Chinese Legal Development: The Influence of Power Struggles on the Adoption of Western Legal Concepts

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By
Alan Uriel Herrera-Flores

Primary Advisor: Professor Jiang Yonglin
Secondary Advisor: Professor Hank Glassman

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Abstract

Historically, Chinese legal governance has been through criminal codes that specify punishments for actions taken against the state or society. Following the First Opium War (1839-1842), power struggles between China and Western Powers have resulted in the adoption of Western legal concepts. The main mechanism behind this process is the negotiation of perceived positions of power that occur through power struggle dynamics. When an involved government is acutely displaced from its perceived position of power, the displaced power must accommodate a new order, typically by adopting not only the predominant group's legal concepts but also its legal institutions. From 1842 to 1912, the Qing experienced this phenomenon, resulting from the war between China and the eight Western Powers. Eventually, the Qing's displacement of power led to the adoption of foreign legal institutions in order to find a place within the new power structure. In particular, the power struggles primarily with Britain, Japan, and the United States have shaped and influenced China's adoption of international law, changes to criminal law, civil and company law, and constitutional law (1908-1911). These power struggles have taken place on the field through Military displays of power, and on the court through legal confrontations between Chinese officials and representatives of Foreign Powers. Accordingly, China's legal landscape has been deeply influenced through these interactions with Western Powers and their legal concepts.
Introduction

With the expanse of Western Colonialism and seafaring technologies, a few nations became increasingly globalized, increasing their power reach and influence. As a result of this, cultural clashes become more common as nations were having increased interactions and understanding that value systems often differed and were sometimes contrary between nations. For this reason, I’d like to present the framework of power struggles as a means of understanding how these cultural clashes unfolded and lead to legal developments in the 19th Century for China. Power struggles in this case, are defined as the negotiation of perceptions of power (i.e., perceived military, political, or legal strength) through the use of effective displays of that power (e.g., military superiority demonstrated through conquest(s), or forced sustained acceptance of legal norms in the court). It is important to note in the above definition, that the perceived position of power does not necessarily need to reflect actual military, political, or legal strength. Therefore, the framework of power struggles is useful for understanding interactions between Qing and foreign powers through a dual lens that analyses both Chinese and Foreign perspectives.

China was negotiating its perception of world order with the offending parties who were trying to impose their ways on Chinese systems. To begin, I would like to briefly focus on the First Opium War (1839-1842) as it established the context in which power struggles between Chinese and British officials boiled over into a war that would lead to the commencement of the Unequal Treaties era in China. Scholarship on the period following the Opium was in China, tends to depict the Qing as having been forced into acceptance of Western systems through Western Military superiority as well as due to lack of understanding of western legal institutions. However, this perspective only represents one side of history, as more recent scholarship shows
how the Qing response was appropriate according to the traditional way of dealing with outsiders who threatened the order of the Qing rules.¹

Constant tension and conflict between Chinese and Foreign Powers continued as a series of events that would eventually lead to the creation of the Shanghai International Settlement as well as to other port openings throughout China. After subsequent clashes, the Shanghai Mixed Court was created from the international settlement's resolve to protect its people and trade. The Qing response throughout these events, and especially during the existence of one of China's longest running foreign legal institutions, the Shanghai Mixed court (1863-1927), provides a clearer perspective on how the power struggle with foreign powers influenced the adoption of western legal concepts. This power struggle between Qing and foreign powers informed Chinese legal development throughout late 19th century and early 20th century China.

The interaction between power struggles and Chinese legal development is specifically established by the negotiation of perceived positions of power between the Qing and the foreign powers as demonstrated on the field or in the court. In regards to early British intervention in China during the first Unequal Treaty following the First Opium War (1839-1842), British representatives to China arrived with a self-perceived position of power that was higher than the Qing from their perspective. And how the British representatives displayed their power demonstrates an early power struggles between Chinese and foreigners. John K. Fairbank supports this notion as he states that J.F. Davis (1795-1890), representative to Britain in regulating relations with China, had a perspective “which came closer to the concept of

trusteeship for native peoples then being developed by British administrators elsewhere." The relations between Qing and British officials was distinct in that both considered their position higher relative to the other, despite relatively equal international legal status at that point. Furthermore, an example of military power struggle is the case of the Treaty of Nanjing, where the emperor had explicit guidelines for how to handle relationships with the British potentiary. On the British side, Lord Napier had transgressed against Chinese regulations despite specific orders from the British government to maintain order in Canton. This intersection of cultures tested the British and Chinese resolve to secure their perceived position of world order through military power struggles. Lack of access to each other’s military information further fueled the power struggle by obscuring military facts such as troop size and access to weapons which meant that the military conflict between the Qing and British forces was more perceptual than based on absolute information. These miscalculations from both the Qing and British officials represent a tension that fueled a power struggle that resulted in even more violent displays of power from both sides. After the First Opium War, the Qing underestimated the extent to which the British government would be willing to secure their extraterritoriality initially attained through the Treaty of Nanjing (1842) in the five Treaty Ports, including Shanghai. Throughout this period, the Taiping Rebellion (1850-1864) and other civil wars were also happening throughout China which split the attention of the Qing Court and possibly lead to not fully comprehending the threat posed by foreign imperialism, leading to ineffective displays of power by the Qing which further increased the adoption of western legal concepts in Chinese legal systems. However, at least in the mind of one Chinese official Liang Zhangzhu (Liang Chang-Chti), the power struggle

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between Chinese and foreign powers had clearly begun following the First Opium War (1839-1842). After several ports had already been taken by British forces by 1842, Liang Zhangzhu decided to write a letter to Liu Cibo (Liu Tz'u-po), governor of Fujian province, stating his views on the power that the foreign forces had, not just in terms of military strength, but in terms of their ability to display their power effectively:

If said barbarians, citing the precedent of Fukien, in Shantung ask for a wharf at Tengchow, in Chihli ask for a wharf at Tientsin, in Liaotung ask for a wharf at Chinchow, will they have only to command to be obeyed? Moreover, of the outer barbarians it is not a case of one nation only. If all the outer barbarians cite the example of the English and also in each seacoast province ask separately to establish a wharf, then will they also have only to command to be obeyed?3

Liang Zhangzhu understood that if the British representatives were able to successfully and continuously display their power through military power struggles and use it to negotiate their world views, then they would surely receive the rewards that they were searching for. Furthermore, other nations would see this power struggle and realize that they too can benefit from engaging in successful power struggles with China. However, Liang Zhangzhu also understood that a power struggle could also work in favor of the Qing in his following words also included in the same letter as above:

We know that now the barbarians' confidence in their own power compared with ten years ago is still greater... If this scheme succeeds it will have evil results which cannot be foretold... I hope the officials in charge of the negotiations together with the city's

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civil and military officials and with the local gentry... will cause the English barbarians to know that China does not permit them to use unreasonable methods and recklessly trespass and that from now on they must respectfully obey commands.\(^4\)

The above passage demonstrates Liang Zhangzhu's belief that this British "scheme" was a display of power and thus understood that an effective display of power from the Qing could hold back British forces before their perceived position of power greatly surpassed that of its actual military strength in China. The perceived position of power derived from military conquest such as those referenced in the quote above, could be used to impose legal institutions on other nations. Hence failed power struggles between Qing and foreign powers on the field and in the courts could and often did result in changes to Chinese legal concepts through forced and consistent accommodation of foreign powers that more effectively displayed their power and imposed their perception of world order.

