 申 being the traditional character for Shanghai. *Shenbao* is available in a bound and reprinted edition at the Shanghai Library.

[48] Barbara Mittler, *A Newspaper for China? Power, Identity and Change in Shanghai's News Media, 1872-1912* (Cambridge: Harvard University Press, 2004), 420.

[49] Mittler, *A Newspaper for China,* 4.

[50] Mittler, *A Newspaper for China,* 49-51. Here, she outlines a few of the ways which foreign style papers were "sinified" from its layout and adapting its periodicity to Chinese practices by not publishing on Sundays. *Shenbao* also began by adhering to the Chinese lunar calendar.

[51] Mittler, *A Newspaper for China,* 117.

[52] Mittler, *A Newspaper for China,*13.

[53] Mittler, *A Newspaper for China,*15.

[54] Mittler, *A Newspaper for China,*125. Here, Mitler is quoting Arthur Smith in *Proverbs and Common Sayings in Chinese.*

[55] I am sure that this transition was initiated to increase readership, but I cannot be sure that it was a response to the increase in noteworthy and commentary worthy cases at the Mixed Court or to the fact that there was a waning interest in the daily proceedings. The proceedings were never dull, but were often redundant. I do know that after about 8 months of publication, the stories about the Mixed Court got much "juicer" and less frequent.

[56] Mittler, *A Newspaper for China,*69.

[57] Mittler, *A Newspaper for China,*75.

[58] Macauley, *Social Power and Legal Culture,* 25.

[59] David Spurr, *The Rhetoric of Empire: Colonial Discourse in Journalism, Travel Writing, and Imperial Administration* (Durham: Duke University Press, 1993), 11. He is saying that there is a tension in colonial writing because the writers are trying to create legitimacy by gaining the acceptance of the colonized people, but at the same time they are writing for the colonizers.

[60] Mittler, *A Newspaper for China,*78.

[61] Bickers, *Britain in China,* 37.

[62] Bickers, *Britain in China* ,87.

[63] Mittler, *A Newspaper for China,*357.

[64] Bryna Goodman, *Native Place, City and Nation: Beyond Netowrks and Indentities in Shanghai 1853-1937* (Berkeley: California University Press, 1995). This is an argument that Goodman makes throughout her book.

[65] Bryna Goodman, "The Locality as a microcosm for the nation?: Native Place Networks and Early Urban Nationalism in China," *Modern China* 21, no. 4 (1995): 387-419.

[66] Mittler, *A Newspaper for China,*364.

[67] *Shenbao*, July 21, 1872. I have taken the liberty of converting all the lunar dates of the *Shenbao* articles to Western Calendar equivalents in order to maintain consistency in this paper with the help of the wonderful website hosted by Academia Sinica which can be found at: http://www.sinica.edu.tw/~tdbproj/sinocal/luso.html

[68] *Treaties, Conventions, Etc., Between China and Foreign States*, (Shanghai: AMS Press, 1917), *The Treaty of Nakjing, 1842.* Also in P.D. Coates, *The China Consuls: British Consular Officers, 1843-1943* (Hong Kong: Oxford University Press, 1988), 26.

[69] P.C. Kuo, *A critical study of the first Anglo-Chinese war, with documents* (Westport: Hyperion Press, 1973), 165. Also, in A.M. Kotenev's *Shanghai: Its Municipality and the Chinese* (Shanghai: North China Daily News Herald, 1927), 28. Kotenev contends that: "According to the Treaties only one fact is beyond dispute. It is that the foreigners were entitled to reside, lease land and build houses in certain parts of Chinese territory—the Treaty Ports—without being necessarily confined to the 'ground and houses' set apart by the local Chinese officers and Consuls. All other rights, including the right of a further extension of the settlements pertained to questions, the nature of which could have...been disputed by the Chinese authorities."

[70] Rodney Gilbert, *The Unequal Treaties: China and the Foreigner* (Arlington: University Publications of America, 1976), 116. The problem of extraterritoriality was quickly rectified by adopting it from an American treaty which also included provisions for the most-favoured-nation clause. The most-favoured-nation clause was seen as an important way of articulating power in Asian countries in the nineteenth century. As a formal bilateral agreement, it stipulated that the two countries involved in treaty negotiations were privileged to the outcomes of the treaties negotiation of all the other nations and the host nation. Although the most-favoured- nation clause is conspicuously absent from the Treaty of Nanjing, it was the first binding international agreement entered into by the Qing government with a foreign power. The most-favoured-nation clause was added to an American treaty three years later and set the precedent for other countries.

