# The Glass Fortress of Anglo-China: 1898-1911

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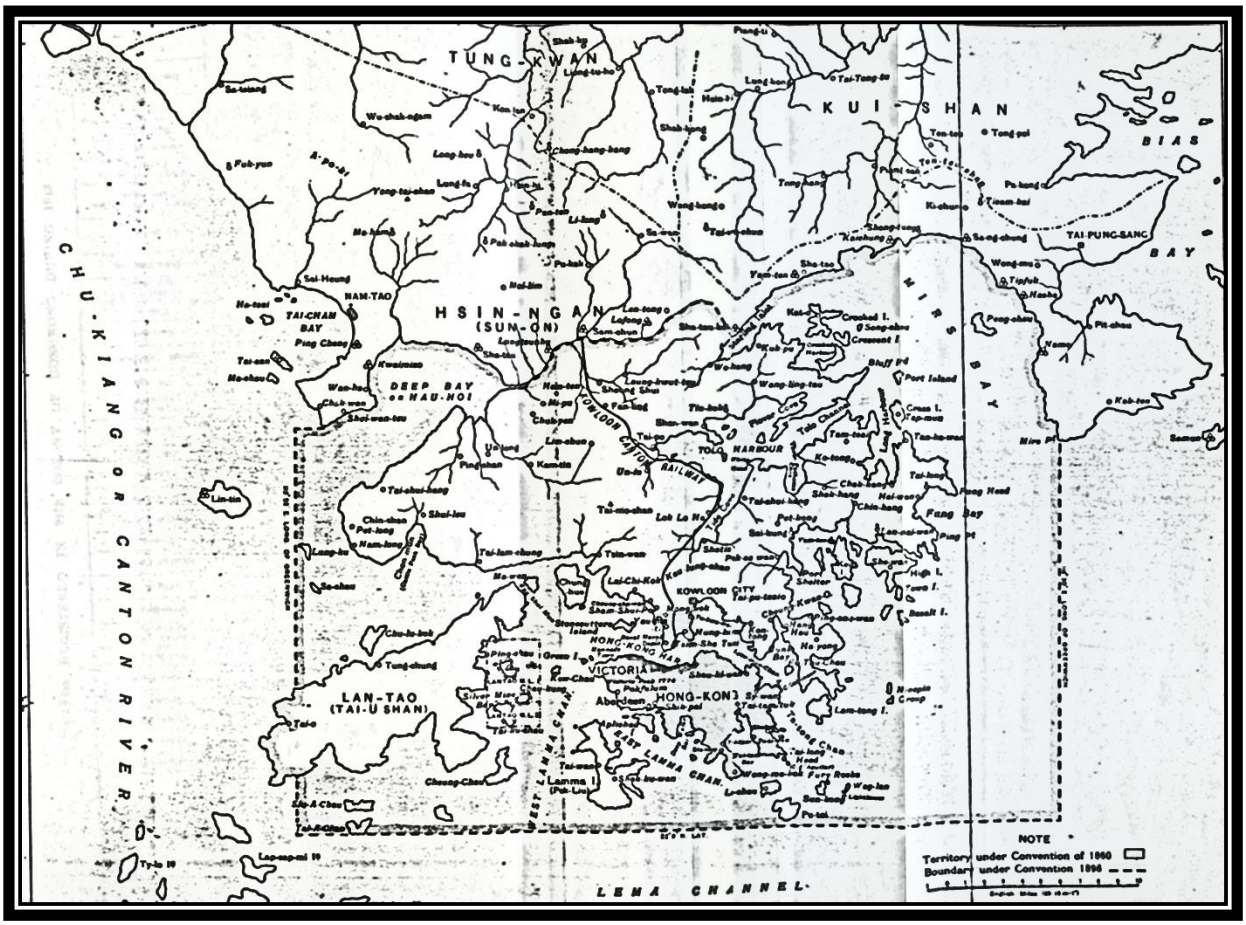
## Abstract

Hong Kong was a British colony between 1842 and 1996. In the early periods of the colony's existence, the colonial government and judiciary were unable to successfully establish British values of law and order, primarily because of inexperience in governing a predominantly Chinese society. Consequently, British leaders in Hong Kong had to learn to adapt their governance to accommodate, but also control, the population of their territory. For the colonial British government and judiciary, Hong Kong's safety quickly became a point of grave concern. One response to this apparent lack of safety, for instance, was an even more stringent application of colonial law.

This thesis examines the period in Hong Kong's history between 1898 and 1911 as not just a continuation, but *evolution*, of earlier colonial governance. We center on judicial case studies as the primary source of evidence for this evolution. Colonial attitudes and actions in Hong Kong were, by the turn of the century, highly conservative and utilitarian. These attitudes and reactions are best represented in the metaphor of a "glass fortress." British leaders intended to portray a sense of strength, safety, and control, both to foreigners as well as those living within the colony, hence the grandiose and domineering appearance of the "glass fortress." However, British leaders were limited by the realities in the colony, such as its geographic size, social makeup, and insufficient military strength. Additionally, the actions of these leaders were occasionally too aggressive and overbearing. The failure of British leaders to successfully substantiate their approach suggests that the "glass fortress" was, in fact, structurally flawed.

In our analysis of the "glass fortress," we investigate three types of actions, or reactions to developments in Hong Kong, which characterized colonial governance from 1898 to 1911. The first was **colonial restraint**, in which colonial leaders adopted a seemingly lax approach to

governance that was, in fact, meant to prevent the colonial government from overreacting and making serious mistakes. The second type of reaction was **colonial discrimination**, in which colonial leaders shared an ambivalent relationship with Hong Kong's Chinese elite, which betrayed the government's prejudice against the Chinese in the colony. Lastly, we look at the reaction of **colonial tyranny**, in which the colonial government used disproportionate repression and violent punishment, especially when it feared the possibility of insurrection in Hong Kong.




British Hong Kong on the eve of the Xinhai Revolution, 1911.[1]

[1] Administrative map of the Hong Kong annual colonial Administrative Reports, 1912.

# I

## The Glass Fortress of Anglo-China

"Liberation." That, or at least the "pursuit" of "liberty," was the 1871 justification in which Chief Justice J. J. Smale affirmed the acquittal of Kwok A-sing, a coolie who soon became one of the best-known defendants in British Hong Kong's legal history.[2] Sometime on the 30th of November 1870, the French vessel *La Nouvelle Penelope* left Macau for Peru, carrying on board some three hundred and forty Chinese migrant workers. It never reached its destination. En route, the coolies collectively seized control of the ship, massacred the French captain and crew, and dumped the corpses into the sea. After somehow managing to navigate *La Nouvelle Penelope* back to the Chinese coast, the rebellious coolies promptly disembarked, carrying with them plunder from the ship. Kwok escaped through the mainland to Hong Kong, where he was soon apprehended by British authorities. His compatriots were not so lucky; many of them were captured within Chinese jurisdiction and subsequently beheaded by Qing officials.[3] Presumably, the French were furious that their vessel had been lost. However, in official records,

[2] The term *coolie* is mainly defined as a labourer, often working in a colonial setting. It carries certain connotations depending on the historical context of its use. In regions such as the Caribbean, it is nowadays considered a pejorative in most settings. However, in Hong Kong, *coolie* is considered relatively innocuous (depending on context of use) and continues to be utilized in academic literature. For the purposes of this thesis, we will be relying on this latter context. I have chosen to use *coolie* rather than *labourer*, not only because of its already established presence in Hong Kong literature, but also for the sake of historical accuracy in highlighting clear forms of discrimination and inequality at the time. The definition, however, is not central to this thesis.

[3] *Attorney General of Hong Kong v. Kwok A Sing*, [1872] UKPC, in *The Times* (2 February 1872). Available at http://www.law.mq.edu.au/research/colonial_case_law/colonial_cases/less_developed/hong_kong/attorney_general_of_hong_kong_v_kwok_a_sing_1872/. The Judicial Committee of the Privy Council reviewed the case. Its reports were subsequently published in *The Times*. However, "The Times" is often a generic name or placeholder for a newspaper, and it is unclear which specific newspaper is referred to in these records.

it is interesting that they were silent on the matter. Instead, the British completely took control of the case. One might imagine that France was implicitly acknowledging British dominion over the enforcement of Western European law in China. Where the French may have been incapable of administrating justice, the British stepped in to bring "civilization" to this part of the world.

In Hong Kong, Kwok A-sing's famous case is unusual in that he was actually charged twice for the same crime, but also acquitted in both cases for similar reasons. When the first charge of murder fell through, the Attorney-General of Hong Kong, Julian Pauncefote, instead argued that the defendant was guilty of piracy. Pauncefote claimed that this was because Kwok had taken valuables from the captain's person at the time of the homicide.[4] Evidently, Chief Justice Smale was not sufficiently convinced by Pauncefote's connection between the murder and the theft: both times, he freed Kwok on grounds that the coolie had been subjected to a state of bondage, and was thus justified in regaining his "liberty." Smale also considered the second arrest unjust, believing that Kwok A-sing was already free by the terms of his first *habeas corpus* release order. Perhaps the most prominent and enduring fact about Kwok, however, is that his relative freedom stands out in a time when many Chinese individuals received much harsher punishments for much more minor crimes.

Smale's apparent obstinacy has puzzled critics and historians alike. How could the most learned man in Hong Kong remain so singularly determined without consideration to alternatives? The historian Christopher Munn has suggested that *Attorney General of Hong Kong v. Kwok A Sing* marked a turning point in British colonial policy on trade and human rights. Previously, European merchants regularly took advantage of Chinese coolies by forcing them

[4] Ibid., in *The Times* (20 June 1873). "There was also some evidence that Kwok-A-Sing and other coolies took possession of the captain's watch and a quantity of dollars on board."

into illicit arrangements, while the colonial government largely tolerated these activities. After *Rex v. Kwok A Sing*, the British colonial courts took a no-tolerance stance towards the more serious forms of exploitation, at least officially.[5] As far as Smale's personal motivation in deciding this case is concerned, however, Munn is remarkably silent.