Fundamentally different value systems caused much strain on the relationship between Qing and British officials that resulted in power struggles and subsequently the adoption of foreign legal concepts. Historically, the Chinese legal viewpoint had been that law was to be used as a deterrent of crimes and thus traditionally it did not concern itself with treating civil and trade disputes of the nature that the British officials were accustomed. This shaped Chinese-British interactions that are evident in court transcripts and legal documents recorded in Chinese and foreign archives. Moreover, the British were particularly unsettled by these differences because they were trying to establish a settlement with values and institutions which they felt were incompatible with the Chinese System of legal governance. This difference in values held

\(^4\) Gaskill, 86.
by Qing and British representatives who were to be treated on an equal legal status in the Court, represents tension that could build up to a power struggle. Because of the inherently oppositional nature of the values that the British and Qing held, only one of those values systems could be effectively imposed. How this was determined represents a power struggle that began on a relatively equivalent perception of power from both the Qing and British officials. Thus, as the "[the assessors] continually insisted upon departures from [the Chinese system] to conform to their own concepts of propriety and their own scales of values," they engaged in a power struggle to ascertain that their value system would be implemented.  

Often, intimidation and deadlock tactics were used until one side was able to display their power more effectively and thus coerce the other to adopt their value and legal concepts. Hence these legal power struggles between Qing and British officials resulted in changes to the Chinese legal system. For example, following these legal power struggles, legal counsel was allowed to appear to represent each party. "Rules of Evidence" were aligned with western concepts, and torture and corporal punishments were phased out.  

Thus legal power struggles resulted in localized legal development that would eventually influence and be studied by Shen Jiaben who would be placed in charge of reforming the Qing legal system in the early 1900s.

Scholarly debate on Chinese legal development centers on differing factors that all seem to influence the adoption of western legal concepts following wars with foreign powers. The foreign powers that most directly interacted with Qing officials, primarily on war terms, are Japan, Great Britain, Germany, France, Italy, the United States, Austria-Hungary, and Russia.  

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6 Stephens, 47.
Of these nations, my research will focus on power struggles with Japan, Great Britain, and the United States. In understanding Chinese legal development, some prominent scholars refer to some of the resulting legal developments in China as being caused by “military superiority” as stated by Stephens, B. Thomas, and “Political factors” as claimed by Hua Shiping, but these reasons essentially refer to the power struggles that I propose are the mode of adoption of Western legal concepts in China from the 1840s to 1911. The factors propose by Stephens and Hua can be better understood under the framework of power struggles which expands on their definitions to provide a new perspective. These factors can be negotiated through displays of power in military and legal areas to influence their perceived position of power, and therefore do not necessarily reflect the actual state of military strength or some sort of global political hierarchy at that time. The framework of power struggles helps to understand interactions between China and foreign powers, as well as the resulting piece-meal adoption of western legal concepts.

The three main primary sources used in this paper are the Shanghai Court Cases, Legal Documents (Treaties), and official communications (Imperial Edicts, memoranda, and newspapers), which are used to establish the connection between power struggles and Chinese legal development. These sources are important because they help convey how the Qing underestimated the extent to which foreign powers would use legal methods and military force to enforce their control abroad through power struggles. Regarding the Shanghai International Settlement, the British and Chinese were able to have legal discourse through the Shanghai Mixed court cases which often dealt with issues that Qing and foreign powers had differing cultural values on. And because in the traditional Chinese perspective there is no formal separation of power between the judiciary and legislative branches as in some western countries,
these cases and the official documents exchanged between municipal magistrates and the Qing court help illuminate the Qing response to challenges on the Qing world view by foreign powers and the resulting legal developments. Additionally, legal documents such as those exchanged between Qing officials, and proclamations made by the Qing emperor and his magistrates, provide an understanding as to why the Qing retaliated so strongly against foreign legal concepts, yet ultimately adopted so many. Another source to note is a book by Anatol M. Kotenev who was a Russian resident residing in the Shanghai International Settlement at the time of its foundation and through the development of the Mixed Court as well as the International Settlement’s termination following the collapse of the Qing Dynasty. Kotenev’s book is a secondary source, referencing many primary sources that I make use of in support of the power struggles framework. In Kotenev’s book, *Shanghai: Its Municipality and the Chinese*, he references many newspapers, memoranda, and direct communications surrounding the happenings of the Shanghai International settlement and its Mixed Court as well as providing his own commentary on the developments in Shanghai. Furthermore, these sources reveal how conflicts stemmed from a fundamental power struggle that resulted when trying to reconcile the inquisitorial nature of the Chinese legal system versus the advisory nature of western legal systems. We can learn more about this power struggle by studying Qing contemporary legal and official documents as discussed above.

In order to highlight the connection between Chinese-foreign power struggles and Chinese legal development, I will use a four step process outlined here. First, I will establish and define the power struggle in each case to better understand more subtle displays of power. Secondly, I will describe the event or case to provide more context and information on the interactions between Chinese and foreigners. Then, I will focus on how the particular power
struggle lead to legal development as embodied in the creation of new norms or legal codification. Finally, this paper will conclude with an overall commentary on the scope of law and the implications from the adoptions of western legal concepts.

This paper will focus on the power struggles present in a few thematic aspects of legal development, including International Law, Criminal Law, Civil and Commercial Law, Family Law, and Constitutional Law (1908-1911). These thematic topics well help understand how conflicts with foreign powers led to the adoption of western legal concepts in China; and furthermore, increase our understanding of the nature of those legal changes as they related to Chinese society at large during the late 19th Century.

