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Yorgos Moraitis: Georgiou Olympiou 72, 26224, Patras, Greece, gmoraitis01@qub.ac.uk, <https://orcid.org/0009-0009-2630-9608>

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Extraterritorial law as a colonial structure: Sir Robert Hart and his independence from British legal authorities in China (1870-1873)

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Abstract

*This paper examines the use of English law in British extraterritorial courts in China, drawing on the well-noted *Von Gumpach v Hart* (1870) case. The argument put forth is that the application of English law in this context was shaped by the quasi-colonial circumstances of extraterritoriality in China's treaty ports, and that it largely adapted to the social and political realities of this colonial setting. The paper contends that extraterritorial law can only be fully understood as a colonial phenomenon, reflecting a colonial worldview and power dynamics. In the particular case of *Von Gumpach v Hart*, the operation of extraterritorial law was influenced by the political and economic interests of British colonial elites in Shanghai, as well as by colonial assumptions, discourses, and value systems.*

The paper draws on local newspaper reports of the case, legal documents and untapped sources such as the diaries of the defendant, Sir Robert Hart. During the relevant period, Hart served as the Inspector General of the Chinese governmental tax-collection agency, but also functioned as an advisor to the Qing government of China in foreign affairs. Hart's dispute with von Gumpach unfolded during a period that his role Sino-British relations had come under scrutiny by the British community in China. The paper shows that the British political and commercial elites in China used the controversy as an opportunity to voice their concerns over Hart's growing influence in Sino-British politics.

Keywords: Chinese Imperial Maritime Customs, Comparative law, English law, Extraterritoriality, Sir Robert Hart, Hart's diaries

Introduction

Extraterritorial law was developed in China after the Opium Wars to regulate the activities of foreign nationals living and conducting business in China. It was imposed by Western powers, particularly Britain, as a condition of the unequal treaties that ended the Opium Wars. The practice of extraterritorial law, largely known as extraterritoriality, meant that foreign nationals living in China were not subject to Chinese law, but instead were governed by the laws of their home countries. This created a system of parallel legal jurisdictions in China, with foreigners living under the jurisdiction of their own consular courts, rather than under the Chinese legal system.

Initially, extraterritoriality only applied to British nationals living in China. However, other Western powers, including France, the United States, and Germany, soon extended this privilege to their citizens as well. These countries created consular courts in areas close to China's ports, known as 'concessions', and appointed their own consular representatives to govern those areas and exercise legal authority over their nationals in criminal or civil cases.

Western powers justified the use of extraterritoriality on the grounds that China's legal and penal practices were so unjust and barbaric that Western expats had to be kept within the realm of legal 'civilisation'.¹ Accordingly, extraterritorial law was treated as a badge of honour for foreigners living in China and as a marker of respect among them. But it was also perceived as some sort of 'punishment' that China's rulers, the Qing government, had to endure due to their perceived inferiority vis-a-vis the Western nation-states.²

¹ Gerrit W Gong, *The Standard of 'Civilization' in International Society* (Oxford: Clarendon, 1984); Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*, Reprint edition (Cambridge: Cambridge University Press, 2014).

² Kate Miles, 'Uneven Empires', in *The Extraterritoriality of Law*, ed. Daniel S. Margolies et al., *Politics of Transnational Law* (Routledge, 2019).

The above worldview was evident in the way foreign consuls applied extraterritoriality in cases they presided over between foreigners and Chinese. Extraterritoriality, for most foreign consuls, meant that their nationals were essentially immune to accusations made by Chinese and their authorities.³ Accordingly, most cases were handed poorly, to say the least. The context within which consuls were asked to make judgments favoured such an impartial approach. Most of them were not trained lawyers (in fact, not even professional consular officers) but merely local merchants appointed to protect and promote their country's interests.⁴

The majority of studies on extraterritoriality in China emphasise its impact on China's sovereignty and Chinese responses to or influence on it.⁵ However, less attention has been given to the relationship between extraterritorial courts in China and their corresponding legal institutions in their home countries, especially in regards to the application of national laws. This article aims to address this gap by examining the *Von Gumpach v. Hart* case, which was heard in 1870 at the British Supreme Court for China and Japan in Shanghai (BSC), and was later appealed in London at the Privy Council, the highest court of appeals in the British Empire. It should be noted that compared to the other extraterritorial courts in China, the BSC was the only British legal institution in China whose judges had received formal education in law. This allows for a more meaningful comparison of the decisions made by each court in this case.

³ Eileen Scully likens foreigners' perception of extraterritorial privileges to the mythical Midas touch. See Eileen P. Scully, *Bargaining with the State from Afar: American Citizenship in Treaty Port China, 1844-1942* (Columbia University Press, 2001), p.18.

⁴ Douglas Clark, *Gunboat Justice Volume 1: British and American Law Courts in China and Japan*, vol. 1 (Hong Kong: Earnshaw Books, 2015), pp.24-5.

⁵ Kayaoğlu, *Legal Imperialism*; Gong, *The Standard of 'Civilization' in International Society*; Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (Oxford; New York: Oxford University Press, 2012); Miles, 'Uneven Empires'.

Both parties involved in this dispute were British subjects, though the defendant, Sir Robert Hart, was accused of actions taken while in the employment of China's rulers at the time, the Great Qing. Hart held the position of Inspector General (IG) of the Chinese Imperial Maritime Customs (CIMC), a tax-collection agency that was run by foreigners but under the supervisory authority of the Qing Ministry of Foreign Affairs, also known as the Zongli Yamen. His relationship with astronomer Johannes von Gumpach began while Hart was assigned by the Zongli Yamen to recruit foreign professors for the first state-sponsored college for Western learning in Beijing, also known as the Tongwen Guan. Although Hart was the one who recommended von Gumpach's appointment, it soon became apparent that von Gumpach was unfit for the job and was subsequently released from his duties. Von Gumpach was dissatisfied with this situation and filed a lawsuit against Hart in the BSC, alleging that he had been misled about his expected duties at the Tongwen Guan.

Victoria Barnes and Emily Whewell have recently applied a somewhat narrow approach to analyse the judges' handling of this case, focusing on a comparison between the law reports of this trial and those of similar trials in England.⁶ Through this comparison, they maintain that 'local context', particularly 'local customs or society that would be found in China,' did not influence the judges' approach to the English doctrine of misrepresentation in Shanghai.⁷ Barnes and Whewell though seem to have overlooked other important aspects of the context of this case. These are related to Hart's trying relationship with the British authorities and local community in Shanghai as well as Hart's concerns to establish jurisdictional independence from British extraterritoriality. The next section sheds light on these aspects by focusing on the fragile political landscape within

⁶ Victoria Barnes and Emily Whewell, 'English Contract Law Moves East: Legal Transplants and the Doctrine of Misrepresentation in British Consular Courts', *The Chinese Journal of Comparative Law* 7, no. 1 (June 21, 2019): 26–48.

⁷ *Ibid.*, p.47.

which this case unfolded as well as Hart's own positioning vis-à-vis British authorities at the time.

Context

In the late 1860s, both British and Qing authorities were preparing for the scheduled decennial revision of the Treaty of Tianjin, which in 1858 had opened several of China's ports to foreign trade and residence. As the revision approached, the demands of all affected parties came to the forefront. The most vocal group were the British merchants in Shanghai, the city with the highest trade volume in China and the largest international settler community. Unlike other treaty ports where each foreign power had its own national 'concession', in Shanghai, most foreigners lived within the confines of a self-governed International Settlement.