For Smale's contemporaries, many pressing questions continued to arise. Didn't Kwok A-sing just kill a man? Didn't the British authorities in Hong Kong have a moral obligation to conduct a trial, at minimum? Or, as the coolie was technically a "subject of China" under the Treaty of Tientsin (Tianjin), some of Smale's colleagues reasoned that Kwok should have at least been transferred to the Chinese authorities, to be brought to "justice" in the mainland.[6] Instead, Smale had elected to do none of these. How could the British Empire continue to operate under the pretense of fairness, when one judge was so obviously partisan in his own activism?

Fellow members of the judiciary were understandably livid with the Chief Justice. Lord Justice Mellish, for example, "remarked that Kwok A-Sing had not been kidnapped," while Sir Barnes Peacock "thought there was no evidence that Kwok A-Sing had been forced on board against his will, and therefore justified in regaining his liberty in the manner he had done."[7] Some thought that Smale, a fervent abolitionist, had exceeded his capacities in mixing emotion with the rule of law. An adversarial legal system is naturally conducive to argumentation, given that its established processes of truth-seeking are firmly based in what is essentially a battle of opinions before a presumably impartial authority. It should be no surprise, then, that Smale was

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[5] Christopher Munn, *Anglo-China: Chinese People and British Rule in Hong Kong, 1841-1880* (Richmond: Curzon, 2001), 48.

[6] *Attorney General of Hong Kong v. Kwok A Sing*, [1872] UKPC, in *The Times* (20 June 1873). The Treaty of Tientsin stipulated the conditions under which the British were to deliver Chinese criminals to Qing authorities.

[7] Ibid., in *The Times* (15 May 1873).

roundly "criticized by his learned friends" and others, including Pauncefote.[8] The counterarguments of Smale's opponents were equally sound.

For all their insightful criticisms, however, these dissenters may have been asking the wrong questions. Perhaps, they had missed a key point about the society in which they lived, and its role as impetus for Smale's decision. Despite the undoubtedly numerous protestations of Smale's contemporaries, it remains difficult for the modern historian to simply dismiss the Chief Justice as an obstinate old man. Kwok A-sing's freedom was not merely borne out of an ostensibly dogmatic adherence to rigid interpretations of the law. The world of British Hong Kong was not black-and-white.

Modern historians ought to look at the colonial situation holistically, and from a pragmatic perspective. This is because the judicial system did not exist in a vacuum. For instance, it is important to remember that Hong Kong's institutions were at this time still in their relative infancy, and thus vulnerable in the minds of colonial officials. Outside of the courts, territorial security was another factor that was at times as much a perceived issue as it was an actual one. Later, in the mid-20th century, imperial military and police forces would certainly play a very significant role in defending Hong Kong from Japanese invaders. But the origins of colonial security actually lay in paranoia, rather than a real threat. For instance, James Hayes traces the history of the Hong Kong Volunteer Force back to June 1854, when an "Auxiliary Police Force" was created not in response to domestic disturbances and crime, but the fear of Russian conquest stemming from the Crimean War.[9] This anti-Russian sentiment rested on various assumptions, many of which were unfounded. One assumption was that Hong Kong, at

[8] Ibid. Pauncefote supported an appeal and commented on the "strong" nature of Smale's opinion.

[9] James Hayes, "A Short History of Military Volunteers in Hong Kong," *Journal of the Royal Asiatic Society Hong Kong Branch* 11 (1971): 154.

the time relatively economically undeveloped, was even *worth* attacking, when most of the action was taking place seven thousand kilometres away on a neighbouring continent. Another assumption was that the HKVF could even accomplish much in the way of a proper defense, should the Russians have truly dedicated their war effort towards seizing the island colony. Accordingly, the volunteer force was effectively disbanded, at least for a few years, when the Russian threat did not materialize.[10]

For the colonial government and judiciary, Hong Kong's security seemed to be in continual danger. The geography of the region certainly contributed to the perception that the colony had serious vulnerabilities and lacked a proper defense. Even after the acquisition of the New Territories in 1898, British Hong Kong remained incomparably tiny, only encompassing slightly over one thousand square kilometres in total landmass from the southwestern tip of Lantau Island to Bias Bay (modern-day Daya Bay) in the northeast.[11] The colony's limited jurisdiction was only matched by its equally limited population, which was slightly over 450,000 in 1911, but which nevertheless remained minute compared to the mainland population.[12] Even if fears of a Russian attack seem irrational in hindsight, it is easy to see why the colonial administration behaved the way it did. Whether the measures taken were effective is a whole other matter of concern.

Considering the saliency of such details, Smale's thought process gains a little clarity. Certain realities about Hong Kong's vulnerability existed that a British court of law simply could

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[10] Ibid.

[11] Refer to the map on page 4.

[12] These statistics are taken from "A History of Hong Kong 1842-1984," available at http://www.ouhk.edu.hk/~etpwww/oustyle/aw213.pdf, and "Issues and Trends in China's Demographic History," available at http://afe.easia.columbia.edu/special/china_1950_population.htm. The catastrophic Taiping Rebellion claimed some thirty million lives, but the total population remained above the 400 million mark.

not ignore. It is wholly possible that Chief Justice Smale had considered a humanitarian argument: Kwok A-sing could not have been extradited to China because the Qing government would have probably immediately executed him, without first applying a sufficiently "English" standard of legal procedural rigour. However, political realism likely served as a greater catalyst for Smale's judgement. The Chief Justice had great incentive in portraying to the world the "fairness" of English common law. Perhaps more importantly, handing Kwok over to Qing officials would have been tantamount to an acknowledgement of the superiority of Chinese law over supposed British sovereignty in Hong Kong. This, Smale was not willing to concede, because it would have damaged the already vulnerable prestige of the Supreme Court. That said, *La Nouvelle Penelope* was a French ship based out of a Portuguese port, and well within Chinese waters when the mutiny occurred, so the incident was only tangentially related to British jurisdiction.

Smale's "humanitarianism" merely served as cover for the political realism of the colonial judiciary. By the time of the Xinhai Revolution in 1911, such "humanitarianism" no longer existed in Hong Kong, where imperial policy had become highly authoritarian. As writers including Jung-fang Tsai have demonstrated, the colony had been heavily fragmented from the time of its inception in 1842. Generally speaking, the population was divided into three more-or-less clearly defined categories, wherein local Chinese merchant elites served as mediators between the common worker and the colonial administration. This tripartite arrangement remained relatively stable for about twenty to thirty years until the 1890s. Eventually, the rise of Chinese nationalism and radical republicanism severely disrupted the established divisions by

exacerbating them.[13] In response, the British imperialists adopted an attitude that can only be characterized as essentially conservative.

Many colonial fears towards this new brand of Chinese nationalism were highly exaggerated. Stephanie Chung notes that most intellectual and affluent Chinese nationalists did not seek to effect change in Hong Kong, but instead the mainland:

> In colonies which were overwhelmingly Chinese, Malaya and Hong Kong, for instance, British administrators were struck by the fact that the Chinese had no nationalism toward the respective colony; the British feared that Malaya would be colonized by Chinese settlers and would one day be part of China. Because of a similar fear, Singapore was excluded from Malaysia.[14]

This British astonishment is quite revealing. British administrators adopted meticulous policies in preparing for their own expectations, but these expectations often fell short of reality. Nonetheless, the lack of a wider, conspiratorial effort of Chinese irredentism did not preclude the presence of nationalistic *sentiment* in riots, boycotts, and other forms of insubordination in Hong Kong. There is indeed a serious and marked distinction to be made between the concept of nationalism as formulated by the great revolutionary leader Sun Yat-sen, and the specific strain of nationalistic sentiment which only served as fuel for the average commoner's preexisting proclivity towards disobedience against the colonial government. Most of Hong Kong's Chinese population was not ideologically motivated, and their disobedience had traditions that preceded Chinese nationalist ideology. As Jung-fang Tsai argues, the dockyard workers in Hong Kong who disobeyed British orders to repair French ships during the Sino-French War of 1884 were, in

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[13] Jung-fang Tsai, *Hong Kong in Chinese History: Community and Social Unrest in the British Colony, 1842-1913* (New York: Columbia University Press, 1993).

[14] Chung Po-yin (Stephanie Chung), "Business Investment in Politics: Overseas Returned Chinese, Hong Kong, Compradores and the Canton Government, 1911-1924," *Journal of the Royal Asiatic Society Hong Kong Branch* 36 (1996): 196.

large part, motivated by a sense of emotional patriotism that had more to do with their own families and livelihoods than anything else. Although these workers were not rebelling against an abstract concept of Western imperialism, they were influenced by a mixture of difficult living conditions, government repression, and anti-French propaganda distributed by the colony's ideological Chinese elites. As Tsai argues, "all of this contributed to arouse among the working people a vague sense of collective identity… against the French enemy," but this was not some widespread ideological movement, at least not in 1884.[15] Towards such recalcitrant workers, British colonial authorities frequently used policing as a means of control.

Unfounded fears and overreactions meant that colonial law and policy was often ineffectual. Nevertheless, despite the Supreme Court's flaws, it remained the highest extension of British imperial will. Learned men such as Chief Justice Smale acted to protect Britain's colonial jurisdiction to the best of their abilities. If, in the process of doing so they could grant the local Chinese population the freedoms which the Empire so often claimed to defend, then these men would have gladly considered such a grant all the better for everyone involved, which was indeed the case with Kwok A-sing. As we will see, however, freedom was too often incompatible with the goal of security. Imperial jurisdiction came first and foremost, because a colony which could not defend itself could not defend those who lived within its borders.