**International Law**

International Law in China during the Qing was particularly affected by the foreign intervention and power struggles between the Qing and foreign powers. It is one of the first themes of legal development to be affected and set the context for future developments as it allowed for the creation of the Municipal Council and the consequent Shanghai Mixed Court. The creation of the Mixed Court helps set in context the environment in which the other themes were influenced and why such a strong adoption of foreign legal concepts was possible in China. Moreover, the creation of the court itself represents how foreign powers were able to use their influence based on power struggles to create western legal institutions in China, as proposed by Thomas B. Stephens:

The mixed Court depended for its existence and for its direction and control upon the hierarchical and military superiority of the Western nations, particularly Great Britain, over the Chinese. When British superiority began to falter and to fail in the face of rising
nationalist sentiment in China and Declining military strength in Britain, the Mixed Court could no longer sustain its own competence and simply went out of existence.\(^8\)

The above also hints at the eventual repercussions of power struggles for the British as their perceived position of power declined, they lost grasp on legal institutions abroad. Furthermore, the change in status of foreign powers as perceived by the Qing allowed for a multitude of actions to take place that would lead to further legal development.

One of the most significant changes to the status of non-Chinese in China was the adoption of treating foreigners, not as barbarians as had previously been the tradition when dealing with borderland aggressors, but instead as equals under Chinese law as a result of power struggles. In order to understand how this equalizing of statuses occurred, we first need to examine the early power struggle between British and Chinese representatives. Kotenev represents the outside perspective on the Chinese view towards foreigners by comparing “Westerners” to “barbarians, who brought along with them death for the nation and peril for the dynasty, and whose civilization was founded on greediness, treachery and blood.”\(^9\) This perspective represents what scholars of China studies saw as the motive for the Qing response to foreign transgressions, and thus describes an awareness of the power struggle inherent in Chinese-foreign relations. The word used by the Qing for foreigners was “barbarians”, thus conveying that the Qing perceived position of power was higher than that of the foreigners. Equal legal status then resulted from negotiations of power between the Chinese and foreign powers, as seen in the creation of the Municipal Council and the holding of trials in the Mixed Court. It is important to understand how the Council was created and how Court cases were held

\(^{8}\) Stephens, 112.

for this reason. The Municipal Council was first defined as a result of the power struggle that was apparent in the Land Regulations evident through its many revisions. The Land Regulations allowed for the creation of the British Consul and its ability to regulate along with local Qing authorities as stated in Article XXII of the Land Regulations:

The interpretation of the regulations, their correction, if necessary, and any additions to them should be the duty of the local authorities in communication together.\(^\text{10}\)

And the power to enforce those regulations was also given to the British Consul through Article XXIII:

Hereafter, should the English Consul discover any breach of the Regulations above laid down, or should any merchants or others lodge information thereof, or should the local authorities address the Consul thereon, the Consul must in every case examine in what way it is a breach of the Regulations, and whether it required punishment or not, and he will adjudicate and punish the same in one and the same way, as for a breach of the Treaty and Regulations.\(^\text{11}\)

These regulations were meant to establish power a localized regulatory body with the British Consul as its enforcer, excluding other nations from sharing this power. Thus the regulations were intended to display the British power above those of the Qing and other Western Powers in China. Representatives from other nations, such as the United States, felt threatened by these regulations. Similarly, the Qing government was coerced into accepting these regulations due to treaty guidelines. As a result, when a particular American representative in Shanghai saw this as a challenge to their own power and consequently challenged the British power in return, the Qing

\(^{10}\) Kotenev, 5-7.

\(^{11}\) Kotenev, 6.
took advantage of the situation to redirect the power struggle between the British and Americans. Consequently, the American representative placed an American flag within the British concession in direct challenge of the Land Regulations act agreed upon by the British Consul and the Daotai. In this case, the Daotai is a head of a department of government in the Qing that primarily dealt with traded goods. Additionally, the Daotai was given the power to direct the relations with foreign Consuls at any of the Qing open trading ports. In order to refocus the conflict between the Americans and British, the Daotai in 1847 declared the following subsequent Article XXIV to the Land Regulations in support of the British in the British-American power struggle:

> With the exception of the British ensign, no individual belonging to any nation will be allowed to hoist any national flag within the limits appointed for the English merchants to rent ground.\(^{12}\)

It is possible that the above action by the Daotai was made as a result of coercion from the British; however, the theory that the Daotai was pitting the British again the Americans is characteristic of other actions taken by the Daotai in order to displace British perceptions of power. Furthermore, this argument is also supported in Kotenev’s book through the description of the power struggle present in the initial years of the foreign presence in China as not only were the Qing trying to defend against the already more established British representatives, but also the newly arriving Americans who wanted their slice of territory and power. The Qing were in a position where they were already coerced into accepting the Land Regulations, but found that they could use this same tool to leverage their power against the Americans. This kind of action is seen throughout Qing foreign relations and is again encountered within this paper. By

\(^{12}\) Kotenev, 6-7.
redirecting the power struggle, the Qing would be able to focus less on the threat imposed by foreign nations if they were also in conflict with each other. By siding with the British government in this case, the Qing government was able to successfully display their power against another offending nation. Furthermore, the notion that this incident was indeed a power struggle that led to a more equal legal status for foreigners in China during this period is supported by Kotenev’s following statement:

The whole case of the flag serves as an index of the notions prevailing at that time, not only in the minds of Chinese local functionaries with regard to the power of the British Consul, but also in the minds of the British Consuls themselves, establishing one of the first remarkable precedents for the extension of consular jurisdiction in Shanghai.¹³

Ultimately, this conflict between the Qing, British, and Americans backfired on the Qing due to the fact that the conflict or power struggle actually served to solidify British order in China. Furthermore, the British and Americans decided to coordinate their efforts against the Qing as evident by the fact that the Shanghai International Settlement was initially set up by the French, British, and Americans. In the case of the International Settlement, the British display of power displaced the Qing’s perceived power, and thus the goal of the British representatives to establish consular jurisdiction in Shanghai fulfilled. On the other hand, due to loss in perceived power, the goal of the Chinese representatives to limit foreign expansion in China failed. This British-American alliance coupled with the fact that the Taiping Rebellion (1850-1864) was threatening stability in the area, the French, British, and American Consuls and Ministers in Beijing created the Municipal Council Land Regulations of 1854. Thus the creation of the Shanghai International Settlement through the power struggle of foreign powers is apparent in the Qing response to the

¹³ Kotenev, 7.
negotiations for the Land Regulations as well as the subsequent Municipal Council Land Regulations. In this manner, there was a cascading effect in the Qing displacement of perceived power, as the power struggles that resulted in the creation of the Shanghai International Settlement created more tensions that perpetuated the Chinese-foreigner power dynamic. The struggle for power between the Chinese and foreign representatives as seen in the creation of the Municipal Council and later through the holding of trials in the Shanghai Mixed Court (1863-1927) show how a more equal legal status for foreigners was being developed.