The British were the main economic and political force within this semi-colonial environment. Their interests, however, were not always in sync with British government's China Policy. A good example of this was the period leading up to the treaty revision. Shortly after the Second Opium War (1856-1860), the British government switched to a more conciliatory policy towards the Qing government.⁸ This practically meant less military coercion, and generally, a more lenient approach towards the Qing. The shift was driven by two factors: firstly, imperial rivalries posing a potential threat to the political and economic stability that had enabled Britain to maintain a leading position in China; secondly, the overall disillusionment in Britain with the prospects of trade in China.⁹ In light of these developments, both the British Foreign Office (FO) in London

⁸ Mary Clabaugh Wright, *The Last Stand of Chinese Conservatism: The T'ung-Chih Restoration, 1862-1874*. (Stanford: Stanford University Press, 1957), pp.251-99; Richard J. Smith, John K. Fairbank, and Katherine F. Bruner, eds., *Robert Hart and China's Early Modernization: His Journals, 1863-1866* (London: Harvard University Press, 1991), p.289.

⁹ One area of concern was the Russian and French aggression towards the north and south borders of China; another one was the US, which were also competing for influence, and for a moment,

and the British Minister to China, Sir John Rutherford Alcock, agreed that a less assertive approach would be preferable thereafter.¹⁰

Throughout much of 1868 and 1869, Alcock visited the treaty ports in order to secure the backing of local British communities. However, his efforts were to no avail. Most British merchants strongly opposed the proposed departure from previous methods of negotiating with the Qing (those made at gunpoint). But this was how British settlers were used to operate in China, especially in Shanghai where the local British community had its own priorities and a relative political and administrative autonomy from the metropole.¹¹

The divergence between the center and the periphery was also reflected in the public discourse, particularly through the *North China Herald* (NCH), which was the most influential institution of public opinion in Shanghai at the time. The NCH was a weekly journal which was founded in 1850 by British auctioneer Henry Shearman. According to Zigui Li, after Shearman's passing, the newspaper became 'more engaging and vocal on issues that it deemed important to the community it served: the British residents of Shanghai, mostly merchants'.¹² Likewise, the NCH took an active role in providing a platform for those who demanded from Alcock a more assertive policy. Besides Alcock and the British government, another target of those opposing the treaty revision was Sir Robert Hart, the Inspector General (IG) of the Chinese government tax-collection agency,

seemed to be gaining momentum with the appointment of US Minister to China, Anson Burlingame, to represent the Qing Court in the West in discussions about treaty revisions. James Louis Hevia, *English Lessons: The Pedagogy of Imperialism in Nineteenth-Century China*. (Durham; London: Duke University Press Books, 2003), p.146; Zigui Li, 'The "Impartial Not Neutral" Old Lady on the Bund: A History of the North-China Herald (1850-1900)', PhD diss. (The Chinese University of Hong Kong, 2020), p.43.

¹⁰ Hevia, *English Lessons: The Pedagogy of Imperialism in Nineteenth-Century China*, p.146.

¹¹ Robert Bickers, 'Shanghaianders: The Formation and Identity of the British Settler Community in Shanghai 1843-1937', *Past & Present*, no. 159 (1998), p.180.

¹² Li, 'The "Impartial Not Neutral" Old Lady on the Bund', p.34.

the Chinese Imperial Maritime Customs (CIMC). Hart, in spite of working for the Qing government, was a close advisor of Alcock during the negotiations.

Hart was heavily influential upon Sino-British relations for the most part of his career in China. Especially in the 1860s and the 1870s, Hart regularly served as a mediator between the two sides, advocating for diplomacy over coercion and urging for a more patient approach towards Qing efforts to catch up with the West.¹³ Richard Horowitz supports this view in his study of Hart by arguing that it was him who urged Alcock 'to understand the political realities that the [Qing] faced and avoid pushing demands too far'.¹⁴ Hart's diaries from this period provide additional evidence of this. His daily entries indicate that he gave detailed information to Alcock about his meetings with Qing officials and regularly instructed him on how to approach the ministers of the Zongli Yamen.¹⁵

The influence Hart had on Alcock was widely known among the British in Shanghai. From their perspective, Hart was useful as the leader of the CIMC but in politics his role was controversial. Catherine Ladds has argued that for many foreigners in China,

¹³ Emma Reisz, 'An Issue of Authority Robert Hart, Gustav Detring and the Large Dragon Stamp', *Jiyou Bolan (Philatelic Panorama)* 2018–8, no. 371 (31 August 2018): 187–205.

¹⁴ Richard S. Horowitz, 'Politics, Power and the Chinese Maritime Customs: The Qing Restoration and the Ascent of Robert Hart', *Modern Asian Studies, Cambridge University Press* 40, no. 3 (2006), p.578.

¹⁵ For example, one point of contention during the negotiations was whether foreign trade and residence would be allowed in the interior of the empire. So far, article XII of the Sino-British Treaty of Tianjin vaguely stipulated that British subjects could reside 'at the ports or at other places' without specifying the latter. Hart, thus, suggested to Alcock that the best way to benefit off this clause would be by emphasising to the Zongli Yamen that unless inland trade and residence was explicitly acknowledged in the new treaty, other powers would, at some point, make use of the vagueness of the existing clause 'to the disadvantage of China'. Thus, instead of asking the Zongli Yamen 'will you make this right?', Hart advised Alcock to analyse the previous points and suggest that Britain was 'willing to [...] make rules for exercising this right of a kind to be most likely to save you from harm'. 26 April 1868 in Robert Hart, 'Diary Vol.10', pp.150-1, Special Collections & Archives, Queen's University Belfast, MS 15/1/10.

Hart and the CIMC foreign staffers were regarded as 'deracinated turncoats, willing to abandon their national loyalties in order to serve a hostile, less civilized government'.¹⁶ Consequentially, it is no wonder that there was much suspicion over Hart's influence on Alcock. For example, in March 1869, an article published in the *NCH* wondered about Alcock's 'firmness and courage' during his negotiations with the Qing because of 'the extent to which Mr. Hart has had encrusted on him the views and character of his *collaborateurs*' in the Qing government.¹⁷

Hart kept clippings of these articles in his records. One of them from June 1869 criticised him for his 'incessant meddling in matters beyond the legitimate scope of his office'.¹⁸ Indeed, Hart disliked the idea of being 'a mere collector of customs' and was much more interested in bringing 'real changes' in China's governance.¹⁹ According to his diaries though, he was far from the passionate guardian of Qing interests that the *NCH* portrayed him to be at the time. In March 1869, Hart wrote that he consider himself a 'loyal Britisher' while five months earlier he had privately expressed his wish that 'foreigners' asked 'all that could be barked for' in case there was a 'row' with the Qing about the treaty revision.²⁰

¹⁶ Catherine Ladds, *Empire Careers: Working for the Chinese Customs Service, 1854-1949*. (Manchester: Manchester University Press, 2016), p.27.

¹⁷ 'Shanghai, Tuesday, Mar. 23, 1869', *North China Herald*, p.146.

¹⁸ 12 June 1869 in Hart, 'Diary Vol.12 INSERTS', p.10, Special Collections & Archives, Queen's University Belfast, MS 15/1/12 INSERTS.