Concepts such as Smale's "humanitarianism" often merely served as cover for political expediencies. When times grew hard, these "benign" policies were just as easily abandoned in favour of oppressive ones, many of which turned out to be ineffectual or sometimes even actively deleterious. To the elites of this vulnerable society, especially the foreign imperial administrators, Hong Kong was a "glass fortress": on the outside, the entire structure appeared as

[15] Tsai, *Hong Kong in Chinese History*, 140-141.

though one colossal, tyrannical, domineering system. It was, after all, meant to reassure its inhabitants and the foreign imperialists who governed them. But to anyone who looked closely, this "glass fortress" was just as ready to shatter at any given moment. Legal policies, and the other meticulously constructed institutions of Hong Kong, were already beginning to show signs of considerable strain. It is not difficult to imagine why the justices of Hong Kong's courts grew fearful of radical threats, many of which came from within. Indeed, the legacy of these underlying issues could still be seen thirty years later, when British Hong Kong quickly, and decisively, fell to invading Japanese forces in 1941. That, however, is a historical event which deserves another discussion in its own right.

Historiographically speaking, the concept of British imperial conservatism, and its parallel connection with Chinese radical republicanism, is not particularly new nor especially surprising. Most narratives that cover Hong Kong in this period tend to mention it only in passing and without much depth. For instance, a cursory search through the most prominent academic journal of Hong Kong history, the *Journal of the Hong Kong Branch of the Royal Asiatic Society*, reveals a relative lack of discourse surrounding early twentieth-century events in the colony, whether in matters social, political, legal, or economic. Accordingly, I have chosen to focus primarily on legal case studies at the height of the colony's conservative period, from the New Territories lease in 1898 to the fall of the Qing dynasty (and its effects on the colony) in late 1911.

***On the use of law as a primary source***

The main case studies in this thesis belonged to the colonial Supreme Court of Hong Kong. Records of these cases have been passed down over the years via various publications.

The most recent iterations of these records have been digitized by LexisNexis, and have been made available through access granted by the University of Hong Kong.

There are certain limitations when using Supreme Court records as primary sources. Many of these cases and their decisions, particularly criminal cases, are not very representative of daily life in the colony of the time. However, the corollary to this disadvantage is that Supreme Court cases tended to be recorded for their notability. Some set precedents that significantly altered Hong Kong's legal landscape. Others are not necessarily as noteworthy today, but still represent one established legal principle or another. These Supreme Court cases, like those belonging to the highest courts of other jurisdictions, were supposed to contain some of the finest legal thinking in this corner of Britain's colonial empire. This was indeed true in some instances. This is not to say that Supreme Court judgements were, in practice, completely fair and impartial. Far from it, many judgements were perhaps too hastily passed, or were passed based on insufficient evidence.

These lengthy, written court documents also pose another limitation. They often assume that their reader is highly familiar with legal culture and practices. The most obvious example of this is in the heavy use of legal jargon. Critical explanations are occasionally left out entirely, resulting in gaps in our understanding. Where possible, I attempt to reconstruct explanations based on existing knowledge of the colonial courts, such as through the use of secondary sources.

***On the use of secondary sources***

Two secondary sources are central in supporting the philosophical backbone of my study, and are indeed generally well-regarded as surveys of the early colonial period. The first is Jung-fang Tsai's *Hong Kong in Chinese History: Community and Social Unrest in the British Colony*.

Tsai traces the social history of Hong Kong from the years prior to British conquest, when the locale was but a small fishing hamlet, through the decades of colonial consolidation of power and the formation of the Chinese merchant elite. Within this narrative, nationalism plays the ultimate role in reinvigorating the Chinese populace, but Tsai simultaneously proves nationalism's divisiveness in inflicting new wounds upon a tenuous social fabric which the wealthy Chinese elite had laboured to build in the 1860s and 1870s. For Tsai, Hong Kong's colonial history is replete with highly rational denizens who, possessing no complete, blind loyalty to any single government or institution, readily undertook whatever means were necessary to further their own survival. Inevitably, rational self-interest often meant outright criminality on the part of society's most destitute, though not always.

Christopher Munn's book, *Anglo-China: Chinese People and British Rule in Hong Kong 1841-1880,* is the second major secondary source. It is the only one to deal with the law as its primary collection of evidence, and is also the origin of the nebulous term "Anglo-China." Vaguely and informally defined, the term refers not only to the unrealistic utopian ideals of some early imperialists, but also to the expectation that the resident Chinese population of Hong Kong would become model British subjects, and thus Anglo-Chinese in their identity. In other words, "Anglo-China" was part of the idea that British society could fully replicate itself, complete with all its liberal institutions, anywhere within the realm of the British Empire. As Munn correctly points out, this ideal was quickly overshadowed by the very real difficulties of governance, yet historians such as Geoffrey Robley Sayer continue to idolize the Anglo-China vision with some degree of nostalgia.[16]

[16] Munn, *Anglo-China*, 6.

Unsurprisingly, like Tsai, Munn also incorporates into his analysis the rational needs and desires of the Chinese underclass. The difference between the two authors is one of perspective: while Tsai discusses Chinese self-interest, Munn instead focuses on the British *response* to that self-interest, a response that is characteristically paranoid in nature because criminality was often as much a matter of perception as it was a reality. The response, of course, was harsh punishment and savage discipline. For Munn, the legal history of Hong Kong is intensely and almost entirely violent, and is a history in which the British readily abdicated their supposed moral responsibilities in favour of what the sixth Governor of Hong Kong, Sir Richard Graves MacDonnell, once euphemistically dubbed "self-preservation."[17]

In addition to the numerous resources available from the *Journal of the Royal Asiatic Society*, other valuable secondary texts include but are not limited to G. R. Sayer's *Hong Kong 1862-1919: Years of Discretion*, which tells Hong Kong's history from the perspective of the governors and their respective colonial administrations; it is an approach which Munn criticizes (if at least respectfully so) as being overly romantic, but Sayer's book nevertheless remains an essential read for any historian who desires insight into the colonial mindset. *Custom, Land and Livelihood in Rural South China* by Patrick H. Hase is useful in determining the communal nature of society in the New Territories prior to the 1898 ninety-nine-year lease, as well as its embodiment in the form of the Customary Land Law. Hase also discusses the limits which official British policy faced when struggling to integrate pre-colonial local Chinese customs, formal or informal, into the British rule of law.

[17] Ibid., 342.

***Bridging a historiographical gap: some other considerations***

As we can see, many recurring themes appear throughout Hong Kong's legal history, such as issues of societal fragmentation, class paranoia, and institutionalized discrimination. However, while astute in their arguments, few historians fully address the changing nature of society, law, and the rise of nationalism in the nineteenth century as they pertain to Hong Kong's relationship with the 1911 revolution and beyond. Thus, the "glass fortress" is my attempt to bridge this historiographical gap by detailing the evolution of colonial policy and law up to 1911, as well as the changing attitudes which enabled this evolution. To some extent, the "glass fortress" is a continuation of Munn's legal approach towards Hong Kong history, but with less of his pessimistic tone.

There is, however, one critical point of divergence from Munn. It is undoubtedly true that Hong Kong's judiciary and administration were flawed entities. Nevertheless, modern historians including Munn, and to a lesser extent Tsai, have been exceptionally unkind to British government, even after taking into consideration its failures and overreactions. The truth is that Britain did not leave a uniformly oppressive colonial legacy across the globe, and thus historians do themselves no favours when generalizing colonial life in Hong Kong as necessarily and *fundamentally* cruel, something which Munn himself has reluctantly admitted is a common kind of historiographical flaw.[18] For instance, unlike in other imperial possessions such as India, Hong Kong, though restrictive, was not exactly exploitative as a society: in fact, the imperial government in Westminster arguably expended a disproportionate amount of energy in protecting and investing in the colony, even after factoring in the benefits of trade and commerce. Here, the British intended to develop an extensive and complex "government system

[18] Ibid., 18.

with executive, legislative, and judicial branches." Hong Kong was not merely an economic resource for the British. It was also a legal and cultural project, but one that was ultimately flawed.[19] One really wonders why the Empire continued to cling to this tiny little outcrop of Southeast China, when it proved to be, in many regards, a continual source of anxiety. Perhaps those such as Smale and Piggott simply *hoped* that the colony would one day finally become the fabled "city on a hill," even if they themselves did not live to see that day.

British colonial conservatism is best understood through legal case studies for two reasons. The first is that much of the social history that has been conducted regarding Hong Kong, and perhaps Southeast China as a whole, has often overgeneralized the entire population of the region, the resident European population included. This criticism is perhaps most applicable to the "Beijing" or Marxist school of Hong Kong history, which has traditionally written about the colony in a way that subsumes the needs and desires of the Chinese underclass under the ideological aims of the Chinese nationalist state. Invariably, as Munn writes, the "experiences of ordinary people" do not matter when the Beijing historians neatly fit cherry-picked elements into a "crude Marxist-Leninist view of imperialist expropriation, exploitation and national humiliation."[20]

The more modern schools of Hong Kong history naturally fare better in this regard, but still stand to benefit from the greater use of case law, primarily because it sometimes contains first-hand testimony or information from voices that have otherwise been lost to the historical record. These voices cannot only be described as subaltern. Despite the obvious power dynamics at play, court documents occasionally reveal useful details about the lives of Chinese litigants

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[19] Elizabeth Sinn, *Pacific Crossing: California Gold, Chinese Migration, and the Making of Hong Kong* (Hong Kong: HKUP, 2013), 16-22.