As one of the longest running foreign legal institutions in China, the Shanghai Mixed Court cases allow for a deeper understanding into the power struggle between Qing and foreign powers. Although similar courts were present throughout China in the other four treaty ports, the Shanghai Mixed Court is particularly important because of the confrontations with British and American representatives. From the Qing perspective, the Shanghai Mixed Court acted on a Chinese disciplinary law model that was intended to maintain the Chinese rule of order in the Shanghai International Settlement. The Court was a place where the Chinese magistrates and foreign assessors decided on cases together on equal grounds, at least according to the law. Stephens further supports the practical distinction between real power and perceived power through the following statement:

In theory, it was a Chinese court administering the Chinese system of social order. But the Chinese system was archaic and deficient. Shanghai was, above all, a community of traders, and the Chinese system offered neither a civil nor a commercial code to guide the court in trade disputes.\(^\text{15}\)

\(^{14}\) Kotonev, 7.
\(^{15}\) Stephens, 46.
According to the passage by Stephens, in theory, the power of the Chinese authorities over the local population of Shanghai was equivalent or greater than that of the foreign assessors. In practice, however, this was a source of tension where power struggles between the Chinese officials and foreign powers could play out as they negotiated their perceived position of power on Chinese ground. According to the institutions and treaties that resulted in the creation of the Shanghai Mixed Court, the court is supposed to serve as a neutral institution that is meant to serve the interests of the International Settlement in Shanghai. And in many cases that appears to be the case, as per the case of a Chinese resident who died at the hands of British residents. The case itself is a great example of how court procedures were recorded and of what roles the foreign Consuls and Daotai fulfilled in this legal institution.\textsuperscript{16} Even when conflict between the Daotai and Consuls arose during a trial, there was meant to be a means of equitably dealing with the situation. Note that at this point in time, in Shanghai, the equitable status of British troops on Chinese ground had already been established, and now was serving as a compounding effect for future power struggles to develop. This was a result of the Treaty of the Bogue (1843) which granted the key provisions of extraterritoriality and the most favored nation status to Britain, officially giving British residents equal or superior status in many respects within the International Settlement. In addition, according to the Treaty of the Bogue, "if unfortunately any dispute take place of such a nature that the Consul cannot arrange them amicably, then he shall request the assistance of a Chinese Officer that may together examine into the merits of the case, and decide it equitably."\textsuperscript{17} Even a decade later, many of the ideals and regulations expressed in the Treaty of Nanjing and the Treaty of the Bogue are represented in future treaties. For example,

\textsuperscript{16} Shanghai Mixed Court Case, “Death of Tshoy-nue-tseong,” Shanghai, 1852.
\textsuperscript{17} Treaty of the Bogue, Art. XIII. China, 1844.
in a similar passage as the Treaty of Bogue (1843) quoted above, the Treaty of Tianjin, Art. I, states:

A British Subject having reason to complain of a Chinese, must proceed to the Consulate, and state his grievance. The Consul will inquire into the merits of the case, and do his utmost to arrange it amicably. In like manner, if a Chinese have reason to complain of a British subject, the Consul shall no less listen to his complaint, and endeavor to settle it in a friendly manner. 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, and decide it equitably.\(^\text{18}\)

These treaties were meant to emphasize the equitable nature of jurisdiction over the residents of the International Settlement. The reality, however, was that the court served as an arena on which the Qing-foreign power struggle could take place within a legal framework. In terms of sharing power during cases, the Chinese magistrate and foreign assessors tended to work together to decide on trials, but not without confrontation. Although the Chinese and foreign officials worked together on cases, there was a lot of tension because both the *Daotai* and the foreign assessors had ulterior motives, and as a result, disputes were very common. These intentions were formalized into legal documents such as the Treaty of the Bogue (1843) that intended to negotiate additional regulations on Chinese official’s power within the International Settlement in Shanghai. The power struggle present here is that of limits to Chinese jurisdiction within the settlement, and so the sides present here are also distinctly British authorities *versus* Qing authorities. From the British Treaty of the Bogue, we know that British officials were intent and very methodical about increasing their power over the international settlement as shown by the

\(^{18}\) Treaty of Tianjin, Art. I, China, 1858.
consistency and frequency with which laws were made. This process of amending laws is indicative of the power struggle that took place, within a legal framework, as only then could they justify their perceived position of power and use it to impose new regulations, as alluded to in the following excerpt:

The Supplementary Treaty and General Regulations of Trade having been amended and improved, and the substance of their provisions having been incorporated in this Treaty, the said Supplementary Treaty and General Regulations of Trade are hereby abrogated.¹⁹

Treaties and Regulations were the mode used by foreign powers to negotiate and impose their perceived position of power and subsequently their value systems on the Chinese population as seen in the Treaties and Regulations reference throughout this paper. Therefore, this gradual extension of foreign powers against Chinese sovereignty was not only allowed because of equal legal status established through the negotiation of previous power struggles, but also reinforced by further power struggles arising from the foreign assessors. Accordingly, even in cases where Chinese officials had already decided on a verdict, the Municipal Council of the International Settlement in Shanghai was given the power to negotiate with the Daotai a retrial for cases where there was newly acquired evidence.²⁰ Perhaps, part of the reason that this system of equal legal representation was more readily adopted by the Daotai could be that in traditional Chinese legal culture, case records and evidence were considered open to reinterpretation at any time by the magistrate as studied by Philip C. C. Huang.²¹ Therefore, it made sense that the Consul could request to have a further look at the case. On the other hand, it probably came as a surprise to the

¹⁹ Treaty of Tianjin, Art. I. China, 1858.
²⁰ Shanghai Mixed Court Case, “Death of Tshoy-mue-tseong.” Shanghai, 1852.
"Daotai when foreign assessors chose to indefinitely delay their judgment on court cases until the Daotai followed the Assessors’ specific demands. In a United States Court Case (1864) the following was recorded:

The Taotai actually went to the length of closing and putting his seal on Messrs. Bohstedt’s gosowns, and issuing a warning to all natives who might be indebted to them, to withhold payment of the sums due until the action pending has been decided. And it was only in the U.S.A. Consul declaring that he would not pronounce judgment until these restrictions had been withdrawn, that His Excellency could be induced to retract.\(^{22}\)

The Daotai had closed down the offender’s firm without collaborating with the US Consul first. The situation was such that the Daotai had acted in his own power, without first consulting the US Consul. This tension lead then erupted into a power struggle, as both officials were determined to ascertain their views. This was an opportunity for the United States to enforce its Treaty Rights and for China to assert her sovereignty. In particular, this case also reveals how complicated the relationship between foreign assessors and the City Magistrate and Daotai could become as well as the tools that they had at their disposal for negotiating perceptions of power. In this case, the US Consul used deadlock tactics to wear down the Daotai into eventually agreeing to the terms of the U.S. Assessor, conveying the position of power that foreign assessors could hold over officials and the Chinese public in the International Settlement. This helped to solidify a transition to a more equal status for non-Chinese in China.