¹⁹ Hart to Campbell, 4 October 1870, no.18, Sir Robert Hart, *The I.G. in Peking: Letters of Robert Hart, Chinese Maritime Customs, 1868-1907*, ed. John King Fairbank, Katherine Frost Bruner, and Elizabeth MacLeod Matheson, vol. I, Two vols. (MA Cambridge: Harvard University Press, 1975), p.59.

²⁰ 29 March 1869, in Hart, 'Diary Vol.11', pp.168-8, Special Collections & Archives, Queen's University Belfast, MS 15/1/11; 2 October 1868, in Hart, 'Diary Vol.11', p.51, Special Collections & Archives, Queen's University Belfast, MS 15/1/11.

But Hart had generally a much softer approach compared to that favoured by the British settlers in Shanghai. Broadly speaking, Hart represented one model of imperialism; one that took into account Qing interests, for he genuinely believed that this was the most beneficial approach for both sides. In the relevant period, Hart found himself in dispute with a more colonial model of imperialism, represented by the British merchants in Shanghai. As shown in the next section, during the *Von Gumpach v. Hart* trial these two models ended up fighting it out.

Establishment of the Tongwen Guan and frictions with von Gumpach

Within this hostile environment, it is no surprise that Hart's involvement in the Tongwen Guan did not escape criticism from the Anglo-Chinese press. As mentioned earlier, Hart had been tasked by the Zongli Yamen with recruiting foreign instructors for the institution. 'The Peking College is a failure' read the opening line of another newspaper article that Hart had saved in his diaries. The article then continued:

The staff of 'professors' selected by Mr. Robert Hart, were men whom no one, who entertained serious ideas of founding a college, would have selected to connect with its inauguration. English was to be taught by an Irishman, and Astronomy by a man who denied the value of the Newtonian discoveries.²¹

The latter professor mentioned here was German-born Englishman Johannes von Gumpach. Before his placement at the Tongwen Guan, von Gumpach had published numerous articles in European scientific journals, one of which criticized Isaac Newton's

²¹ Irish writers were widely popular in Victorian Britain, so the idea that an Irishman could not teach English should also be interpreted as a personal attack on Hart, who was Anglo-Irish. See James H. Murphy, *Irish Novelists and the Victorian Age* (Oxford: Oxford University Press, 2011). 26 June 1869 in Hart, 'Diary Vol.12 INSERTS', p.17, Special Collections & Archives, Queen's University Belfast, MS 15/1/12 INSERTS.

'erroneous' theories.²² Hart's critics apparently took notice of this. It is unclear, however, whether Hart was aware of von Gumpach's eccentric views when he invited him to Beijing. In fact, his first impression of von Gumpach seems to have been a positive one. The two met through Hart's chief secretary in London, James Duncan Campbell, on August 3, 1866, when Hart was on leave. The same day, Hart wrote in his diary about meeting 'a Mr. Johannes Von Gumpach', whom he described 'an erudite German', equally capable of 'speaking English & French'.²³ 'I think he'll do', he concluded.²⁴

In November 1866, Hart travelled back to Beijing with Campbell and von Gumpach. Around this period, he was particularly optimistic about the future of the college and even maintained in his diary that 'China *is* changed, once and for all' as the Qing had 'finally' started 'to see things in clearer lights' regarding Western ideas and methods.²⁵

Between January and February 1867, Hart spent most of his time arranging plans of classes for the college. He wanted the courses to extend to twelve years:

four to be dedicated to either English or French: four more to Mathematics, natural Philosophy, natural History, Chemistry, Political Economy, International Law, Science of Interpretation: and the final four to special subjects, as 1) Military Science 2) Civil Engineering 3) Surgery 4) Astronomy.²⁶

²² Johannes von Gumpach, *The True Figure and Dimensions of the Earth ... in a Letter Addressed to George Biddell Airy* (London: R. Hardwicke, 1862); see also article on von Gumpach's research David Le Conte, 'The Curious Case of Johannes von Gumpach (1814-1875)', *Society for the History of Astronomy*, no. 32 (Autumn 2019).

²³ 3 August 1868, in Hart, 'Diary Vol.8', p.65, Special Collections & Archives, Queen's University Belfast, MS 15/1/8.

²⁴ *Ibid.*

²⁵ 10 January 1867, in Hart, 'Diary Vol.9', p.14, Special Collections & Archives, Queen's University Belfast, MS 15/1/9; 7 January 1867 in Hart, 'Diary Vol.9', p.23, Special Collections & Archives, Queen's University Belfast, MS 15/1/9.

²⁶ 4 February 1867, in Hart, 'Diary Vol.9', p.40, Special Collections & Archives, Queen's University Belfast, MS 15/1/9.

If everything went accordingly, Hart predicted that in 'twenty years' time', the Qing government would have around four hundred Western-educated students ready to 'take the matter in their own hands', and 'establish similar schools through the Empire'.²⁷ On the long run, he believed that the dissemination of Western knowledge across the Qing empire would even elevate China into 'the chief among nations'.²⁸

In the midst of all this, Hart sent a note to all foreign instructors of the college requesting 'a couple of memoranda'.²⁹ The first 'having reference to their own special subject, and spreading their course over five years', while 'the second, having reference to the subject, generally, of education for the Chinese'.³⁰ Von Gumpach was the first to respond to Hart's request. However, from his response, it appears that he was not exactly on the same page with Hart about his duties at the Tongwen Guan.

Von Gumpach's first area of concern was his students' inadequate English skills, which practically made it impossible for him to teach in English.³¹ Moreover, von Gumpach apparently expected, upon arrival, to establish his own observatory and build an astronomical library.³² Hart, however, claimed that he had already warned von Gumpach that his role at the Tongwen Guan would resemble more that of a 'country schoolmaster'.³³ As such, von Gumpach could not expect teaching his students astronomy

²⁷ Ibid.

²⁸ Ibid.

²⁹ 14 January 1867, in Hart, 'Diary Vol.9', p.18-9, Special Collections & Archives, Queen's University Belfast, MS 15/1/9.

³⁰ Ibid.

³¹ Report of the Case: On Appeal from Her Britannic Majesty's Supreme Court for China and Japan, Between Robert Hart, Appellant, and Johannes von Gumpach, Respondent, p.40.

³² Report of the Case: On Appeal from Her Britannic Majesty's Supreme Court for China and Japan, Between Robert Hart, Appellant, and Johannes von Gumpach, Respondent, pp. 32-4.

³³ Report of the Case: On Appeal from Her Britannic Majesty's Supreme Court for China and Japan, Between Robert Hart, Appellant, and Johannes von Gumpach, Respondent, pp. 32-4.

for the first five of six years of his at the college.³⁴ Instead, he had to first focus on teaching mathematics and only 'if things prospered satisfactorily', he would be authorised to establish an observatory and commence the formation of his astronomical library.³⁵

Up to May 1867, von Gumpach continuously refused to take up his mathematical duties, describing them as 'an indignity to a man of his position'.³⁶ He also refused to learn Chinese, repeatedly complained about the 'uninhabitable' house intended for him, and expressed dissatisfaction with his salary, which he considered too low.³⁷ On 12 September 1867, von Gumpach finally went by Hart's office to have 'a serious talk' with him.³⁸ According to Hart's diaries, the encounter was a 'storm'.³⁹ Von Gumpach accused Hart of being 'inconsiderable' and 'tyrannical' and criticised him for being a private person and 'very unpopular' among foreigners in China.⁴⁰ Moreover, he added that according to his knowledge, 'some of the [foreign] Ministers' were also highly critical of Hart for being 'too much on the Chinese side', working 'for his rice' and 'having too much influence!'.⁴¹

Hart listened to all this 'quietly' and when von Gumpach finished, replied:

I am determined to carry out my plans, - my time will not allow me to gad about, - I'll work might and main, - and the professors shall be subordinate to me! [...] I say 'if you are to stay, stay willingly, give over complaining, and work cheerfully; but if you are disinterested, go away!' I've engaged

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid., p.28.