[20] Munn, *Anglo-China*, 7.

and participants. In some cases, the colonial judiciary did conduct a vigorous, if flawed, inquiry into the individual character and circumstance of defendants. This, however, was not always the case, and the courts did not necessarily treat each defendant fairly. Kwok A-sing was an anomaly, but heavy racial discrimination was the norm, with coolies commonly being sentenced to penal transportation for so much as stealing a handful of iron nails.[21] Nevertheless, case studies are excellent sources for our own purposes of inquiry. That Kwok A-sing had the tenacity to later sue Pauncefote, the Hong Kong's Attorney-General, for malicious prosecution demonstrates that he possessed a peculiar sense of determination, which would only be surprising if one assumes the stereotype that all coolies were meek and submissive by temperament.[22]

The second, and perhaps more important point for our purposes, is that the same principle of individual inquiry also applies to justices, magistrates, and other members of the colonial judiciary. They, especially the Supreme Court justices, are the main historical agents of this thesis. A courtroom certainly contains a level of decorum, and its members are required to follow protocols and formalities. That said, it is as unfair to generalize the judiciary as much as it is unfair to generalize the subaltern. Ultimately, judges are as fallible in their humanity as any other, but it is the very same fallibility which personalizes them for historians. It was the individual temperament of judges which arguably influenced individual cases, and through those, the legacy of Hong Kong's judicial history. Perhaps this is best seen in the character of Francis Piggott, of whom Peter Wesley-Smith has this to say:

> Piggott was genial but tactless, pompous but lacking in dignity, learned but inaccurate, industrious yet impecunious, and admired by a few while reviled by

[21] Ibid., 141.

[22] Smale also presided over this subsequent case. See *Kwok-Asing v. Pauncefote* (1872) in *The North-China Herald*, 4 January 1872.

> many. His record as a judge is sound, though he failed as a judicial administrator and there were many allegations of his partiality on the bench. Eventually he was required to retire soon after reaching the age of sixty. This was a rude shock to him[.][23]

The "glass fortress" is thus, to some degree, a history about thought, but also a history about power. It is a history driven by sympathy, because it is in part about individuals who, bounded by the constraints of their circumstances and group identities, rationalized their worldviews into concrete plans of action. Although I cannot claim to write a purely individualist history, as no one can, it is the goal of individuality which makes legal history worthy of writing, reading, and understanding. It is thus in the pursuit of this ideal that I will begin to make my case.

### *Outline of this thesis*

In British Hong Kong, three types of colonial reactions characterized the conservative period between 1898 and 1911. The three types of reactions form the basis for the metaphor of the "glass fortress."

We will first encounter the reaction of **colonial restraint**. By 1900, Hong Kong's government had learned valuable lessons in establishing local law and order, owing to its troublesome experiences earlier in the 19th century. In what ways did the colonial administration and judiciary apply these past lessons? In what ways did the turn of the century involve an evolution of British colonial governance? During much of the 19th century, the colonial government faced practical everyday difficulties, many of which limited its ability to govern proactively. There is evidence to suggest that consequently colonial leaders occasionally adopted a restrained approach towards governance. I argue that such restraint was in fact calculated: such

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[23] Peter Wesley-Smith, "Sir Francis Piggott: chief justice in his own cause," *Hong Kong Law Journal* 12 (1982), 260-92, in *The Oxford Dictionary of National Biography*, available at http://uniset.ca/naty/maternity/piggott_odnb.html.

an approach was indeed more lenient, but only because it was meant to help the leadership avoid making any serious and damaging decisions. Colonial restraint, or the appearance of leniency and good governance, thus forms the first component of the "glass fortress."

The next type of reaction which we will discuss is **colonial discrimination**. Colonial control was indeed relatively subtle during the turn of the century. Yet, the colonial government continued to cling to power. How were they able to accomplish this? As we will see, informal modes of discrimination permeated the colony, despite the officially egalitarian stance of British law. In what ways was informal discrimination utilized by the colonial government in reaction to changes within the colony? In turn, how did the Chinese in the colony respond to such discrimination? I argue that the use of informal discrimination by the colonial government was part of a broader low-key, ambivalent, and utilitarian relationship between the colonial government and the Chinese residents of the colony, particularly the wealthy Chinese elite. Despite facing informal discrimination, the Chinese elite needed the support of colonial leaders to advance its long-term goals, and thus maintained a respectful attitude towards the government. At the same time, the colonial government ultimately depended on the Chinese elite to maintain Hong Kong's economic growth, and thus could not afford to completely alienate the colony's Chinese population. The government thus reacted to the activities of the Chinese elite in an ambivalent manner, maintaining a cordial relationship with the elite primarily when it was advantageous to do so. Where the interests of both groups did not align, the government often acted prejudicially towards the elite. Colonial discrimination, which was part of an atmosphere of utilitarianism, forms the second component of the "glass fortress": Hong Kong's social fabric, strong and stable on the outside, was subject to internal, if low-key, tensions and struggles for political control.

The last type of reaction was **colonial tyranny**. How did the colonial government react when crises tested the precarious and carefully constructed social fabric of Hong Kong? It retained extraordinary measures for these occasions. During the 1911 revolution in China, the colonial government imposed disproportionately draconian rule over Hong Kong. I argue that such measures, although seemingly sudden, in fact held their basis in decades of colonial attitudes, decisions, and policies. As we will see, the revolution in China invoked irrational fears of insurrection in the colony, many of which played on long-held prejudices against the Chinese residents of Hong Kong, particularly lower-class Chinese workers. Paranoia led to the implementation of authoritarian policies and decisions. Colonial tyranny thus forms the last component of our analysis of the "glass fortress," in which the colonial British government, while finding subtlety a beneficial strategy, also never forgot the intermittent but simple necessity of utilizing repression and brute force.

# II

## Colonial Restraint: An Answer to Uncertainty

### *1898: A year of restraint?*

Southern China had been no stranger to European influence for at least three centuries. In 1557, Portuguese merchants established a colony in Macau, where trade flourished under the ever-watchful gaze of Qing officials. These Portuguese foreigners never held any real political power under this arrangement, and were regularly subjected to severe regulations and restrictions by the Qing government, whose interest in their economic activities was tepid at best. Because the Chinese empire could afford to be essentially autarkic with regards to its foreign and economic policies, this state of affairs continued to exist for the next two hundred years.

Three centuries later, the balance of power had shifted. The nineteenth century saw a progressively deteriorating Qing dynasty succumb to the ever-increasing machinations of European powers. The establishment of Hong Kong as a legitimate social and political project, unlike the "impermanent" Macau, is perhaps the most outstanding example.[24] 1884 saw the Sino-French War and acts of French aggression against China, during which the neutral British did not sit idly by. While on a brief detour to Hong Kong en route to action, the French naval officer Charles-Dominique-Maurice Rollet de l'Isle observed:

> Yesterday a notice was posted up in the town. The Queen [Victoria] has ordered the militia to be mobilised in England and all the available warships armed. This has caused a great stir here. But everybody knows the target of these warlike preparations. If there's a scrap, it will be with the Russians. It will be rather ironic

[24] Munn, *Anglo-China*, 40.

> if the French squadron, after playing a leading role in the drama, now becomes a spectator in its turn.[25]

Contrary to the expectations of Rollet de l'Isle, the British maneuvering was not conducted in response to the Russians, as one might have otherwise assumed in the aftermath of the Crimean War and the so-called "Great Game" in Central Asia. Rather, the maneuvering was actually against the French themselves. This was quite normal in a multipolar world in which two powers, convenient friends in one moment, could very easily become bitter enemies in the next.[26] Britain, France, Russia, Japan, the United States, Germany, and all the major competitors – all wanted a slice of the Chinese pie, and each was willing to fight or otherwise outsmart the others to get the biggest piece.

It is against this backdrop of multipolarity that we begin our study with Sir Henry Blake, as well as his role in the ninety-nine-year lease that saw the New Territories ceded to British jurisdiction. Blake arrived in Hong Kong in November 1898 and was immediately sworn in as the twelfth Governor of Hong Kong. Almost from the very start, he had to contend with a variety of threats. There was the usual maneuvering and tit-for-tat on the part of rival Europeans: in only the eight short months between the start of Blake's tenure and the end of that of his predecessor, Sir William Robinson, Germany had demanded from China the lease of Kiaochow (modern Jiaozhou Bay) as compensation for the deaths of two missionaries in Shantung (Shandong). This in turn prompted the Russians to occupy Port Arthur (Lüshunkou) in response to the upset

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[25] Charles-Dominique-Maurice Rollet de l'Isle, in David Wilmshurst, "Hong Kong during the Sino-French War (1884-85): impressions of a French naval officer," *Journal of the Royal Asiatic Society Hong Kong Branch* 50 (2010), 158.

[26] This idea also forms the basis for Stephen Van Evera's *"*The Cult of the Offensive and the Origins of the First World War," in *International Security* 9, no. 1 (1984), 58-107. Multipolarity involves constant scheming, and thus competitors within a multipolar system must constantly take the initiative. Evera is mainly concerned with the European theater, but similar patterns occurred in China, if on a slightly lesser scale.

balance of power, while France and Britain expanded into Guangzhouwan (Zhanjiang) and Weihaiwei (Weihai), respectively.[27] Gradually, the Chinese mainland was being carved up at the behest of these squabbling European nations. Territorial expansion was the means by which these powers could be reassured of the safety of their overseas possessions. This was especially true for the British, because of Hong Kong, and for whom the New Territories was now next on the plate.