The events above eventually led the Qing government to take action in adopting international laws as a means of engaging in a power struggle by joining the international law debate. This required that the Chinese government use translation schools in Beijing from 1861

and in Shanghai from 1870s to systematically translate international law texts. Through these actions, China was preparing to engage in an international power struggle in which it tried to negotiate its position of world order, but this time in order to attain a more equal standing to end further power struggles that largely resulted in harm towards China and its people and institutions. Consequently this power struggle, resulted in the adoption of the “Western model of international law as a universal value” and the subsequent formation of the Zongli Yamen that the Chinese government intended to use to support the concept of “the sovereign state to strengthen [China’s] own interests.” Thus it is apparent that China was not submitting to the foreign powers by admitting to having a lower position of power, but rather it shows that Chinese authorities understood that the system was such that international law currently favored western powers. Stefan Kroll sees this “local strategy… aimed at refusing the global model” by its “adoption and enactment” as a “paradox.” However I propose that the framework of power struggle from the Chinese perspective helps make sense of this “paradox.” As in the examples shown above, effective displays of power meant that the adoption of legal concepts from the nation that was able to more effectively convey its perceived position of power is to be expected. Conversely, if a nation intends on elevating its perceived position of power, it must make effective displays of power, and so the Chinese government understood that by engaging in a legal power struggle on the subject of normative international law, it could negotiate a position of power that would put China on an equal international status. China, through proximity and frequency of use of the engaged scholars in this power struggle, adopted international law but

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24 Kroll, 38.
25 Kroll, 38.
with the Chinese perspective of ending the Unequal Treaties and securing its position of power in the world order.

**Criminal Law**

Western Powers had a large influence on Chinese adoption of Western concepts of criminal law; however, it is similarly important to understand that Power Struggles can be used as two-way channels that are not dependent on the absolute strength of nations to impose or protects a nation’s values. In this section, I will discuss a few instances where the power struggle favored the Qing and allowed for value systems to be retained, while at other times it lead to legal changes. The fact that Chinese authorities were able to weld their legal power to protect Chinese legal institutions and values also shows how it was possibly that failure could mean the replacement of the Chinese legal system with Western legal concepts. Hammond shows how in some smaller cases, “Chinese and British were punished differently according to the crimes they committed” and with punishments that mostly fit the defendants’ home legal codes by the Mixed Courts seen in the table provided below.²⁶

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<td>Fines</td>
<td>Body Crimes</td>
<td>Imprisonment</td>
</tr>
<tr>
<td>Fines</td>
<td>Money Crimes</td>
<td>Fines</td>
</tr>
<tr>
<td>Dismissal</td>
<td>Drunkenness</td>
<td>Fines</td>
</tr>
<tr>
<td>Not applicable</td>
<td>Vagrancy</td>
<td>Dismissal</td>
</tr>
</tbody>
</table>

The fact that Chinese and Foreigners were punished differently by the Mixed Court means that both Chinese and Foreigners were engaging in a relatively equal power struggle. That is when

Chinese authorities won a particular power struggle, it meant that their view of legal discipline would be upheld; likewise, when foreigners won a particular power struggle their law would be enacted. From this we can see that the Mixed Court served as a relatively even ground for Chinese and foreign powers to negotiate their world order with some effectiveness. However, this should not be taken to mean that there were not deficiencies in the court that caused more wide-reaching power struggles to occur which forced Chinese authorities to adopt western legal concepts. On the other hand, the fact that there was no definite code of law meant that cases would always come down to Chinese and foreign representatives assessing court cases in which the nature of punishment differed widely between Chinese and foreigners. In fact, Hammond elaborates on this point by referencing the Foreign Office Records in the National Archives of the United Kingdom which state the following, in regard to a system of punishment that can remedy the difference in nature of punishment between Chinese and foreign views:

…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.27

As is apparent from the official document above, the British assessors already had in mind the intention of changing Chinese legal concepts to fit those from their world view. Realizing that this would not be an easy task, they knew they had several options. Either they could engage in a military power struggle, using force to impose their values, or they could engage in a legal

27 Foreign Office Records, National Archives of the United Kingdom, FO 288/910.
display of power in the court and use their legal power as assessors to hold their views over Chinese punishment principles. Essentially, the foreign assessors wanted to replace the punishments of bambooing, the cangue, and the chain-gang with imprisonment and hard labor. As a response to the tension arising from differences in legal punishment values, the Qing took charge of limiting the power that the Mixed Court had. By limiting the power of the court, the resulting power struggle would not be as effective. Hence even if the foreign punishments could be enacted, they would not serve as effective tools for foreign assessors to use and would weaken the power foreign assessors had over Chinese defendants. This can be seen in Kotenev’s reference to a note from Mr. C. Alabaster that states that the Chinese magistrate “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.”

Furthermore, Hammond quotes Dr. Yates from the American Consul in response to the perceived inadequacy of the Mixed Court stating, “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.” This view shows how the foreign powers were responding to the legal power struggle that the Chinese and foreign powers were engaged in. The American Consul understood that the Qing tactic to lower the strength of the court was effectively reducing the American Consul’s ability to convey their values in the court. Thus this was a power struggle to negotiate the legal restrictions and powers of the court. Consequently, the government better able to display their power would be able to either bring with it foreign legal concepts, including foreign prosecutors or lawyers, or allow the Qing to

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28 Kotenev, 53.
29 Hammond, 59.
preserve the advisory nature of judges and legal hierarchy. The Chinese authorities, in order to safeguard their view of order, displayed their power in the court by mandating that Chinese law states that “grave offences such as those which were punishable by death or by perpetual banishment… needed to be reported to the provincial governor (xunfu) for investigation.”

Hammond even points out:

> 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 1896 were to be made with much consideration and hasty decisions at the court regarding how to deal with Chinese criminals should be avoided.

These actions by the Chinese authorities show an effective display of power, which the Chinese authorities were able to hold successfully to preserve their legal concepts instead of allowing these certain foreign concepts to be adopted. Through this example, the nature of a power struggle is apparent in that the side which successfully negotiates their perceived position of power is able to impose their values, and in this case legal concepts on the other side, and it works both ways for Chinese protecting their legal institutions and foreigners imposing their own.