³⁷ Ibid., p.54

³⁸ 11 September 1867, in Hart, 'Diary Vol.9', p.12, Special Collections & Archives, Queen's University Belfast, MS 15/1/9.

³⁹ 12 September 1867, in Hart, 'Diary Vol.9', pp.12-3, Special Collections & Archives, Queen's University Belfast, MS 15/1/9.

⁴⁰ Ibid.

⁴¹ Ibid., p.14.

another professor of mathematics, and [you] will not have an astronomical class for the next five or six years.⁴²

Hart attempted to retroactively change the meaning of the original text in his journal. On a side note, he wrote about the final sentence: 'wrong: ought to be "I am about engaging" [another professor]'.⁴³ Hart by that time was expecting to hear back from another professor, R.A. Jamieson.⁴⁴ The reason though that Hart went back to clarify this in his journal was because von Gumpach would later claim that Hart on that day had permanently relieved him of his mathematical duties. And with maths teaching out of the way, von Gumpach figured that until his astronomy courses began, he could still earn his salary and be a professor at the Tongwen Guan.

Hart was under the impression that, after that meeting, von Gumpach would finally work on his Chinese and get back to maths teaching at a later date. However, much to Hart's disappointment, a year later von Gumpach could still barely speak any Chinese.⁴⁵ After much back and forth, the two came to an agreement in September 1868: von Gumpach would resign from his post and receive a full year's pay in return.⁴⁶

For a while this eased tensions between the two. In October 1868 though, von Gumpach returned to Hart's office and disputed the fact that he had ever resigned from his post. Hart, in the meantime, had already informed the Zongli Yamen that von Gumpach was off the list. Von Gumpach strongly protested this decision and said that the

⁴²12 September 1867, in Hart, 'Diary Vol.9', pp.12-3, Special Collections & Archives, Queen's University Belfast, MS 15/1/9.

⁴³ Ibid.

⁴⁴ Jamieson, however, did not take up von Gumpach's post.

⁴⁵ 14 May 1868, in Hart, 'Diary Vol.10', pp.162-3, Special Collections & Archives, Queen's University Belfast, MS 15/1/10.

⁴⁶ 28 May 1868, in Hart, 'Diary Vol.10', p.170, Special Collections & Archives, Queen's University Belfast, MS 15/1/10; 11 October 1868, in Hart, 'Diary Vol.11', p.56, Special Collections & Archives, Queen's University Belfast, MS 15/1/11.

matter was to 'go officially', meaning that he intended to inform both native and foreign authorities about the matter.⁴⁷ 'Is he acting?', Hart wondered in his diary the same day.⁴⁸

It proved to be a sincere warning, though. Throughout 1869, von Gumpach visited the offices of Alcock and of other foreign ministers multiple times to complain about his dismissal. No one, however, supported his cause. Alcock in fact once had to 'throw' von Gumpach 'out of the room'.⁴⁹ Despite these rejections, von Gumpach in early 1870 decided to bring a civil suit against Hart at the British Supreme Court for China and Japan in Shanghai (BSC). In his petition, von Gumpach accused Hart of having convinced him 'through false representations' to come to Beijing but also of 'wilfully misrepresenting' to the Zongli Yamen his resignation from the Tongwen Guan.⁵⁰

Despite the frustration caused by the 'falsehood, suppressio veri, and suggestio falsi' of von Gumpach's petition, Hart thought that the matter raised a 'jurisdiction question' that was of far greater importance.⁵¹ He elaborated on this in his diary: 'Personally, I have no objection to arbitration; but officially I doubt if I the agent have the right or power to make my principal, the govt., go into such a court'.⁵² The next section shows

⁴⁷ 11 October 1868, in Hart, 'Diary Vol.11', p.56, Special Collections & Archives, Queen's University Belfast, MS 15/1/11. Underlined text by Hart in his journal. 16 October 1868, in Hart, 'Diary Vol.11', p.59, Special Collections & Archives, Queen's University Belfast, MS 15/1/11.

⁴⁸ 11 October 1868, in Hart, 'Diary Vol.11', p.56, Special Collections & Archives, Queen's University Belfast, MS 15/1/11.

⁴⁹ 10 July 1869, in Hart, 'Diary Vol.12', p.72, Special Collections & Archives, Queen's University Belfast, MS 15/1/12.

⁵⁰ Report of the Case: On Appeal from Her Britannic Majesty's Supreme Court for China and Japan, Between Robert Hart, Appellant, and Johannes von Gumpach, Respondent, pp.64-5.

⁵¹ A Latin legal maxim that is used here by Hart to say that in his view, it was von Gumpach who had in fact defrauded the British Supreme Court through his deliberate suppression of material facts. 22 February 1870, in Hart, 'Diary Vol.13', p.49, Special Collections & Archives, Queen's University Belfast, MS 15/1/13; 26 February 1870, in Hart, 'Diary Vol.13', p.49, Special Collections & Archives, Queen's University Belfast, MS 15/1/13.

⁵² 11 October 1869, in Hart, 'Diary Vol.12', p.138, Special Collections & Archives, Queen's University Belfast, MS 15/1/12.

how Hart tried to establish these points in Shanghai. Previous studies have largely given credit to Hart's lawyer Nicholas Hannen for his use of English law during the trial.⁵³ It is to be shown, however, that it was Hart's own legal approach to the case that informed Hannen's line of argument.

Trial in Shanghai

Hart believed that British extraterritorial courts had no jurisdictional authority to subpoena the agent '*through*' whom the Qing state had acted.⁵⁴ If such right was established, this would essentially mean that all British subjects could thereafter sue in the BSC any member of the Qing government. But it was not only Hart who understood what was at stake here. Bickers points out that the British in Shanghai were always ready to seize opportunities like this to improve their position vis-a-vis native authorities.⁵⁵

In early 1870, the psychological moment was right. Only a few months earlier, Alcock had signed the revision of the Treaty of Tianjin, which as previously shown, the British merchant class considered as overly generous to the Qing. For this, they blamed their home government, Alcock (albeit to a lesser extent), and Hart, one of the architects of this agreement. Therefore, the trial in Shanghai unfolded within an already hostile towards Hart political climate.

Hart's lawyer, Nicholas Hannen, warned his client that his 'unpopularity' in Shanghai could work in von Gumpach's favour.⁵⁶ Hannen initially suggested that the easiest way to be done with von Gumpach would be by simply challenging his British nationality and by extension his right to appeal to the BSC. Von Gumpach, as mentioned

⁵³ Barnes and Whewell, 'English Contract Law Moves East'.