The appointment of Governor Blake seemed highly appropriate given these circumstances. From relatively humble origins in Limerick, in Ireland, he rose through the Irish Constabulary to a magisterial position, before becoming governor of the Bahamas in 1886, Newfoundland in 1887, and Jamaica in 1889 (as well as British Ceylon in 1903, after his term in Hong Kong ended). Blake himself must have been familiar with territorial changes and disputes. During his term in Newfoundland, he tactfully resolved the colony's fishing disputes with United States and France, both of which had competed against Newfoundland's traditionally fishing-based economy due to shared access to regional waters.[28] With such an experienced leader at the helm, Hong Kong's European community surely had nothing to fear! As G. R. Sayer eagerly explains,

> [T]he enlargement of her [Hong Kong's] own boundaries [into the New Territories] naturally touched the Colony closely, the news of the completion of the agreement being received with considerable relief by the local community. The long siege was at length to be raised. The veil was at last to be lifted from those mysterious hills! The military could now at least feel free from the menace of hostile guns, the navy could now at least carry out minor exercises in their own

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[27] Geoffrey Robley Sayer, *Hong Kong 1862-1919: Years of Discretion*, ed. D. M. Emrys Evans (Hong Kong: HKUP, 1975), 80. During the eight-month interim period, Major General Wilsone Black served as the acting head of government in Hong Kong.

[28] "Blake, Sir Henry Arthur (1840-1918): Governor, 1887-1889," *Heritage Newfoundland & Labrador* (website), April 2015, available at http://www.heritage.nf.ca/articles/politics/colonial-henry-blake.php.

> waters, and civilians - and military and naval gentlemen in mufti - eagerly canvassed the possibilities of the new territory for sport and recreation.[29]

To say that Sayer is optimistic here is a massive understatement. Qing China ceded control of the New Territories willingly, at least on paper, but the inhabitants of the region were evidently not pleased. For instance, Sayer disregards the Six-Day War of 1899, a brief but fierce period of local resistance against the British occupation. The aftermath of the conflict saw local acceptance of British sovereignty in the region, in return for a guarantee that the British authorities would allow local pre-existing legal traditions and customs to continue largely unhindered.[30] And what of the esteemed governor? In comparison to his more proactive tendencies in Newfoundland, Blake was far more passive and "detached" in Hong Kong, chalking up the resistance to a capricious case of "militant irritability."[31]

Why did Blake go through this apparent change in personality? One possibility may be derived from R. G. Groves, who correctly demonstrates that British "control over both land and political institutions" in the newly acquired region "appeared to be at risk." Control had, in fact, been tenuous from the very start of the British administration of the New Territories. The transfer process was troublesome enough that the British government had to ask the Viceroy of Canton for military assistance.[32] Eventually, British "military posts," police, and magistrates were established in the region. They helped to quell the more serious cases of unrest, which was directed not only against the government, but also between local villages themselves.

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[29] Sayer, *Hong Kong 1862-1919*, 82.

[30] J. W. Hayes, "The Pattern of Life in the New Territories in 1898," *Journal of the Royal Asiatic Society Hong Kong Branch* 2 (1962), 86-88.

[31] R. G. Groves, "Militia, Market and Lineage: Chinese resistance to the occupation of Hong Kong's New Territories in 1899," *Journal of the Royal Asiatic Society Hong Kong Branch* 9 (1969), 47.

[32] Ibid., 48.

Nevertheless, the British faced limitations and mostly left regular communal life alone.[33] Blake and the rest of the colonial administration were content in simply allowing the local inhabitants to continue their lives unimpeded, so long as they no longer caused trouble and Hong Kong received its buffer zone. In other words, additional British effort became superfluous, the moment the primary objective of sovereignty and the security of Hong Kong had been achieved.

Another basic but equally possible reason, which we will now explore in depth, is that the British authorities may have simply lacked sufficient know-how in handling the local population. This is particularly true if one considers the fact that most locals were commoners or were otherwise raised with little Western influence, and thus sometimes completely alien to any British system of governance. In this argument, the 1898 New Territories acquisition stands out as a landmark example of a new method of British colonial governance towards the turn of the century, one in which the government occasionally turned towards a relatively hands-off approach, or a form of social *laissez-faire*. This was because policy and law could not be created or executed based on flimsy, imperfect, or otherwise poor knowledge without serious drawbacks. Policy requires substance, of which the British colonial administration had generally been lacking in from the very start, as was indeed the case in the New Territories.

***Restraint in jurisdictional matters***

The 1907 case *Ip Tsung Nin v. Kwong Tse King* is a fascinating example of colonial restraint put into actual practice. The case surrounded an alleged act of piracy in which the plaintiff suffered the loss of a junk on the high seas. The junk had been stolen and then "brought to Hong Kong," where it was sold on the market. This was a "private case," or in modern parlance, a civil lawsuit. The plaintiff was reportedly a Chinese subject. We also know that the

[33] Hayes, "The Pattern of Life in the New Territories in 1898," 86-88.

actual value of the vessel probably exceeded seven or eight hundred dollars, as the official estimation of all the lost property, complete with items such as "tackle, furniture, and nets," was approximately $1,000. The original decision by Justice Henry Gompertz dismissed the plaintiff's claim, upon which the Attorney General of Hong Kong decided to take over the case on appeal.[34] To little surprise, the case was then dismissed a second time, this time by Chief Justice Francis Piggott, with Justice Wise concurring. What *is* surprising and relevant, however, is the *basis* on which the appellate court rejected it. Piggott's rationale had, in fact, nothing to do with the actual details of the alleged piracy. Rather, the Chief Justice argued that the Attorney General had, by merely participating in the case, already committed gross overreach in his role as a public figure.[35]

What exactly was the Attorney General's role? Post-1997, the modern equivalent of the Attorney General is Hong Kong's Secretary of Justice, a title which is arguably more reflective of the actual nature of the position. In 1907, as it is today, the Attorney General was the main (and often sole) legal representative of the government within the courts. He was often more akin to a government official than a legal servant: in fact, Hong Kong's Legal Practitioners Ordinance stipulated that he need not even be a member of the bar.[36] Thus, the Attorney General's involvement in the case led to implicit ramifications for the administration which he was representing.

The most obvious ramification was that the government was now indelibly linked to what was supposed to be a civil case, or at least would have been, had Piggott allowed the appeal to progress any further. Because the plaintiff (now appellant) was not a British subject, the

[34] The reasons for the original dismissal are not available.

[35] *Ip Tsung Nin v Kwok Tse King*, 1907 HKSC 1551, [1842-1910] HKC 223.

[36] Ibid.

government was really acting outside its jurisdiction, based on no other premise than the assumed goodwill of the Chinese authorities. Secondly, Piggott refused to believe the Attorney General's explanation that this "private case" symbolically represented a matter of public interest, based on which the colonial government could justifiably intervene within Chinese jurisdiction.[37] The Chief Justice was arguably correct: after all, a stolen boat and a couple of chairs hardly constitute a matter of national emergency. Piggott thus coldly informed the Attorney General:

> It would introduce a great difficulty, a grave prejudice to the public, if the Government might arbitrarily take up a case in which private parties are concerned… I personally am of opinion that your appearance on behalf of a private party amounts to an interference with the administration of justice which is a question of public order, and which the court is bound to take notice of: but it might be put on the lower ground that the court is bound to take notice of the status of any person appearing before it.[38]

One can certainly interpret "status" to include the usual suspects of gender, race, class, and nationality, but Piggott was only concerned about status to the extent that it represented a conflict of interest. By "status," he was thus probably trying to distinguish between the legal and the political. Piggott believed that the potential dangers of government intervention far outweighed the benefits, and he was clearly not willing to negotiate on this matter.

There are indeed many lessons to be learned from *Ip Tsung Nin v. Kwong Tse King*. For aspiring legal professionals, the case is likely a lesson in appropriate proportionality. The Attorney General had gravely misapprehended what was at stake. A prosecutor must not act with reckless abandon, even if the government which that prosecutor represents so happens to control

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[37] Of course, the government could not become involved with every private case even if it wanted to, and so interferences such as these were almost definitely measured calculations designed to uphold the legitimacy of the colonial administration.

[38] *Ip Tsung Nin v Kwok Tse King*, 1907 HKSC 1551, [1842-1910] HKC 223.

the most powerful empire on the face of the earth. For historians of the law, this case also demonstrates a changing attitude towards the concept of jurisdiction, as well as the measures necessary to enforce it. The Attorney General's actions not only carried with them legal outcomes, but political consequences as well. Recalling the classic case of *Attorney General of Hong Kong v. Kwok A Sing*, which we discussed in Chapter 1, Chief Justice J. J. Smale had in 1871 advocated for a judicial position completely opposite to that of Piggott in 1907. At the time, the argument was *for* intervention, because Smale was interested in the abolition of slavery (or the "state" of slavery), even if accomplishing this goal meant that Chinese jurisdiction was to be infringed upon. Conversely, in 1907 Piggott rejected extrajurisdictional intervention out of hand, even though the basis for such an intervention, if disproportionate, was nevertheless still present.

In 1907, restraint was clearly considered a valid and often superior option within jurisdictional matters, compared to earlier years when British ships actively hunted for Chinese pirates in Chinese waters.[39] However, this did not necessarily mean that the Supreme Court had grown complacent or lenient by the time Piggott was appointed Chief Justice. At risk of sounding overly Machiavellian, it must be suggested that the only clear reason for the shift is that the British courts, simply put, increasingly found intervention to be less and less of a politically advantageous solution to British woes. Again, the courts could have hardly cared less about "humanitarianism" or "public interest" if, in the end, neither concept really provided any tangible net benefit towards Hong Kong's jurisdictional security.