[71] In *Imperial Designs and Indian Realities,* Dossal notes that by 1875 Bombay had been significantly restructured and that "the unwalling of the Fort, the reclamation of additional land, and the development of cotton mills, railways and wet docks were complemented by institutions such as the Bombay Municipal Corporation and the Bombay Port Trust, testifying to the growing importance of the city in the capitalist world networks." (3) She also notes that Bombay was the testing ground for British colonialism and urban design throughout the nineteenth century.

[72] A.M. Kotenev, *Shanghai: Its Municipality and the Chinese*, 145.

[73] Yuen-Sang Leung, *The Shanghai Taotai: Linkage Man in a Changing Society: 1843-1890*

(Hawaii: University of Hawaii Press, 1990), 174.

[74] Leung, *The Shanghai Taotai,* 13 and 22.

[75] Leung, *The Shanghai Taotai,*22.

[76] Kuo, *A Critical Study of the First Anglo-Chinese War*, 175.

[77] Coates, *The China consuls,* 101.

[78] Kuo, *A Critical Study of the First Anglo-Chinese War*, 175. The document which was signed by the *daotai*, was never officially acknowledged by Beijing.

[79] Kuo, *A Critical Study of the First Anglo-Chinese War*, 175.

[80] Pott, *A short history of Shanghai*, 249.

[81] Pott, *A Short History of Shanghai,* 113.

[82] Pott, *A Short History of Shanghai,* 36.

[83] Lu, *Beyond the Neon Lights,* 74.

[84] Nanjing is about 160 km west of Shanghai.

[85] British House of Commons, Parliamentary Papers, Dublin: *Irish University Press Series, 1977:* Sir F. Bruce to Earl Russell, Beijing, April 30, 1863 (Received August 11, 1863). vol. LXIII, 74.

[86] British House of Commons, Parliamentary Papers, Dublin: *Irish University Press Series, 1977:* Sir F. Bruce to Earl Russell, Beijing, April 30, 1863 (Received August 11, 1863). vol. LXIII, 93-94.

[87] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/96.

[88] Elvin, *The Mixed Court*, 135.

[89] Elvin, *The Mixed Court,* 135.

[90] A.M. Kotenev, *Shanghai: Its Mixed Court and Council* (Shanghai: North China Daily Herald, 1927), 46. Kotenev contends that Consul Parkes stated: "[p]rior to the institution of this court [Mixed Court] in May last, all offenders arrested by the Municipal Police within the Foreign Settlement (exclusive to the French Quarter), frequently to the number of 20 a day, were brought before H.M.'s Consul and committed by them to the Chief and nearest Chinese Magistrate inside the [Chinese] City."

[91] Elvin, *The Mixed Court,* 137.

[92] Gustavus Ohlinger. "Extra-Territorial Jurisdiction in China," *Michigan Law Review* 4, no. 5 (March 1906), 846. Ohligner explains that the Mixed Court is "presided over by a Chinese magistrate and the representatives—'assessors,' they are called—of Great Britain, Germany and the United States have regular days for sitting with him."

[93] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/96.

[94] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/96.

[95] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/96.

[96] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/5.

[97] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/5.

[98] Pär Cassel, "Excavating Extraterritoriality: The "Judicial Sub-Prefect" as a prototype for the Mixed Court in Shanghai," *Late Imperial China* 24 no. 2 (December: 2003), 156-164.

[99] Kotevev, *Shanghai: Its Mixed Court and Council,* 55. Article VII of the Treaty of Tianjin states as follows: "Toute affaire entre les sujets russe et chinois dans les ports et villes ouvertes sera examinée par les autorités chinoises de concert avec le Consul russe ou l'agent qui représente l'autorité du Gouvernement russe dans l'endroit." And Article VIII of the Treaty of Beijing provided that: "Les

contestations qui se rapportent point à des affaires de commerce entre marchantes telles que litiges, plaints, etc. *sont jugées de consentement mutuel par le Consul* et le chef local, et les délinquants sont punis d'après les lois de leur pays."

[100] Kotenev, *Shanghai: Its Mixed Court and Council,* 55.

[101] Cassel, *Excavating Extraterritoriality,* 175.

[102] Cassel, *Excavating Extraterritoriality,* 180.

[103] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/96.

[104] Kotenev, *Shanghai: Its Mixed Court and Council*, 64.