⁵⁴ *Ibid.*

⁵⁵ Bickers, 'Shanghaianders', pp.172-3.

⁵⁶ 24 February 1870, in Hart, 'Diary Vol.13', p.50, Special Collections & Archives, Queen's University Belfast, MS 15/1/13.

earlier, was English but born in Germany.⁵⁷ Hannen's approach though did not enthrall Hart. Such 'quibbles', he wrote, could not secure him a legal victory on the 'main issues' of the case: one was 'of law', meaning whether the court had jurisdiction; the other, was 'of fact', namely whether he had 'acted unjustly'.⁵⁸ 'It is on these [...] that I desire the case to go on', he concluded.⁵⁹

The hearings for the *von Gumpach v. Hart* trial lasted almost one month, between 22 March and 14 April 1870. The *NCH* covered all sessions not only because of the attention it drew among its readers but also because the newspaper functioned as the sole organ for public announcements of the BSC.⁶⁰ At the bench of the BSC was its founder and chief judge, Sir Edmund Grimani Hornby, as well as his assistant, Charles Wycliffe Goodwin. The two had arrived in China five years earlier to establish the first appellate court for British subjects in China, Japan and Korea.⁶¹ As previously mentioned, a singularity of this court was that its judges had previously received formal legal education compared to the judges of other extraterritorial courts. Hornby, in particular, had previously served as a judge of the British Supreme Court at Constantinople.

Despite his background, Hornby was an eccentric man, with no time for lengthy legal arguments by lawyers.⁶² According to the historian Douglas Clarke, Hornby, 'would have already made up his mind before hearing counsel and would tell them so'.⁶³ By

⁵⁷ This was one of the reasons that Alcock refused to support von Gumpach's cause. 10 July 1869, in Hart, 'Diary Vol.12', p.72, Special Collections & Archives, Queen's University Belfast, MS 15/1/12.

⁵⁸ 24 February 1870, in Hart, 'Diary Vol.13', p.51, Special Collections & Archives, Queen's University Belfast, MS 15/1/13.

⁵⁹ *Ibid.*

⁶⁰ Li, 'The "Impartial Not Neutral" Old Lady on the Bund'.

⁶¹ Clark, *Gunboat Justice Volume 1: British and American Law Courts in China and Japan*.

⁶² *Ibid.*, p.74.

⁶³ *Ibid.*

today's standards, Hornby's views on extraterritoriality could also be described as eccentric even though during the relevant period they were somewhat typical of the colonial mindset that British settlers had in China and other parts of the world. According to Pär Cassel, Hornby once stated that even the notion of China's legal system being applicable to British subjects should be considered 'a farce' and 'an insult to English justice'.⁶⁴ It is, thus, hardly surprising that Hannen had a hard time presenting Hart's case before Hornby.

On the first day of the trial, Hornby immediately rejected Hannen's claim that Hart could not be tried in a British court for actions taken in his professional capacity. 'There could be no pretension', Hornby replied, 'that two British subjects entering the Chinese service agree to be bound by Chinese laws or tribunal appealed to as existing for the trial of such cases'.⁶⁵ Hannen then held that Hart enjoyed qualified privilege, meaning that 'the said presentations' were made to von Gumpach only in Hart's professional capacity 'as a servant of the Chinese Imperial Government'.⁶⁶ That is to say, the job offer in London and the notification to the Zongli Yamen about von Gumpach's resignation were part of Hart's official duty of administering the Tongwen Guan. Hannen additionally offered to show Hornby a report made by Hart to his superiors about von Gumpach.⁶⁷ His purpose was to argue for a non-suit as there could be no trial based on evidence that was privileged.

Yet Hornby, perhaps aware of Hannen's tactic, refused to accept the documents as evidence. He responded that 'false statements or misrepresentations' were beyond Hart's 'sphere of duty' as an employee of the Qing state.⁶⁸ In addition to this, Hornby deliberately refused to direct the jury as to the meaning of Hart's plea for privilege. The

⁶⁴ Cassel, *Grounds of Judgment*, pp.70-6.

⁶⁵ 'Law Reports', *North China Herald*, April 21, 1870, p.283.

⁶⁶ *Ibid.*, p.282.

⁶⁷ Hart to Campbell, 8 February 1872, no.29, Fairbank, Bruner, and Matheson, vol. I, p.73.

⁶⁸ 'Law Reports', *North China Herald*, April 21, 1870, p.283.

only comment he made on this was: 'To any that this plea is a good answer in law would be to say that anything Mr. Hart might say or do against another British subject who happened to be in the service of the Chinese government, however false or malicious, he might do it with impunity'.⁶⁹

Previous studies of this case have not questioned Hornby's decision to reject Hart's plea for privilege and instead focus on whether Hart falsely induced von Gumpach to come to Beijing. In the case of Barnes and Whewell's article, this has led them to go down the rabbit hole of trying to explain Hornby's interpretation of 'misrepresentation' and whether his was in line with other contemporary interpretations of the same principle in English courts.⁷⁰ But focusing on the application of the principle of misrepresentation is almost irrelevant to what this case was about. Hornby wrote about this in his autobiography and admitted that what 'anger[ed]' him was Hart's 'object [...] to ignore the fact that he himself and the other English officials [...] in the employment of the Foreign Customs Department were under the jurisdiction of the Supreme Court'.⁷¹

Hornby was overall biased against Hart for the same reasons that the British merchants in Shanghai were. In his autobiography, he accused him of dealing with British merchants in an 'autocratic way', a view that British merchants themselves shared through the NCH.⁷² Hornby also admitted that his 'construction of the treaties' did not 'tally exactly' with Hart's, and it could be safely argued that Hornby here implied that Hart's was much more accommodating to Qing interests.⁷³ Finally, Hornby believed that Hart could not be 'a loyal subject of the country of his birth when the interests of that country are opposed to those of the country of which he is the paid and very humble

⁶⁹ Ibid.

⁷⁰ Barnes and Whewell, 'English Contract Law Moves East'.

⁷¹ Edmund Hornby, *Sir Edmund Hornby: An Autobiography* (Constable, 1928), pp.238-40.

⁷² Hornby, *Sir Edmund Hornby: An Autobiography*, p.238.; Stanley Fowler Wright, *Hart and the Chinese Customs* (Belfast: Published for the Queen's University [by] W. Mullan, 1950), p.347.

⁷³ Hornby, p.238.

servant'.⁷⁴ Similarly, five years later, an article in the *NCH* about the CIMC staff argued that: 'No man can serve two masters'.⁷⁵ The above, thus, show that there was much overlap between Hornby's views on Hart with those expressed by the British community in Shanghai during this period.

Yet, because of their focus on the principle of misrepresentation, Barnes and Whewell conclude that local context did not influence Hornby. He almost religiously, they argue, interpreted English law based on the legal education he had previously received in England. Hornby's approach *indeed* adapted to fit local circumstances, but compared to Barnes and Whewell's expectation that this had to reflect an adaptation of English law based on 'local customs or society that would be found in China', this article contends that Hornby adapted English law to fit the peculiarities and agenda of the British merchant cliques in China. This explains why Hornby did not even enter the discussion about Hart's plea for privilege.