[39] A. D. Blue, "Piracy on the China Coast," *Journal of the Royal Asiatic Society Hong Kong Branch* 5 (1965), 72. "British traders in Hong Kong… considered that they were entitled to much greater protection, and after repeated protests and representations to the home and Hong Kong governments the Hong Kong government passed its first anti-piracy ordinance in 1847, and the Royal Navy began to take more effective action."

***Restraint in the application of corporal punishment***

Another example of the utilitarian, and increasingly restrained, approach to justice was present as early as Smale's term as Chief Justice in 1879. Smale discussed a controversy surrounding the application of violent corporal punishment. Commenting on an earlier case, in which he had sentenced a prisoner to two years of hard labour and fifty strokes of the whip for the crime of child-stealing, Smale stated:

> I have always hitherto, when I have sentenced an offender to be flogged, directed that he should be flogged in public. Individually, I hold that the deterrent effect of flogging as a prevention of crime - brutal and brutalising as it is - is in the publicity of that punishment. This has been the expressed opinion of each judge who from 1865 to 1878 has from this Bench each directed the flogging to be public. I could not depart from such precedents, but Mr Justice Snowden has held that the court is not bound by such precedents, and he has uniformly directed the flogging to be in private. I may as well defer to his high authority[.][40]

This was coming from the same man who had, in 1871, argued that indentured servitude is essentially tantamount to slavery. Of course, Smale was not an abolitionist or a "humanitarian" merely for the sake of being one. It certainly helped that abolitionism was in vogue back in the British metropole, but the real driving factor was judicial utilitarianism. In the trial of Kwok A-sing, Smale had previously found abolitionism useful as a crutch for interventionism. Domestically, he held a similarly utilitarian attitude towards flogging, a punishment that was usually directed towards the inculcation of public obedience through fear. This explains why he only reluctantly permitted the floggings in question to be conducted in private.

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[40] *Re Sentence of Flogging*, 1879, [1842-1910] HKC 128. An editorial note by W. S. Clarke records that the barrister James William Norton-Kyshe earlier acknowledged Smale's judgement in *History of the Laws and Courts of Hong Kong* II, 287. According to Norton-Kyshe, Smale was morally against flogging, although the Chief Justice felt that it was "practically useful," but only because the "horrible tortures" of Chinese law were far crueler in comparison.

A judge in this time did not really possess any quantifiable metric on which he could properly evaluate the "progressiveness" or morality of any sentence or punishment, and this was particularly true in Hong Kong, where European punishments were regularly handed to Chinese convicts. Such evaluations of progressiveness are retroactive labels that are unfairly imposed on past figures and events by modern commentators. After all, from where else could Smale have derived moral approval (or the lack thereof) of his own judgements, at the time? He could have referred to the dominant sentiment back in Europe, which, to his credit, he indeed tried to do, noting that European society was "on the whole greatly opposed to flogging."[41] Even in Australia, Britain's most famous penal colony, many were horrified by the practice. So reported the *Hobart Town Gazette* in 1825 that "fifty strokes of the lash were enough to cut a man round the throat, under the armpits and across his ribs and belly."[42] The Chief Justice of Hong Kong was certainly aware of anti-flogging sentiment elsewhere in the British Empire. But in Smale's time, as they still are now, the courts remained relatively secluded from the influences of public opinion.

The only conceivable metric that Smale could use was to assess each sentence or punishment based on its practical effectiveness. As evidence demonstrates, and by Smale's own (albeit reluctant) concession, the usefulness of flogging as a public deterrent was on the decline. This continued to be true during the terms of Smale's successors, starting with Sir George Phillippo in 1882. The decline in utilitarian value reflects strongly in the *total* number of floggings, not just the number of public floggings, during this period of relative non-violent punishment. Even the magistracy, which Munn contends was ineffectual with its tendency to

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[41] Ibid.

[42] Penelope Edmonds and Hamish Maxwell-Stewart, "'The Whip is a Very Contagious Kind of Thing': Flogging and humanitarian reform in penal Australia," *Journal of Colonialism and Colonial History* 17, no. 1 (2016).

inflate punishment to the extent of unnecessary barbarity, began to phase out flogging with a few prominent exceptions.[43] The colony had, as a whole, greatly restrained its use of the once-common punishment.

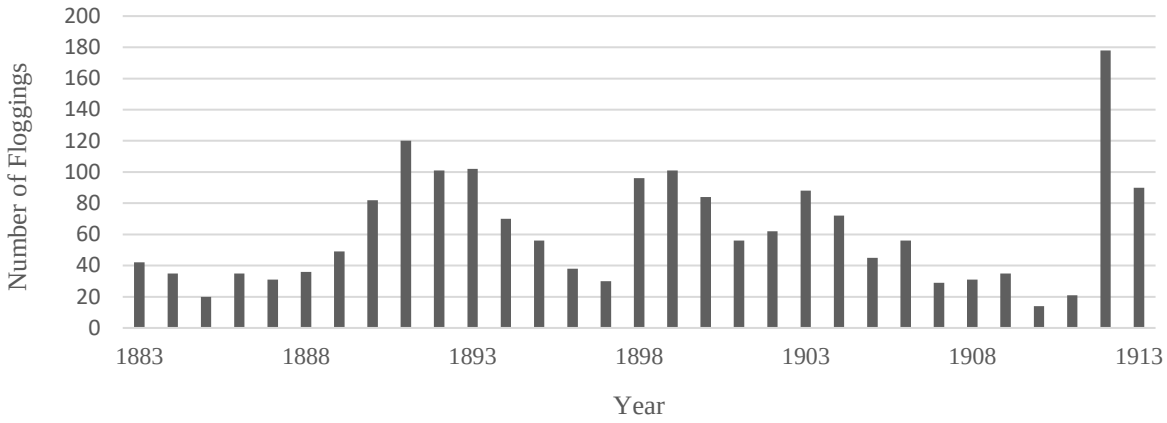


**Figure 1.** Number of whippings resulting from summary convictions between the end of Chief Justice Smale's term and the aftermath of the 1911 Xinhai Revolution.[44]

**Figure 1** demonstrates that flogging was indeed subject to fluctuations in the frequency of its use by magisterial or police courts, which utilized this punishment far more often than the higher Supreme Court. Flogging was at times extremely popular. Nevertheless, it hit a record

[43] Munn, *Anglo-China*, 159. Magisterial courts originally blended European law with Qing Chinese-inspired punishments. Ostensibly, the goal was to help integrate the courts into Chinese culture, but in practice, magistrates often unfairly and summarily passed down harsh judgements.

[44] These statistics are derived from each annual figure for flogging between the years 1883 and 1913, under the "Summary Convictions (Police Court)" subsection of the "Criminal Statistics" section of the Hong Kong Government "Blue Books." These publications are available online, as part of the Hong Kong University Library's Digital Initiatives program, at http://sunzi.lib.hku.hk/hkgro/browse.jsp. The goal of this graph is to demonstrate that flogging had a long history in the colony, but only saw increasing usage due to three major changes in the colony. As a general trend, flogging was on the decline. The trend was not linear, but instead subject to fluctuation. To accurately demonstrate the varied history of flogging, I have included statistics as far back as 1883, to avoid a skewed interpretation of the numbers. Seven Chief Justices served during the period covered by this graph: in chronological order, these were Sir George Phillippo, Sir James Russell, Sir Fielding Clarke, Sir John Worrell Carrington, Sir William Meigh Goodman, Sir Francis Taylor Piggott, and Sir William Rees-Davies.

low in 1910 before seeing an extreme resurgence at the onset of the 1911 revolution, for reasons we will explore in Chapter 4. There are also several details to note: the first peak in the number of floggings, around 1890, is perhaps attributable to the British response to what Tsai considers to be the first wave of nationalism in Hong Kong, and the subsequent effect on the lower classes.[45] The second resurgence in 1898-1899 coincides perfectly with the New Territories transfer, while the largest spike in 1912 is very easily explained by the height of tensions that accompanied the most significant regime change in Chinese history. The attentive reader may also note that, prior to the 1890s, flogging also seems to have been relatively underutilized. However, when one accounts for population growth, it is quite remarkable, excluding periods of tension, that the rate of violent punishment post-1900 was not as high as it should have been.

***Restraint in matters concerning British legal values and prestige***

Controversy over corporal punishment indeed played a role in the courts, but sometimes, the ineffectual nature of colonial policy resulted from far simpler difficulties. For instance, Hong Kong's court records demonstrate that language barriers interfered with the administration of justice on more than one occasion. The impediments of language were not only restricted to the lower courts and petty crimes. In the 1909 Supreme Court case of *Rex v Kwok Leung and Others*, potential murder convictions and the mandatory death penalty were discarded because the defendants could understand neither English nor Cantonese, which were the two languages in which the case was being conducted. English was the language of the court, while witness

[45] Tsai, *Hong Kong in Chinese History*, 180-181. For Tsai, this first peak corresponds to the years 1887-1900. Whatever appeal nationalism had towards coolies in the 1890s was connected more to their own physiological needs, than the lofty abstract ideals of Chinese nationalist elites. Regardless, the colonial government adopted hardline policies against protests and strikes, out of a conservative fear of radicalism, even though the basis for such lower-class unrest was only weakly based in nationalist thought.

testimony was usually given in Cantonese and then translated. The defendants, three Chinese coolies, were put on trial for the killing of a fellow worker, but all three were Hok Lo (Hokkien) and thus could not understand what was going on. Their defense counsel, a man by the name of Calthrop, also failed to acquire proper translation for the three coolies. Originally, "one of the prisoners was acquitted, the other two being convicted of manslaughter." Calthrop then "asked that the point should be reserved, whether the convictions could stand," which was basically a formal request for the court to reconsider its decision. As it turned out, his request paid off, as Chief Justice Piggott soon quashed the convictions, based on the argument that the coolies did not even understand the charges under which they had been found guilty.[46]

However, the quashing was based on an unusual legal technicality. Language barriers were usually not substantial enough to seriously impede the administration of justice. As Justice Henry Gompertz pointedly noted, in a typical "English" court, "matters are not usually complicated by differences of language."[47] This was true even in Hong Kong: we know that the colony's Supreme Court certainly employed capable translators in legal cases which required them.[48] The case of *Rex v. Kwok Leung* thus hinged upon the technicality of language: not because of a lack of translation ability, but almost entirely because of Calthrop's failure to acquire a proper translator. For the court, fault lay entirely with the defendants, or more accurately, their legal representative.