Adoption of Western legal concepts didn’t always have to occur from foreigners winning power struggles, but simply engaging in them could affect Chinese legal development, demonstrating the influential effect that power struggle could produce. Harking back to the fundamental difference between Chinese and Western legal systems (inquisitorial versus

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30 Foreign Office Records, National Archives of the United Kingdom, FO 233/96.
31 Hammond, 60.
advisorial), both systems could not always be implemented in the Mixed Court. On the contrary, it was often the case that the Western view of legal counsel was conflicting with the traditional Chinese roles of the magistrate, and so the roles of the magistrate were again restricted, except this time by the Consular Body of the Shanghai International Settlement. As the Qing had effectively weakened the power of the court, the foreign powers responded by further limiting Qing rule within the already weakened court. In the case of the British Fifer who was accused of murdering a Chinese man where insufficient evidence was produced, the following was recorded:

The Court was cleared and the accused returned to his ship the result of the former examination as to the insufficiency of evidence to criminate him having been confirmed by the Consul, and not contested by the Taoutae[sic]; who nevertheless referred to the Chinese System of conducting such examinations and expressed a desire that both the blacken (the Fifer and the other,) should be repeatedly examined and cross questioned until the truth could be elicited, which the Consul stated was a mode of proceeding altogether opposed to and prohibited by English law and custom, and could not therefore under any circumstance be adopted.32

This case further illuminates how Chinese officials were influenced to adopt western legal concepts, despite having fundamental differences. It shows that by not allowing the magistrate to act through Chinese legal concepts, their only alternative was to adopt foreign ones. This demonstrates one of the many ways that the power struggle between Chinese and foreigners presented itself when negotiating what system of law would be used. With increased exposure to Western legal concepts without having an alternative to act as a pressure valve, working within

32 Shanghai Mixed Court Case, “Death of Tshoy-nue-tseong.” Shanghai, 1852.
the Western legal system would eventually lead officials to adopt those new customs that they were becoming more accustomed to, which is why it was so important for Chinese authorities to respond with their own displays of power to retaliate against the adoption of foreign legal concepts.

The punishment of hard labor was another contentious topic that pitted Chinese ideology against that of the foreign powers and brought about change through power struggles. According to Kotenev, this was a topic where the Daotai and the British Consul had a heated debate regarding which side’s legal concepts should be enforced. From the British perspective, “hard labour was the most effective and practically the only measure to cope with the criminality in the Settlement which was in the power of the Court to inflict upon the convicts without referring to higher authorities” which would include the Chinese City Magistrate and Daotai.33 This type of punishment was intended to bypass Chinese authority and allow the British assessors more power in the outcome of court cases with heavier penalties. However, the Daotai disagreed with this perspective and, in a memorandum to the British Consult, wrote, “There is no such punishment in the Chinese code as hard labour, and it is not agreeable to the Treaty that Chinese should be punished with a punishment belonging to a foreign code.”34 The Chinese and British authorities were fundamentally at odds on this type of punishment. As evidenced by court cases following this exchange, such as the case of wounding tried by the Supreme Court of China and Japan, the practice of hard labor was continued despite Chinese opposition.35 Hammond further provides evidence to the foreign imposition of the use of hard labor as a punishment as most of the cases with Chinese defendants that dealt with “property crimes” resulted in the sentence of

33 Kotenev, 59.
34 Kotenev, 59.
hard labor. In this case, the power struggle was in the favor of foreign powers and their legal concepts were implemented.

Although Qing authorities had some success fighting changes to Chinese criminal law, the compounding effect of the previous power struggles had already severely displaced Qing power. For instance, in the above case regarding the role of the magistrate in the Mixed Court, the Qing and British started off on a relatively equal legal standing. The Qing however, took the initiative to stave off potential problems arising from the court in overextension of jurisdiction by lowering its overall effectiveness. The Qing saw this as a threat to their perceived position of power, and thus retaliated in what resulted in a power struggle that not only weakened the court but also regional Qing authority. In the end, the power struggle was really harmful for the Qing. This can be seen in the case of hard labor above, where the Qing were not able to effectively display their power as they had already been displaced from their perceived position of power. Power struggles often had compounding effects, such that by the end of the Imperial era in China, the Qing perceived position of power was much lower than what it was in the middle of the 19th century.

**Civil and Company Law**

The Chinese adoption of Civil and Commercial law largely occurred as a result of power struggles in special areas of conflict where Chinese and non-Chinese engaged in commerce and trade. Chinese law on trade had not been as in Western states during this time. However, through the pressure of the previously failed power struggles, China felt that its position of power had been weakened to the point that it needed to adopt more institutionalized concepts of law from Western powers in order to regain some ground from which a more fair power struggle could
later take place. It adopted Western legal concepts of contract law meant to support civil and commercial transactions.

The Mixed Court and the Western legal institutions further elaborated on the practice of contracts and codified their process into law. Contracts also existed throughout Chinese history, but served more as a standardized form of transaction rather than a legal guarantee. According to Stephens:

The concept of contract is unknown in disciplinary theory. In disciplinary systems of order there may be found agreements in plenty, and they often look very like Western contracts, but they are agreements which never ripen into contract... The utmost that an aggrieved party can do by way of enforcement through official government channels is to go vertically upward and ask the superior of the other party, as of grace, to issue a command vertically downward, directing the defaulter to honor the agreement. The superior has an unfettered discretion to grant or to refuse the suppliant this favor, but in either case is quite likely to punish both parties for quarreling and for not settling their quarrels without disturbing higher authority.36

In western legal models, legal verbiage could relieve the defendant of added legal penalties, even when there was intention to short the plaintiff (as concluded by the presiding magistrate and assessors). This can be seen in a newspaper article published in 1866:

The fact was admitted, but a counter claim was raised that the Captain had added to the bill of lading the clause “more or less,” and was therefore freed from his responsibility... The Court therefore dismissed the claim with costs."37

36 Stephens, 31.
37 Shanghai Mixed Court, “Master and owner’s ‘Napoleon III’ v. E-Foong.” Shanghai, 1866.
Although the defendant was still charged a monetary cost for the discrepancy, the fact that the wording was made explicit could serve as valid legal defense for the defendant. And as many of these cases dealt with people who had contracts that went unfulfilled, Chinese officials gained even more experience and exposure in dealing with this type of cases. Thus it moved away from the traditional focus of law on criminal codes.