Hornby's assistant Charles Wycliffe Goodwin was even less constrained in his treatment of Hart. On the final day of the trial, Goodwin described the Tongwen Guan to the jury as 'a delusion' of Hart, emphasised to them the 'manifest truth' of von Gumpach's statements, and minutes before the jury was requested to confer on the decision, Goodwin added that between the two parties of this case, the jury should be reminded that 'one [...] might be said to be a man of power and wealth' (meaning Hart), while 'the other was not'.⁷⁶

⁷⁴ *Ibid.*

⁷⁵ 'The Customs and the Mandarinate', *North China Herald*, 26 June 1875, sec. Editorial Selections.

⁷⁶ Although the *NCH* does not mention who sat at the courtroom on that day, Hart's diaries show that it was Goodwin. Hart later heard rumours that prior to the trial, Goodwin had reassured von Gumpach's lawyer that his presence at the bench 'would be security' for his client's payment, who was otherwise in bad financial state. 'Law Reports', p.289; 14 April 1870, in Hart, 'Diary

Small wonder that within an hour the jury returned to the courtroom to deliver justice, 'rough and ready', as Hornby put it.⁷⁷ Hart was found guilty of making false representations to von Gumpach, not in London though, as the jury argued that this could be hardly proved, but to the Zongli Yamen when he falsely announced von Gumpach's resignation in September 1868. These were the very communications that Hart claimed to be privileged and so beyond the scope of that court. Yet, neither Hornby nor Goodwin had directed the jury over the meaning of qualified privilege that Hart had asserted. Little did this matter to Von Gumpach though, who was now entitled to £1,800 of damages, a considerable sum by contemporary standards.⁷⁸

Hart was not surprised by the decision and the treatment he received in Shanghai. A few months later, he wrote: 'the reason for the Shanghai jury's desire to be down on *me* - or to support von [Gumpach] - was simply the mercantile ill-will directed generally against the I.G., for customs or pro-Chinese action'.⁷⁹ He was, however, much disappointed with Hannen's legal defence. Hart had spent considerable time 'preparing questions' for Hannen, even though the latter ended up using none of them.⁸⁰

Vol.13', p.83, Special Collections & Archives, Queen's University Belfast, MS 15/1/13; Hart to Campbell, 13 March 1872, no.32, Fairbank, Bruner, and Matheson, vol. I, p.79.

⁷⁷ 'Law Reports', *North China Herald*, May 5, 1870, p.327.

⁷⁸ Von Gumpach, outside of the courtroom, 'walked straight towards' Hart, the two 'looked at each other hard in the face', and as von Gumpach passed by, Hart 'heard him hiss out "Perjurer"'. 14 April 1870, in Hart, 'Diary Vol.13', p.83, Special Collections & Archives, Queen's University Belfast, MS 15/1/13.

⁷⁹ Hart to Campbell, 8 December 1870, no.21, Fairbank, Bruner, and Matheson, vol. I, pp.62-3.

⁸⁰ Hart frequently made ironic comments about Hannen's preparations for the trial in his diaries. For example, a few days prior to the final hearing in Shanghai, Hart wrote in his diary: 'Hannen at home today working up the case (his clerk says); I fancy sleeping off last night's dancing'. 8 April 1870, in Hart, 'Diary Vol.13', p.80, Special Collections & Archives, Queen's University Belfast, MS 15/1/13; 9 April 1870, in Hart, 'Diary Vol.13', p.81, Special Collections & Archives, Queen's University Belfast, MS 15/1/13.

Hart's analysis of the case, as read in his diaries, yields useful insight into his broader approach to the limits of British extraterritoriality in China. Hart generally applied a narrow approach to extraterritoriality. He believed that 'independent China, in her own dominions', had the 'right and power, in virtue of sovereignty, to do [everything] she has [...] promised [...] to do' according to the treaties.⁸¹ Regarding his authority at the CIMC, the then effective Treaty of Tianjin, provided that 'the high officer' of the CIMC was 'at liberty, of his own choice, and independently of the suggestion or nomination of any British authority, to select any British subject he [saw] fit to aid him in the administration of the Customs Service'.⁸² Accordingly, for the British courts to assert jurisdiction over Hart's dealings with von Gumpach, the Qing had, from Hart's perspective, to explicitly concede such right to the British courts.

Lord Elgin, the British official who signed the Treaty of Tianjin, corroborated Hart's view in his despatches to his home government after the signing of the treaty. British authorities, Lord Elgin argued, could interfere with the authority of the IG only if a British subject in the employment of the Qing state had either infringed the Treaty or been 'molested by the Chinese'.⁸³ In 1863, Lord Russell, then British Foreign Secretary, also commented on this point, this time, specifically in relation to the authority of the

⁸¹ Hart's phrasing of this has been altered as in the original text the phrasing is much more convoluted: '[...] independent China, in her own dominions, has the right and power, in virtue of sovereignty, to do anything she has not promised not to do'.

7 December 1868, in Hart, 'Diary Vol.10', p.78, Special Collections & Archives, Queen's University Belfast, MS 15/1/10.

⁸² Edward Hertslet et al., *Hertslet's China Treaties. Treaties, &c., between Great Britain and China: And between China and Foreign Powers; and Orders in Council, Rules, Regulations, Acts of Parliament, Decrees, &c., Affecting British Interests in China* (London, Printed for H. M. Stationery off., by Harrison and sons, 1908), p.40.

⁸³ William Hutchins, *Memorandum on the Position of British Subjects Employed in the Chinese Customs Service*. (London, 1884), p.3 enclosed in FO-17-973, UK National Archives-Foreign Office papers.

British Supreme Court. In his letter to the first Minister Plenipotentiary to China Frederick Bruce, Lord Russell stated: 'The [British] Courts ought not to hold [British] subjects *civily* liable, when they plead and prove in justification that the acts were done by them officially in the service of the Chinese Govt.'. ⁸⁴ There was, thus, plenty of useful guidance that Hannen could have drawn from. ⁸⁵

The verdict was hailed by the British merchant class of Shanghai as a 'cause célèbre'. ⁸⁶ One anonymous author in the *NCH* repeated almost verbatim Hornby's arguments: 'Mr. Hart was not sued for anything done [...] within the sphere of his authority [...], but for a wrong done beyond such sphere, for mis-representation which never came and could not come within the area of his duty [...]'. ⁸⁷ The defeat of Hart added to the overall enthusiasm of British merchants in Shanghai during this period. In early summer 1870, the British government refused to ratify the agreement as a result of mounting pressure. ⁸⁸ The treaty revision had previously faced major opposition in London from the Board of Trade and several MPs in the British parliament. Their arguments were similar to those of British merchants in Shanghai: Alcock's Convention had conceded too much to the Qing.

This was not only a defeat for Alcock's policy but also for Hart, and von Gumpach drew additional pleasure from this. Although not a merchant himself, von Gumpach had

⁸⁴ Text originally highlighted by Hart in his diary. 9 April 1870, in Hart, 'Diary Vol.13', p.81, Special Collections & Archives, Queen's University Belfast, MS 15/1/13.

⁸⁵ Hannen's later trajectory offers an explanation why he chose not to. Only a year after the trial in Shanghai, Hannen was appointed Acting Assistant Judge of the British Supreme Court for China and Japan in Yokohama, Japan. This perhaps shows that during the trial in Shanghai, Hannen's career aspirations ran contrary to his client's attempts to put a curb on extraterritorial jurisdiction.