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[46] *Rex v Kwok Leung and Others*, 1909, [1842-1910] HKC 244, in *The Hong Kong Law Reports* IV-V, 1909-1910.

[47] Ibid.

[48] We do not know much about court translators, but we do know that many of them were educated men who came from the Chinese mainland to work in the colony. The 1874 case *Rex. v. Lee Lum Kwai* surrounded an incident in which Lee, a "former court interpreter and legal clerk," was accused of extorting two individuals with a charge of murder. Allegedly, Lee in addition to his employment as a court clerk, Lee also held some kind of secret official post within the Chinese government.

The court had every reason to ignore Calthrop's request for a reconsideration. Piggott could have simply chosen to lambast Calthrop and uphold the judgement. He did not. What makes this case doubly interesting is that it spawned an entirely new discussion among members of the judiciary, separate from the details of the original case. In court records, the justices agonized over whether language barriers compelled the court to acquit. Some in the judiciary must have believed that court procedure was paramount. They likely thought that one had to obey the "rules of the game," so to speak: it was only fair that Calthrop, having earlier missed the window of opportunity to acquire translation, could not then go beg for what was essentially the court's pity.

Others, however, attached a moral significance to the case. They did not appreciate Calthrop's incompetence, but nevertheless believed that the court had a moral responsibility to portray its impartiality to the world. The guilty verdict was reversed, in part because Justice Henry Gompertz believed that the coolies' inability to understand judicial procedure was effectively equivalent to not being physically present in the courtroom:

> "No trial for felony can be had except in the presence of the defendant." The rigidity of this rule appears to be absolute: on a trial for felony the prisoner must be in Court… I lay stress upon the importance that the prisoner must be actually present, because this doctrine seems to me to involve a great deal more than the mere corporeal presence necessitated by his being given in charge to the jury. I think it goes further, and requires an actual mental apprehension of the proceedings.[49]

Piggott, for one, did not want the Supreme Court to come across as being overly heavy-handed like the magisterial courts:

> I [Piggott] can only say that in the trial of human beings for crimes, the law of England requires the utmost consideration for the accused, and the most scrupulous exactness in the conduct of the proceedings, and that time and money are nothing compared with liberty and life. I have little doublt [*sic*] that the law, as

[49] Ibid., 173.

> we have laid it down, unless a higher tribunal says it is wrong, will be acted upon throughout the King's dominions.[50]

However, despite the discussion over values and other abstract ideals, and Piggott's claim of "the utmost consideration for the accused," almost no one in the Supreme Court was thinking about the coolies themselves at this point. In fact, after the original decision, the coolies were mostly left out of the discussion, which subsequently centered around the implications which the case had on the morality of British justice. Even as he repeatedly stressed the moral grounds of the law, Piggott lamented that "the quashing of this conviction is regrettable in itself; it is more so from the fact that this is not the first time this question has been raised." In other words, this was not the first time that language barriers had impeded court proceedings, although such impediments were indeed rare occurrences. Piggott was only concerned with the impact which the language barriers had on the appearance of British justice, not the impact which it had on the defendants.

What were the coolies' thoughts during the trial? What were their feelings? We may never know, as their perspective is entirely absent from court documents of the trial. There only remains the court's perspective, which tried to exploit the case to cement the image of British imperial justice as a moral and respectable institution. Where the coolies *were* discussed, they only served as the object of the court's pity. Gompertz, holding the paternalistic view, looked down on the coolies as "unlettered and ignorant men" who, if anything, deserved to be acquitted for the single, supposed reason that all three defendants were either too stupid or timid to understand their own convictions.[51] Both Piggott and Gompertz were presumably frustrated with

[50] Ibid., 172.

[51] Ibid., 178.

Calthrop, because his incompetence had cost the Supreme Court not only time and money, but also the ability to pass decisive and efficient judgement.

*Rex v. Kwok Leung* served as a reminder to the colonial courts that simple difficulties could have serious consequences on colonial governance and justice. The official explanation for the decision in this case was that moral integrity of British law had to be preserved, even if this meant letting potential murderers escape justice. But, like his predecessor Smale, Piggott was not only concerned about morality for its own sake. At least in *Rex v. Kwok Leung*, he realized that a reckless judicial decision could have seriously damaged the prestige of the Supreme Court, not just in the eyes of the local Chinese community, but also the community back in Britain. Piggott thus opted for a more restrained and practical approach. Colonial restraint, in this case, may have indeed upheld the philosophical and moral ideals of British justice, but it also served the dual purpose of preserving the Supreme Court's image. It stands out as yet another landmark example of colonial pragmatism, in a time when a rising Hong Kong began to encounter a myriad of threats.

Despite their shared utilitarian outlook towards the application of law, it is also evident from court records that each Chief Justice had his own individual "style." Smale seemed to value the opinions of his colleagues, even if he often did not agree with them. At least in *Rex v. Kwok Leung*, Piggott and Gompertz adopted a paternalistic tone. How much individual temperament goes into influencing judicial decisions will always be a controversial matter worthy of discussion, but these cases suggest that such influence was entirely possible in colonial Hong Kong. One comment that may be safely made, though, is that Supreme Court justices were certainly not some monolithic entity dedicated towards the indiscriminate suppression of Chinese

residents in the colony. Rather, each justice considered the merits of individual cases as they stood within their respective contexts, even if his accuracy in doing so was highly debatable.

### *Conclusion*

That the British did not annihilate armed resistance in the New Territories during the 1898 takeover was symptomatic of a relaxed approach to governance by the turn of the century, in which official policy and law became more "compassionate" and lenient, particularly towards the lower classes. In one way or another, restraint was also present in such legal concerns as the limits of jurisdiction, the application of corporal punishment, and the moral consideration of British values in law. The truth, I argue, is that this apparent "humanitarian" restraint was in fact calculated: it was just one tool among many in the colonial arsenal. It was only another component in the "glass fortress," which enabled the British to project power and authority. As we will see in the next chapter, the colonial government often acted far more nefariously in the application of law and policy. Colonial restraint was a reaction to earlier experience in the 19th century, when draconian rule achieved mixed results, due to the fundamental inability of the colonial administration and courts to accurately understand and solve societal problems.

# III

## Colonial Discrimination: A Struggle for Control

### *The Supreme Court in everyday perspective*

A good criminal case always intrigues observers. So far, our analysis has brought attention to some of the most infamous instances of disorder that the colony of British Hong Kong ever faced. This is an accurate pursuit in one sense: cases such as *Rex v Kwok Leung* revealed both the best and worst of the Supreme Court, as it struggled to achieve its fullest potential in the face of great pressure. Yet, as a matter of representation, this apparent preponderance of criminality does not hold up to scrutiny. As official documents reveal, most Supreme Court cases were not of the criminal type.

Ever the diligent record-keepers, colonial bureaucrats painstakingly compiled detailed annual reports of the situation in Hong Kong, ranging from matters of finance, to education, sanitation, transportation, and other facets of daily life in the colony. The best-known of these are arguably the Blue Books, thusly named because they were literally bound in blue cover. Other documents are laden with commentary, rather than being solely data-based: these include the Sessional Papers, the Administrative Reports, the Hong Kong Hansard, and the Hong Kong Government Gazette.[52] These publications all shared a common purpose. They were meant to record the statistical history of the colony, not just for the sake of historical antiquarianism, but to actively and meaningfully demonstrate that progress had been made over the course of many decades. Invariably, this also meant "progress" in the judicial realm, and so it falls on us to

[52] All documents pertaining to these collections, between 1842 and 1941, have been archived as part of the Hong Kong University Library's Digital Initiatives program. They are available online at http://sunzi.lib.hku.hk/hkgro/browse.jsp.

interpret these documents with no less the skepticism than they deserve. To put things candidly, despite the factual content present within these reports, their composers were likely lacking in the purity of their authorial intentions.