The commerce law was developed in China in response to China’s resulting position of power after having dealt with foreign powers to a devastating effect. At least from the Western perspective, however, the actions taken by the Shanghai Mixed Court seemed to support the adoption of Western legal concepts as stated by Thomas B. Stephens:

The court aimed at eliminating the determinative influence of the guilds and chambers of commerce in civil disputes. We are not concerned with whether this was or was not a praiseworthy objective according to any absolute or nationalistic or societal standards or ideals. We are only concerned to point out that it was praiseworthy in the sense of its encouragement of trade and commerce in the development of Shanghai. The court did not in practice always achieve the standard in these matters of impartiality, integrity, and honesty that the British and American assessors aimed at, but the ideals were always there and were persistently striven for.38

The consequences of the events that took place in the Shanghai Court was not just limited to that local administrative region, but rather influenced central Qing adoption of Western legal concepts. This influence to the imperial edict charging “Zai-Zhen, a Manchu prince, Yuan Shikai, the most powerful Chinese Governor-General of the realm, and Dr. Wu Tingfang, the

38 Stephens, 107.
former Chinese minister to the United States, to compile a commercial code.”

Not only was the direct action taken by the Qing court representative of the adoption of western legal concepts, but also the rhetoric reflection this idea of giving power to western institutions. As Kirby states, in regards to the imperial edict, it was considered “of the many government functions, the most important is to facilitate commerce and help industries.” This is representative of a concession to western powers in response to a failed Chinese-foreign power struggle in ridding of extraterritoriality through other means. Thus, as the above conveys, the Qing felt it was necessary to adopt the Western standards of law in regards to commerce as it represented a system of power that they could later use once they were in a better position of power. This symbolizes another attempt to break away from this cycle of power struggles that China had been engaging in as many of them had resulted in the piece meal adoption of Western legal concepts. Kirby supports this claim:

The history of this first modern Chinese law is to some degree a barometer of the state’s assumptions toward the economy over the course of the twentieth century. But as the century draws to a close, it would appear that the late-Qing legal drafters were only two-thirds correct: the law would ultimately prove a useful means to define limits to foreign economic activity in China; and the Chinese state would be the prime beneficiary of the adoption of the corporate form of business activity... but the first assumption of the Qing reformers, that the modern corporation on a Western model would be the essential vehicle for private Chinese economic development, would prove quite mistaken.


Ibid.

Kirby, 44.
Although Kirby’s focus is on the economy, his comments help shed some light on the Qing perspective of limiting Western power through the adoption of a Western legal concept and then hoping to use it to further its own position of power.

As a result of the many power struggles that China went through to the end of the 19th century, the Qing were severely displaced from their perceived position of power that they had at the start of the century. The Qing eventually adopted Western legal concepts of civil and company law as a means to regain power. The results of adopting civil and company law were mostly as expected, according to Kirby, but these actions opened up China to internal conflicts of power as this system nationalized. A source of the internal conflict was that company law introduced concepts that by design did not place the emperor and the government at the forefront of disciplinary order, but rather delegated it solely to the courts. This deviation probably caused more internal conflicts in China akin to other more powerful countries where internal formal legal institutions redirect power conflicts. In the end, whether by intentional choice from the Qing or through pressure to assimilate, the Qing adopted legal concepts that resulted from ongoing power struggles with the West.

**Constitutional Law (1908 - 1911)**

As the Qing government centralized power, Constitutional Law in China lost popularity in the eyes of Qing officials. It was not until after a series of power struggles with Western nations in the early 1900s that Chinese legal discourse on Constitutional law resurfaced with support from the Qing government. Through the process of absorption due to proximity and increased understanding caused by the Chinese-foreign power struggles, Western legal concepts made their way into the New Systems Reform called Xin Zheng (1901-1912) which was
characterized by the lack of philosophical debates, but rather focused on “concrete, step by step measure” meant to “modernize China, but save the Qing Dynasty from collapse.”\textsuperscript{42} Similarly, Shen Jiaben (1840-1913), the Qing scholar official believed in the “piece by piece approach in reforming the legal system without grand theories” which largely reflected the way in which China had been adopting Western legal concepts in the mid-19\textsuperscript{th} century as a result of specific power struggles.\textsuperscript{43} Through his personal experience with Qing-Foreign Power conflicts, coupled with his rise in popularity during the Xin Zheng, Shen Jiaben became a vital figure in constitutional law.

Shen Jiaben was a traditional \textit{jin shi} or scholar official who rose in ranks through the Qing civil examination system to a level of power that allowed him to reflect on China’s previous interactions with foreign powers in order to lead the Chinese legal revision process. Shen Jiaben had a very personal understanding of the Chinese-Western Powers struggle. On September 1, 1901 he was arrested by Westerners who believed that he had taken part in the Boxer rebellions aimed at those living in foreign concessions.\textsuperscript{44} According to Hua Shiping, this “incident served as an impetus for him to push for legal reforms, because some Western countries promised that if China had a Western style legal system, extra-territoriality will be eliminated.”\textsuperscript{45} Although the first incident that led to Shen Jiaben being captured did not directly result from a power struggle, the incident did provide him with an account of who the Qing was fighting against. This interaction which I explore further below personally affected Shen Jiaben in the 1900s. And since he was responsible for a large part of China’s modernization effort at

\textsuperscript{42} Hua Shiping. 2013, "Shen Jiaben and the Late Qing Legal Reform (1901-1911)." \textit{East Asia} 30, 2 (2013): 124.
\textsuperscript{43} Hua, 123.
\textsuperscript{44} Hua, 125.
\textsuperscript{45} Hua, 129.
that time, it meant that the effects of his capture had a direct impact on constitutional law. It was also indicative of the perception that China had to submit to a new world order to regain her sovereignty. This was the cause of an internal debate between Qing scholar officials, including Shen Jiaben, on the nature of Chinese legal development. Thus we can understand how Shen Jiaben felt about the legal development process, and are able to directly link it to the ongoing power struggle between the Qing and foreign powers. Furthermore, this extraterritoriality that had resulted from the Chinese-Western Powers struggle was the “direct cause for the Xin Zheng which focused on the legal reforms” and which was assigned to Shen Jiaben.\textsuperscript{46} As a pivotal actor in the Chinese legal revision process, Shen Jiaben’s personal interactions with these events provides insight into how influential these Qing-foreign conflicts were on China’s legal development.

Prior to his capture, Shen Jiaben was not strongly influenced by the Chinese-foreign power struggle. According to Li Guilian, Shen Jiaben did not even have a personal encounter with westerners until Li Hongzhang took him to a banquet with foreigners present when he was the magistrate in Tianjin at the age of 53.\textsuperscript{47} Shen Jiaben’s lack of contact with foreigners does not however signal an absence of conflict between the Qing and foreign powers. Instead, Shen Jiaben was caught in the middle of a Qing-Britain power struggle. The British continued to display their power through further expansion into Chinese cities, including the capital city Beijing. As a result, the Qing responded by redirecting the Boxer Rebellion (1898-1900) directly at British troops while implicitly giving the Boxer Rebellion the Qing seal of approval. At this point in time, however, the Qing forces were spread thin and the British and other foreign powers

\textsuperscript{46} Hua, 129.
were marching troops into Chinese cities. In this case, the perceived position of power and actual military strength were superior to that of the Qing, and therefore it was possible for the British to continue imposing their world views. Shen Jiaben’s capture thus served as a catalyst for him to explore the current military power struggle between Qing and foreign powers, as well as the previous conflicts earlier in the 19th century. Therefore when the option to accept constitutional law to rid China of foreign transgressions, Shen Jiaben chose the route of implementing western legal concepts and institutions. Consequently, “under pressure from the westerners, Ci Xi announced constitutional reform 16 days before his release.”