⁸⁶ 'Summary of News', *North China Herald*, April 21, 1870, p.275.

⁸⁷ 'Shanghai, Thursday May 5, 1870', *North China Herald*, 5 May 1870.

⁸⁸ Wright, *The Last Stand of Chinese Conservatism: The T'ung-Chih Restoration, 1862-1874*, p.292.

come to identify himself with the cause of Shanghai's British merchants, albeit he did that solely for the purpose of gaining the support of his community. A few years later, von Gumpach would publish his own analysis of the Alcock Convention: 'The Hart-Alcock Convention was a miscarriage: the offspring of disloyalty, unscrupulosity, and intrigue on the one hand; of infatuation, incompetence, and want of judgement on the other. Dead and buried: - its only use now is its history'.⁸⁹ Indeed, the Alcock Convention was a failed attempt to open a new chapter in Sino-British relations, putting them on a somewhat more equitable basis than in the past. Its rejection would also coincide with Alcock's retirement, who soon after returned to England, with Sir Thomas Francis Wade succeeding him at his post.

Hart's dispute with von Gumpach did not end in 1870; over the following months, Hart appealed to the Judicial Committee of Privy Council in London, which was the final court of appeal for the entire expanse of the British Empire in the nineteenth and early twentieth centuries.⁹⁰ For this, he had the assistance of his contacts in London: his chief secretary, James Duncan Campbell, and the solicitor of the CIMC, W. Hutchins, who took care of all the legal documents Hannen sent from Shanghai. The next section covers Hart's preparations for this new trial and how his legal team handled his plea of privilege.

The Plea of Privilege in London and judgment of the Privy Council

Hart was determined to push the jurisdiction question '*as far as possible*'.⁹¹ He feared that if his authority in the CIMC did not escape the grip of British colonial judges, there was more trouble for him in the future. For this reason, he sought the best legal

⁸⁹ Johannes von Gumpach, *The Burlingame Mission: A Political Disclosure, Supported by Official Documents, Mostly Unpublished. To Which Are Added: Various Papers and Discourses ...* (London; New York: N. Trübner, 1872), p.399.

⁹⁰ Thomas Mohr, *The Privy Council Appeal and British Imperial Policy, 1833–1939* (Brill Nijhoff, 2019).

⁹¹ Hart to Campbell, 13 March 1872, no.32, Fairbank, Bruner, and Matheson, vol. I, p.77.

advice he could find in London. At first, he tried to 'secure' prominent solicitor Sir Roundell Palmer.⁹² John Fairbank has attributed Hart's intention to appoint Palmer 'possibly' to the latter's 'known sympathies with China' without explaining this further.⁹³ However, there were more crucial factors that informed Hart's decision: Palmer had previously served as Attorney General at the British Foreign Office when Lord Russell was in charge. As previously shown, Hart had drawn from Lord Russell's analysis over the relationship between the authority of the CIMC and the British Supreme Court to establish his point in this case. Therefore, it is quite possible that Palmer was the one who had guided his government on this point.

Palmer initially agreed to represent Hart in London, but another prominent attorney, Sir John Karlake, ultimately took up the case. Karlake had previously been a member of the Conservative party and, similar to Palmer, held top legal offices in the British administration in the late 1860s. Hart explained to Campbell that this replacement was the result of pressure from Wade, the new British Minister to China, who insisted that Karlake 'will be better' than Palmer for this case.⁹⁴ Wade's support of Hart shows that despite the criticism Alcock had faced for working closely with Hart, Wade did not try to distance himself from him.⁹⁵

Hart's appeal did not get a hearing until November 1872 due to the heavy workload of the Privy Council.⁹⁶ In the meantime, Hart kept sending detailed instructions to his lawyers through Campbell. 'The only thing of real importance', he reiterated, was '*the*

⁹² Hart to Campbell, 21 July 1870, no.16, Fairbank, Bruner, and Matheson, vol. I, p.57.

⁹³ Note 1 in Hart to Campbell, 21 July 1870, no.16, Fairbank, Bruner, and Matheson, vol. I, p.57.

⁹⁴ Hart to Campbell, 21 November 1872, no.45, Fairbank, Bruner, and Matheson, vol. I, p.91.

⁹⁵ This would eventually happen a few years later. In fact, Wade would become one of the fiercest rivals of Hart and the CIMC.

⁹⁶ In September 1870, Hart noted that the Privy Council had already over '400 cases to deal with'. Hart to Campbell, 1 September 1870, no.17, Fairbank, Bruner, and Matheson, vol. I, p.50.

privilege plea' and to push that '*as far as possible*'.⁹⁷ Hart essentially wanted to secure absolute privilege, or as Karslake later put it 'immunity [...] in the fullest sense' so that the British courts in China would have no authority over the entire span of his official duties.⁹⁸ If this was established, Hart wrote to Campbell that he would then ask the Privy Council to overrule Hornby's decision for using his privileged communications as evidence and even considered to take legal action against Hornby and Goodwin.⁹⁹

The hearing began in London on 12 November 1872 and was resumed two days later on 14 November 1872. Members of the Judicial Committee were Sir James W. Colvile, Sir Barnes Peacock, Sir Montague Smith, and Sir Robert P. Collier. The first two had previously served as judges in British India; the other two were more connected with domestic politics, Smith being a member of the Conservatives and Collier being in the Privy Council as a personal choice of Liberal Prime Minister William Ewart Gladstone. It is to be shown later in this article that this balance between judges with experience in delivering colonial justice vis-à-vis others more embedded in metropolitan institutions was crucial in the shaping of their final decision.

On both days, as Campbell characteristically put it to Hart, 'Karslake had the best of it' with lengthy legal analyses on the points explicitly stressed by Hart.¹⁰⁰ It would be useful to cite here a lengthy excerpt of Karslake's statement on the point of privilege:

I do not say that a British subject can so far throw off his nationality as that he may not be sued in [the British Supreme Court], he being still the Minister of the Emperor of China. But when he comes into that Court and says –'I did it as an act of state, as a Minister of the Emperor of China', the municipal Court has then no

⁹⁷ Hart to Campbell, 1 June 1871, no.24, Fairbank, Bruner, and Matheson, vol. I, p.65.

⁹⁸ Report of the Case: On Appeal from Her Britannic Majesty's Supreme Court for China and Japan, Between Robert Hart, Appellant, and Johannes von Gumpach, Respondent, p.286.

⁹⁹ Hart to Campbell, 16 March 1872, no.33, Fairbank, Bruner, and Matheson, vol. I, p.80; Hart to Campbell, 13 March 1872, no.32, Fairbank, Bruner, and Matheson, vol. I, p.78.

¹⁰⁰ 23 November 1872, in Hart, 'Diary Vol.17', p.56, Special Collections & Archives, Queen's University Belfast, MS 15/1/17.

power over him. And having regard to the way in which this Court is constituted, it cannot be assumed that the Emperor of China intended to give any such jurisdiction to Her Majesty or that Her Majesty intended to acquire for herself any such jurisdiction as to insist on that right.¹⁰¹

In this excerpt, Karlake essentially applies a similar to Hart's interpretation of extraterritoriality: whatever the Qing had not explicitly conceded in the treaties could not be asserted by foreign states.