[105] Elvin, *The Mixed Court,* 148-149. Elvin notes that it was not until 1905 that it was recommended that the magistrate have the powers of the *fumin tongzhi* (抚民同知), that is to say of an assistant prefect with "jurisdiction over the population of turbulent areas and savage tribes." Until that time, the Chinese Judge or Magistrate at the Mixed Court was simply referred to as *gonghuitong* (公会同).

[106] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/96.

[107] Kotenev, *Shanghai: Its Mixed Court and the Chinese,* 55.

[108] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/96.

[109] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/96.

[110] Foreign Office Records, *National Archives of the United Kingdom* FO 233/96.

[111] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/96.

[112] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/96.

[113] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/96.

[114] Foreign Records Office, *National Archives of the United Kingdom* FO 671/9.

[115] Foreign Records Office, *National Archives of the United Kingdom* FO 671/9.

[116] Manley O. Hudson, "The Rendition of the International Mixed Court at Shanghai," *The American Journal of International Law* 21, no. 3 (July 1927), 454-455.

[117] Bourdieu, *The force of law,* 32.

[118] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/96.

[119] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/96.

[120] A lot of the British commentary on the ineffectiveness of the court is embroiled with Orientalist sentiments. Citing just one example of why a British observer felt some of the mechanisms of the Court did not operate effectively, he noted that: "if any one fancies that the Chinese are at once going to change their laws, or rather their customs, which stand them in the place of laws, purely in the interest of foreigners, he is mistaken. All that can be done with such an obstinately fossilized race must be done by degrees, and very slow degrees, with as little force as possible." (FO 233/96).

[121] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/96.

[122] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/96.

[123] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/96.

[124] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/96.

[125] Foreign Office Records, *National Archives of the United Kingdom.* These sentiments were expressed in a report on the Mixed Court dated from 1868 in the Foreign Office Records, *National Archives of the United Kingdom,* FO 288/910.

[126] Foreign Office Records, *National Archives of the United Kingdom,* FO 288/910.

[127] Kotenev, *Shanghai: Its Mixed Court and Council*, 53.

[128] Kotenev, *Shanghai: Its Mixed Court and Council,* 91.

[129] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/96.

[130] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/96.

[131] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/96.

[132] North China Daily Herald, July 11, 1898, 59. from the website "Tales of Old Shanghai" found at: http://www.earnshaw.com/shanghai-ed-india/tales/tales.htm

[133] North China Daily Herald, July 11, 1898, 59.

[134] *Shenbao,* July 3, 1879.

[135] Bradly W. Reed, *Talons and Teeth, County Clerks and Runners in the Qing Dynasty* (Stanford: Stanford University Press, 2000), 5.

[136] *Shenbao,* July 3, 1879.

[137] *Shenbao,* July 3, 1879.

[138] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/96.

[139] Kotenev, *Shanghai: Its Mixed Court and Council,* 88.

[140] Kotenev, *Shanghai Its Mixed Court and Council*, 54.

[141] My Classical Chinese tutor Jingjing and I decided that within the context of the article, *Heiren* should be taken to mean an Indian person.

[142] *Shenbao*, March 17, 1872.

[143] *Shenbao*, March 19, 1872.

[144] *Shenbao,* April 4, 1872.

[145] *Shenbao,* May 3, 1874.

[146] It is evident that the Westerner was considered a foreigner, but the Classical Chinese quote notes that Cantonese people came from (or brought themselves) from the ocean, using the same terminology that would normally be saved for a person who came from another country (广东人身带洋).

[147] *Shenbao,* September 5, 1872.

[148] *Shenbao,* July 17, 1876.

[149] *Shenbao*, July 5, 1876.

[150] Kotenev, *Shanghai Its Mixed Court and Council,* 76.

[151] *Shenbao,* March 4 and 18, 1877.

[152] This was a colonial court that operated in Hong Kong and Japan using British law.

[153] Foreign Office Records, *National Archives of the United Kingdom,* FO 656/13.

[154] An *ex parte* decision occurs when a judge makes a decision without requiring all of the parties to the controversy to be present. In British legal traditions, *ex parte* means a legal proceeding brought by one person in the absence of and without representation or notification of other parties. It can also be used more loosely to refer to improper unilateral contacts with a court, arbitrator or represented party without notice to the other party or counsel for that party.

[155] Shanghai Municipal Archives, U1-1-108 (1.22)

[156] Foreign Office Records, *National Archives of the United Kingdom,* FO 233/96.

[157] Shanghai Municipal Archives, UI-2-627.