The impact from the series of Qing-foreign power struggles (1842-1911), greatly influenced development of constitutional law. Although Shen Jiaben had not been initially influenced by foreign interactions, his apathy was soon replaced with determination to release China from the cycle of power struggles that plagued her throughout the century. Furthermore, the reach of power struggles went all the way up the Qing ruling hierarchy to the Empress Dowager, Ci Xi. The Qing, having lost perceived power on military and legal fronts, were willing to adopt western legal concepts in order to regain her sovereignty. Thus Shen Jiaben decided to adopt the Meiji style reforms in order to comply with western promise of changes to the status of extraterritoriality. Previously, however, Japan had not attracted a lot of attention from the Chinese in regards to legal reform. Hua states the following on the relationship between China and Japan prior to the Meiji reform:

The first attempt to introduce Japan to China was done by Huang Zunxian (1848–1905) who visited Japan in 1887 and wrote Riben Guozhi, or An Introduction to Japan. Before the Meiji Restoration in 1868, China had major impact on Japan, while Japan’s impact on

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48 Hua, 125.
China was minimal. For instance, from 1660 to 1867, Japan translated 109 Chinese works into Japanese, while only nine Japanese works were translated into Chinese during the period [42]. The situation was worse in law: From 1861 through 1898, 18.\textsuperscript{49} The concept of power struggle can also be applied to Japan, through a Chinese perspective. For instance, China did not view Japan as a nation to learn from due to its weaker position of power, until Japan engaged in the global power struggle and adopted international law and other western legal concepts as a result. Following the Meiji Restoration in 1868, “Shen praised Japan that translated lots of western law books into Japanese and the whole country learned from the west.”\textsuperscript{50} As the Japanese perceived power increase, the Qing saw Japan’s legal institutions as more and more valuable to the survival of Imperial China. Many scholars argue that Japan was China’s most realistic choice to learn legal concepts from due to geography and language, however, they do not emphasize that the Japanese Meiji style model did not become viable until after it demonstrated power through the adoption of western systems. Thus it is important to consider the impact that the power struggle between China and foreign powers had on the adoption of western legal concepts.

This model of learning from Japan’s power struggle to modernize in order to avoid becoming the target of colonization by Western powers is also supported by Wei in his writing of Japan’s defeat of Russia as a constitutional democracy defeating a dictatorship based power. In his writing, the power struggle is more abstract in that it appears to be between constitutional democracy and dictatorship, resulting in China wanting to adopt a constitution.\textsuperscript{51} Hua Shiping

\textsuperscript{49} Hua, 127.
\textsuperscript{50} Ibid.
\textsuperscript{51} Wei Qingyuan. Qing Mo Xianzheng Shi (History of Constitutionalism in Late Qing). Beijing: Zhongguo Renmin Daxue Chubanshe (1993).
also claims that this political factor of Japan’s defeat of Russia, which I contend reflects a political power struggle, “was probably the most important one for late Qing to learn from Meiji Japan” as the Japanese model “suited the Qing elites’ desire to rule China permanently.”

The late Qing saw what benefit could come from creating a constitution, as Japan had already done, in China’s power struggle with foreign powers.

In the case of constitutional law, indirect power struggles had as much influence as direct power struggles in affecting the adoption of western legal concepts as part of Chinese legal development. This was in large part because individuals in China, like Shen Jiaben, were empowered by the government to create new laws based on legal concepts that other more powerful nations had influenced through power struggles whether on China or elsewhere.

Conclusion

Chinese legal development has been heavily influenced by outside force. In particular, conflicts arising from cultural tensions with foreign powers have had a massive impact on Chinese legal development. The framework that I used to analyze these conflicts is the power struggle dynamic. The power struggle dynamic arises whenever two groups or more possess conflicting world views that are mutually exclusive. Some scholars tend to advantage military strength or political hierarchy, supported by some sort of violent punishment, as the mechanism for adopting foreign values. However, the power struggle framework offers an alternative perspective that tries to take into account the rationale behind the various actions that parties take. Often, within a power struggle there is a “winner” and a “loser” in that only one party’s value may be adopted due to the conflicting nature of cultural clashes. However, it is important

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52 Hua, 128.
to keep in mind that power struggles, do not necessarily refer to one specific instance, but rather a series of events that have a compounding effect of the perceived power a group holds. Due to this nature of the power struggle framework, this framework can be used to study change over a longer period of time. Furthermore, this takes into account the notion that a nation’s perceived power can change even without specific power struggles with the nations in question. For instance, when the Qing’s perceived position of power was displaced by the British and Unequal Treaties were enacted, the other Western nations were also able to take advantage of the Qing’s lower perceived power and thus claim similar privileges for themselves. In this way, the framework of power struggles helps analyze the complex web of interactions that result when cultural tensions need to be resolved.

In the case of the Qing, perceptions of power had an immense effect on the adoption of foreign legal concepts. Prior to the First Opium War (1839-1842), scholars could argue that although China’s absolute military strength may have been inferior to that of the British or western powers combined, its perceived power was very large. This is apparent, through the early interactions with the Canton System where the Qing control where foreigners could reside and how they could conduct trade in China. However, over the span for a few decades, China’s perceived power can be seen as gradually being decreased through a series of power struggles. By the early 20th century, China’s perceived power had been severely weakened with many foreign legal concepts already implemented either regionally or throughout the Qing’s reach.

The four thematic topics discussed within the paper are international law, criminal law, civil and company law, and institutional law (1908-1911). These categories were ordered in that manner because they hold a relatively chronological development of China’s perceived power as it relates to legal developments. By the time that the Qing were again considering institutional
law, the Qing were fighting to keep the empire alive, and thus it was as a last resort that institutional law was being adopted. Similarly, by this time period, China’s perceived power had nearly vanished in relation to that of the other Western powers. In each of these themes, however, the Qing were actively retaliating with their own displays of power that were sometimes effective and sometimes had harmful effect. This is due to the cumulative nature of perceived power, as a failed power struggle with one nation, could result in an overall decrease of a nation’s overall perception of power. Thus these themes are intrinsically tied together as the adoption of western legal concepts in one area were not generally excluded from affecting the other legal themes. Instead, my research shows that the effect was compounded from 1842 on, which is correlated with the Qing decline and fall in 1911.

There are other factors that influenced the adoption of western legal concepts such as geographical location and actual military strength, however, the framework of power struggles works with these factors. In particular, the framework of power struggles is effective as it relates to the more realistic assumption that imperfect information and difficulty in communication given distances was probably a common issue that the Qing and Western powers faced. Therefore, the psychological factors of perceived power probably played a bigger role in whether a legal concept was adopted or rejected.
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