It took two more months for the judges to announce their decision. Whilst in the wait, Hart often grew impatient: 'I cannot help being on the look-out every hour for a [...] telegram stating the results'.¹⁰² Finally, the ruling of the Privy Council was announced on 28 January 1873. The decision found that it was indeed Hart's duty 'to make reports to the [Zongli] Yamen upon matters relating to its management and welfare'.¹⁰³ Therefore, his right to claim for privilege was sustained, but only 'in the limited sense', meaning, only with regard to his reports about 'the affairs of the College'.¹⁰⁴ Also, upon reviewing those documents, the judges came to the conclusion that there was no 'intrinsic evidence of malice' against von Gumpach.¹⁰⁵ In fact, they believed that there had instead been 'much which [left] the impression [...] that [von Gumpach] had really resigned' in September 1868.¹⁰⁶ The decision was, thus, to overrule Hornby's verdict and discharge Hart of the obligation to pay any damages to von Gumpach.

¹⁰¹ Report of the Case: On Appeal from Her Britannic Majesty's Supreme Court for China and Japan, Between Robert Hart, Appellant, and Johannes von Gumpach, Respondent, p.133.

¹⁰² Hart to Campbell, 21 November 1872, no.45, Fairbank, Bruner, and Matheson, vol. I, p.91.

¹⁰³ Report of the Case: On Appeal from Her Britannic Majesty's Supreme Court for China and Japan, Between Robert Hart, Appellant, and Johannes von Gumpach, Respondent, p.314.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid., p.307.

¹⁰⁶ Ibid.

The judges, however, avoided the core of the jurisdiction question. They held that von Gumpach had only accused Hart of making false representations but not of firing him.¹⁰⁷ If that dismissal had been challenged and there was proof that the Qing government had 'delegated' such power to Hart, then the judges would have corroborated Karlake's point that the dismissal had been 'an act of the [Qing] Government' through their agent, Hart.¹⁰⁸ But 'the wrong complained of', they continued, did not fall 'within that category'.¹⁰⁹

Regarding Hart's plea of 'absolute privilege', the judges found that it had not been explicitly stated whether according to 'the law or policy in China' his reports to the Qing government were confidential and as a result exempted from 'the law of England'.¹¹⁰ 'If it were shown', they remarked, 'it might be proper to hold that it would be contrary to the comity of nations, and [...] against our own public policy' to summon Hart at a British court.¹¹¹

The decision left Hart in the peculiar position of having his communications with the Zongli Yamen partly recognised as Qing government documents, while the rest of his official functions fell potentially within British jurisdiction. When reading the judgment, Hart could 'scarcely believe [his] eyes that the P.C. [had] left the jurisdiction question open'.¹¹² Instead, he expected a much more 'sober [legal] document [...] from Lordships

¹⁰⁷ *Ibid.*, p.311.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*, p.312.

¹¹¹ *Ibid.*, p.313.

¹¹² Hart to Campbell, 4 April 1873, no.52, Fairbank, Bruner, and Matheson, vol. I, p.103.

so grave and reverend', one that would provide him, 'for the sake of the future [...] full protection' from the British courts.¹¹³

Hart was perhaps surprised to see the Privy Council so hesitant to touch upon the jurisdiction question, for even the judges explicitly admitted in their judgement that the question was 'of great importance'.¹¹⁴ However, the fact that the Privy Council took a middle ground between Hart's narrow interpretation of extraterritoriality and the British Shanghai authorities' extensive one revealed to him that the supposedly 'sober' legal institutions of the metropole were cautious when it came to limiting the actions of the wilder periphery.

Even so, the Anglo-Chinese press in Shanghai still found the ruling unsatisfactory: *Shanghai Evening Courier* described the Privy Council decision as 'a warning to all who have business dealings with [Hart]'; the *NCH*, on the other hand, chose to show its disapproval by not writing 'a word about the case'.¹¹⁵ 'The believers in the enemy keep silence', Hart wrote to Campbell.¹¹⁶ As for the 'enemy', von Gumpach, Hart toyed with the idea of requesting him to cover his litigation costs for both trials, but eventually decided 'not to go to war again'.¹¹⁷ He figured that von Gumpach must have been already penniless and in any case, 'after three years of waiting', it was time for him to 'get rid of this worry'.¹¹⁸

¹¹³ Hart to Campbell, 4 April 1873, no.52, Fairbank, Bruner, and Matheson, vol. I, p.103; 1 April 1873, in Hart, 'Diary Vol.17', p.177, Special Collections & Archives, Queen's University Belfast, MS 15/1/17.

¹¹⁴ Report of the Case: On Appeal from Her Britannic Majesty's Supreme Court for China and Japan, Between Robert Hart, Appellant, and Johannes von Gumpach, Respondent, p.312.

¹¹⁵ Hart to Campbell, 4 April 1873, no.52, Fairbank, Bruner, and Matheson, vol. I, p.104; Hart to Campbell, 29 March 1873, no.50, Fairbank, Bruner, and Matheson, vol. I, p.101; Hart to Campbell, 7 March 1873, no.48, Fairbank, Bruner, and Matheson, vol. I, p.96.

¹¹⁶ Hart to Campbell, 7 March 1873, no.48, Fairbank, Bruner, and Matheson, vol. I, p.96.

¹¹⁷ Hart to Campbell, 16 August 1873, no.61, Fairbank, Bruner, and Matheson, vol. I, p.117.

¹¹⁸ Hart to Campbell, 4 April 1873, no.52, Fairbank, Bruner, and Matheson, vol. I, p.104.

Ultimately, this proved to be not the triumph that Hart had hoped for, but a pyrrhic victory. A few weeks after the announcement of the decision, and with a clearer mind, Hart focused on the positives:

the present judgment decides that I can appeal to privilege – that's really all I care for. To get the Privy Council to say: "Hart is in China's service, British Courts cannot summon him" is what cannot be expected; *I must go into court*, but, so long as I am allowed to show cause why the court should *then* hold its hand, that's enough.¹¹⁹

The truth is that Hart's position vis-à-vis the British authorities had only been slightly improved than before. But what mattered to Hart was that he had at least secured the independence of the CIMC .

Conclusion

This article has shown that Hart wanted to protect his authority from extraterritoriality and used his dispute with von Gumpach in order to establish his official functions as acts of the Qing state. The judges in Shanghai, influenced by the broader anti-Customs sentiment among the British community, rejected Hart's plea of privilege and tried instead to drag his authority within their scope of jurisdiction. The dispute was subsequently transferred to the Privy Council where Hart requested the reversal of the Shanghai verdict and asked, once again, for his authority to be recognised as an extension of that of the Qing state. The judges in London found that Hart enjoyed privilege, albeit only in the limited sense, meaning only with regard to the content of his communications with his nominal masters.

More broadly, the article highlights that the enforcement of British extraterritorial law in Shanghai was heavily influenced by the local colonial environment, including the power structures and discourses in place. It demonstrates how the application of British

¹¹⁹ Hart to Campbell, 4 April 1873, no.52, Fairbank, Bruner, and Matheson, vol. I, p.103.

law was used to maintain the legal superiority of Western expatriates, but this application was distorted by the western men operationalising them far away from home, rather than by 'the natives their laws', which was a typical concern of colonial lawyers.¹²⁰ As a result, English law in Shanghai followed a pattern of being both similar and different from its application in Britain.

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¹²⁰ Personal communication from Alice Panepinto (11 April 2021)

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