[158] Shanghai Municipal Archives, UI-2-627.

[159] Pittman Potter, *The Chinese legal system: globalization and local legal culture* (New York: Routeledge, 2001), 7.

[160] Mitchell, XIV.

[161] Macauley, 14.

Bibliography:

Archival Sources:

Shanghai Municipal Archives (上海档案馆), 12 Zhongshan Road South, Shanghai.

Consulted both Chinese and English sources regarding the Mixed Court and the Municipal Council:

- U1-1-1 thru U1-1-12 (上海公共租界工部局量会会议录) 1854-1895
- U1-1-45 thru U1-1-55 (上海公共租界工部局各委员会会议录) 1854-1908.
- U1-1-107 thru U1-1-109 (上海公共租界工部局公布的会议录)1863- 1877.
- U1-2-622 thru U1-2-673（上海公共租界工部会来柱文书）

Shanghai Library（上海图书馆）Huaihai Road, Shanghai.

For referencing:

- 上海近史 (Shanghai History)
- 老上海 (Old Shanghai)
- 从霞飞路道淮海路 (From Joffre Street to Huaihai Road)
- 大清律例 (The Great Qing Legal Code)
- 中国法律史 (Chinese Legal History)

Primary Sources:

- 申报 (*Shenbao*)—numerous articles from 1872 thru 1886.

The National Archives of the United Kingdom, Kew, England.

Records of the Foreign Office:

- FO 17/1518, FO 233/5, FO 233/96 (A complete file on the Mixed Court from 1863 through 1876), FO 228/910, FO 656/12, FO 656/13, FO 656/52, FO 656/59, FO 671/9, FO 1092/338.

Secondary Sources:

Alford, William. "Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China." *California Law Review*. 72, no. 6 (Dec., 1984): 1180- 1256.

Banno, Masataka. *China and the West 1858-1861: The Origins of the Tsungli Yamen.* Cambridge: Harvard University Press, 1964.

Bhabha, Homi K., ed. *Nation and Narration.* New York: Routledge, 1990.

Bickers, Robert. "Shanghailanders: The Formation of Identity of the British Settler Community in Shanghai 1843-1937." *Past and Present* no. 159 (May 1998): 161-211.

Bickers, Robert. *Britain in China: community, culture and colonialism 1900-1949.* New York: Manchester University Press, 1999.

Bodde, Derk and Clarence Morris. *Law in Imperial China.* Cambridge: Harvard University Press, 1967.

Bourdieu, Pierre. "The Social Space and the Genesis of Groups." *Theory and Society* 14, no 6. (Nov. 1985): 723-744.

Bourdieu, Pierre. *La Distinction: critique sociale du jugement.* Paris: Les Éditions de Minuit, 1979.

Bourdieu, Pierre. "The Force of Law: Toward a Sociology of the Juridical Field." *Hastings Law Journal*, 38 (July 1987): 1-40.

Brinton, Jasper Yeates. *The Mixed Courts of Egypt.* New Haven: Yale University Press, 1968.

Cassel, Pär. "Excavating Extraterritoriality: The 'Judicial Sub-Prefect' as a prototype for the Mixed Court in Shanghai." *Late Imperial China.* 24, no. 2. (December 2003): 156-182.

Chen, Jerome. *China and the West.* London: Hutchinson & Co. Publishers Ltd., 1979.

Chu, Tung-Tsu. *Local Government in China Under the Ch'ing.* Cambridge: Harvard University Press, 1962.

Coates, P.D. *The China consuls: British consular officers, 1843-1943.* New York: Oxford University Press, 1988.

Den Ouden, Amy E. *Beyond Conquest: Native Peoples and the Struggle for History in New England.* Nebraska: University of Nebraska Press, 2005.

Dossal, Mariam. *Imperial Designs and Indian Realities: The Planning of Bombay City, 1845-1875.* Bombay, Oxford University Press, 1991.

du Moiron, Georges. *Les juridictions françaises en orient et Les Tribunaux Internationaux en Égypt.* Alger: Adolphe Jourdan, 1882.

Duara, Presenjit. *Culture, Power and the State: Rural North China, 1900-1942.* Stanford: Stanford University Press, 1988.

Duara, Presenjit. *Rescuing History from the Nation: Questioning Narratives of Modern China.* Chicago: University of Chicago Press, 1995.

Elvin, Mark. "The Mixed Court of the International Settlement at Shanghai until 1911." *Papers on China* 17 (1963): 131-159.

Goodman Bryna. "The Locality as a microcosm for the nation?: Native Place Networks and Early Urban Nationalism in China." *Modern China* 21, no. 4 (1995): 387-419.

Goodman, Bryna. *Native Place, City and Nation: Regional Networks and Identities in Shanghai 1853-1937.* Berkeley: University of California Press, 1995.

Huang, Philip C. "Between Informal Mediation and Formal Adjudication: The Third Realm of Qing Civil Justice." *Modern China.* 19, no. 3. (July 1993): 251-298.

Huang, Philip C. "Civil Adjudication in China, Past and Present." *Modern China* 32, no. 2 (April 2006): 135-180.

Huang, Philip C. "Court Mediation in China, Past and Present." *Modern China* 32, no. 2 (July 2006): 275-314.

Huang, Philip C. "Public Sphere"/ "Civil Society" in China? The Third Realm between State and Society" *Modern China.* 19, no. 2 (April 1993): 216-240.

Huang, Philip C. *Civil Justice in China: Representation and Practice in the Qing.* Berkeley: University of California Press, 1995.

Hudson, Manley O. "The Rendition of the International Mixed Court at Shanghai," *The American Journal of International Law,* 21, no. 3. (July 1927): 451-471.

Kotenev, A.M. *Shanghai: Its Mixed Court and Council.* Shanghai: North-China Daily News

and Herald, 1927.
Kotenev, A.M. *Shanghai: Its Municipality and the Chinese*. Shanghai: North-China Daily News and Herald, 1927.
Kuo, P.C. *A Critical Study of the First Anglo-Chinese War*. Westport: Hyperion Press Inc. 1975.
Lee, Tahirah. *Law and Local Autonomy at the International Mixed Court of Shanghai*, New Haven: Yale University, unpublished PhD dissertation, 1990.
Leung Yuen-Sang, *The Shanghai Taotai: Linkage Man in a Changing Society, 1843-1890*. Hawaii: University of Hawaii Press, 1990.
Lu, Hanchao. *Beyond the Neon Lights: Everyday Shanghai in the Early Twentieth Century*. Berkeley: University of California Press, 1999.
Luhmann, Niklas. *A sociological theory of law*. Boston: Routledge & Kegan Paul, 1985.
Macauley, Melissa. *Social Power and Legal Culture: Litigation Masters in Late Imperial China*. Stanford: Stanford University Press, 1998.
Mitchell, Timothy, ed. *Questions of Modernity*. Minneapolis: University of Minnesota Press, 2000.
Mittler, Barbara. *A Newspaper for China? Power, Identity and Change in Shanghai's News Media, 1872-1912*. Cambridge: Harvard University Press, 2004.
Ohlinger, Gustavus. "Extra-territorial Jurisdiction in China." *Michigan Law Review* 4, no. 5 (March 1906): 339-348.
Pott, F.L. Hawks. *A short history of Shanghai, being an account of the growth and development of the international settlement*. New York: AMS Press, 1973 (reprint of 1928 edition).
Reed, Bradly. *Talons and Teeth: County Clerks and Runners in the Qing Dynasty*. Stanford: Stanford University Press, 2000.
Sin, Waiman and Chu Yiuwai. "Whose rule of Law? Rethinking (Post-) Colonial Legal Culture in Hong Kong." *Social Legal Studies* 7, no. 2 (1998): 147-169.
Spurr, David. *The Rhetoric of Empire: Colonial Discourse in Journalism, Travel Writing, and Imperial Administration*. Durham: Duke University Press, 1993.
Stephens, Thomas B. *Order and Discipline in China: The Shanghai Mixed Court 1911-1927*. Seattle: University of Washington Press, 1992.
Stoler, Laura Ann. *Race and the Education of Desire: Foucault's History of Sexuality and the colonial order of things*. North Carolina: Duke University Press, 1999.
Wassertorm, Jeffery N. *"New Approaches to Old Shanghai."* Journal of Interdisciplinary History 32, no. 2 (Autumn 2001): 263-279.
Wood, Frances. *No Dogs and Not Many Chinese: Treaty Port Life in China: 1843-1943*. London: John Murray Press, 1998.
Yeh, Wen-hsin, ed. *Becoming Chinese: Passages to Modernity and Beyond*. Berkeley: University of California Press, 2002.
Yen, Hawkling. "The Shanghai Provisional Court: Past and Present." *Pacific Affairs*, 3, no. 3 (March 1930): 294-298.