As a major institution, the Supreme Court regularly contributed to the Administrative Reports, conjuring a summary for each of its subdivisions in every annual publication. The scrupulousness of these reports cannot be understated: each financial figure was narrowed down to the exact cent. Every individual case was counted and put into the final tally of the appropriate category. As the Report of the Registrar reveals, in 1908, the total "number of Actions instituted" in the Original Jurisdiction of the Supreme Court was 206, with "280 pending at the [start] of that commencement year as against 261 and 162 respectively in 1907." In the Summary Jurisdiction, the number was 1,735, with 225 "brought forward from 1907, as against 1,894 and 243 respectively in 1907."[53]

The desire to present change from the previous year was strong, as was the desire to emphasize the scale of the Supreme Court's involvement. This is because cases dealt with prodigious quantities of money and capital. For the Original Jurisdiction, the "total amount involved" across all cases in 1908 "was $2,466,274.90, as against $3,276,203.22 in 1907." Meanwhile, the amount in the Summary Jurisdiction sat at a slightly less impressive "$345,051.29, and the debts and damages recovered amounted to $11,283.15, as against $474,500.43 and $183,952.21 respectively in 1907." When one adjusts for inflation, each figure is nonetheless staggering. The activity of the Criminal Jurisdiction quickly pales in comparison: in all of 1908, there were only "26 cases and 59 persons committed for trial at the Criminal Sessions, as against 34 and 70 respectively in 1907." Not all of these accused even went to trial,

[53] "Appendix G: Report of the Registrar of the Supreme Court for 1908," in the *Administrative Reports,* 1908.

as "the number of persons actually indicted was 53, of whom 26 were convicted and 27 were acquitted," while in "1907 the figures were respectively 56, 48, and 8."[54]

Knowing this, it is accurate to conclude that the Supreme Court was primarily a court that dealt with property rights and disputes at the highest level, only outranked by the Privy Council in London. It certainly demonstrated great capabilities in situations of domestic crisis or national prestige, but such situations were the exception, not the norm. Money, instead, was the greatest motivator. It is only fitting, then, that the Supreme Court's Register of Companies involved the greatest amount of aggregate capital, at a terrifying $353,246,635 in 1908, split among 271 registered companies. Again, the Registrar was only too happy to compare performance to earlier years, writing that the Register contained 561 companies at the time of its establishment in 1865, but with only $256,761,334 in aggregate capital shared among them.[55] As we continue with our analysis on the main case studies in this chapter, *Carlowitz & Co v. Sun Shing Firm* and *Man Shun Wo v. The British India Steam Navigation Co Ltd*, it is thus important to remember that such cases were generally representative of the more regular, and "uneventful," experiences of the Supreme Court.

***Discrimination in the courtroom***

By looking at individual legal cases involving propertied companies and their disputes, it is possible to reconstruct a legal portrait of Hong Kong's economy as it stood in the early 1900s. As we will see, the Supreme Court did not necessarily treat each mercantile firm equally, and arguably placed a higher or lower burden of proof on certain companies depending on their regional, socioeconomic, or ethnic origin. While such discrimination may not have significantly

[54] Ibid.

[55] Ibid.

impacted the economic well-being of the colony, it likely damaged the judiciary's reputation among the merchant class. Judicial discrimination thus ran contrary to the objective of colonial cooperation and economic progress.

A case in point is *Carlowitz & Co v. Sun Shing Firm*, a 1905 action in which the plaintiffs pursued "damages arising from the sale of defective goods":

> The contract was for the sale of firecrackers. It was made in Canton between a Chinese firm (the defendant) as vendor, and a German firm trading at Canton and Hong Kong (the plaintiffs). The goods were delivered to the plaintiffs in Canton, transported to Hong Kong and sold onward to the United States. Both the plaintiffs and the buyer in the United States examined the firecrackers and accepted them as good and merchantable. There was unchallenged evidence, taken on commission in the United States, that the firecrackers did not explode, and were not as good as those of the same grade previously supplied.[56]

Chief Justice Piggott first determined that the case could be divided into three constituent parts. The first question in order was "whether Chinese or Hong Kong law governed the contract," and, following that, the next question was "what the [appropriate] Chinese law was." The third and last question was whether the plaintiffs' original acceptance of the goods as "merchantable" could be considered a point of contention significant enough to subject the plaintiffs to estoppel.[57] This was a flamboyant way of saying that the plaintiffs' original acceptance could have potentially been treated as "final" by the court, preventing them from seeking damages.

Of the first question, Piggott answered that the contract between Carlowitz & Co. and Sun Shing Firm was legally a Chinese one, because the place of delivery, exchange, and acceptance took place in Canton (Guangdong). Because both the plaintiffs and defendants assumed that Hong Kong was the appropriate place for an action, the plaintiffs were now at

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[56] *Carlowitz & Co v Sun Shing Firm*, 1902 HKSC 32, [1842-1910] HKC 184.

[57] Estoppel is a legal principle which prevents a person from saying something that is contrary to his or her own previous action or statement.

serious risk of losing their fight due to the technical issue of jurisdiction. However, in comparison to the relatively passive nature of his arbitration in criminal cases like *Rex v. Kwok Leung and Others*, the Chief Justice adopted a surprisingly interventionist attitude here:

> The plaintiffs had failed to show what the law of China was. But it was the defendant who appealed to… *caveat emptor*. The court could not assume that similar principles were in force in China. However, the court could presume that it was a part of the law of China as of every other country that you were entitled to get what you paid for: that if you bought beef an action would lie if the vendor supplied mutton.[58]

The logic here is simple: if you buy beef, the purpose of your purchase, implicit or otherwise, is so that you may eat beef. It is thus common sense that the product must be able to achieve its intended purpose, at least to the extent which the product is expected to perform as a matter of basic function. In the same fashion, Piggott plainly states that "if you buy a [firecracker], you are entitled to get something which does what crackers are supposed to do - explode with a certain satisfactory noise, which is in fact a cracker." This is an undeniably fair analogy. Because the concept of basic function is a universally accepted principle, Piggott understandably wrote that "proof from the plaintiffs as to the law of China was unnecessary," rendering the case's first two questions immaterial. As for the third question, on the matter of estoppel, Piggott believed that the plaintiffs' original examination and acceptance of the goods was more of a customary commercial procedure, rather than a contractually binding obligation. He thus claimed it "impossible" to determine whether the plaintiffs could be estopped, but nevertheless, Piggott did not allow estoppel to affect the case's outcome.

What is interesting to historians is that the Chief Justice could have chosen to immediately dismiss the case, due to the technicality of jurisdiction alone. After all, the case took

[58] Ibid.

place in China, not within British territory. An interventionist approach was not necessary. Yet, Piggott elected not to do dismiss, and in fact ruled in favour of the plaintiffs. However, before concluding the case, Piggott made a startling admission: there was a possibility that the poor quality of the firecrackers might have instead been attributable to natural deterioration or accident, through no fault of the defendants.

Deterioration and accidents, and the subsequent loss of goods, frequently arose due to the state of shipping at the time. For much of the 19th century, it was generally difficult for shipowners, even those who were wealthy European businessmen, to maintain the good physical condition of ships while simultaneously retaining decent profit margins. It was even more difficult during periods of economic downturn. These hardships were further compounded by the massive costs and inefficiencies associated with operations in geographically extant areas, which was usually the case for merchant fleets engaged in colonial trade. The more serious accidents could cost shipowners upwards of tens of thousands of dollars, but accidents were matters which shipowners had little control over, as they usually left the daily management of these vessels to their hired crews. For example, when a ship called the *Triumph* was grounded off the coast of Hainan in 1891, the total cost of repairs amounted to $33,000, and this figure did not even include the replacement of lost goods. In anger, the *Triumph*'s owner, a businessman named Michael Jebsen, wrote a seething letter of reproach to the captain of the ship, a Captain Bruhn, whom Jebsen believed had directly caused the accident through carelessness. However, Jebsen nevertheless did not fire Bruhn. This perhaps suggests that shipowners were so desperate to meet

their tight budgets that they would rather absorb such costs, than go through the trouble of finding new captains and crews.[59]

Deterioration, accidents, and other problems plaguing the shipping industry were not new and surprising issues for the colonial courts, which must have considered these possibilities from time to time. Despite admitting the possibility of deterioration in *Carlowitz & Co. v. Sun Shing Firm*, however, Piggott refused to discuss the matter any further. Although the defendants themselves never brought up deterioration, it is reasonable to believe that any other curious Supreme Court justice would have normally conducted a new inquiry into the issue, particularly because any new information that was uncovered would have almost certainly influenced the case's outcome. Piggott's absence of inquiry was highly conspicuous, arguably even for the standards of the time. Instead of conducting an investigation, he briefly concluded that "whatever may have been the cause of the crackers being defective; as Carlowitz and Co have suffered from it, so also must the defendants suffer." And suffer Sun Shing Firm did indeed, though arguably more due to Piggott's reluctance to investigate, than the actual evidence provided by the firm's adversaries.

How do we account for the lack of inquiry? It is true that Sun Shing Firm was involved with shipping, a line of work that was known to be unreliable, as far as the safety of goods was concerned. But as we will see in the next case study, the colonial courts were not inherently biased against shipowners. Rather, Piggott's reluctance to investigate deterioration in *Carlowitz & Co v. Sun Shing Firm* seems to have been the result of stereotypes and prejudices against the validity of Chinese testimony. We will expand on this observation shortly.

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[59] Bert Becker, "Coastal Shipping in East Asia in the Late Nineteenth Century," *Journal of the Royal Asiatic Society Hong Kong Branch* 50 (2010), 266.

In the 1907 case *Man Shun Wo v. The British India Steam Navigation Co Ltd*, roles were reversed when a Chinese individual sued a European shipping company, over a complaint arising from an allegedly botched delivery of several crates of white birds' nests. As the court summarized:

> [The plaintiff], or his agent, shipped on board the defendant's vessel some cases of white birds' nests: he received some cases of peanuts. He therefore alleges that the defendants have not fulfilled their contract of carriage, as it is expressed in the bill of lading, and seeks to recover the value of his birds' nests… [The nests] were shipped by the SS *Van Rebeck* [from Batavia/Jakarta], not on a through bill of lading to the plaintiffs in Hongkong, but on a bill of lading to the Ban Ann Hoh, a firm in Singapore who forwarded them to the plaintiffs, by another steamer on a separate bill of lading.[60]

One curious facet of the case is that the plaintiff chose to sue "not for damaged goods, but for non-delivery of goods as shipped." Although seemingly trivial at first, this distinction posed a significant impact towards the case's outcome. The implication is that, in determining or proving "non-delivery of goods *as shipped*," any court must obviously inquire as to *what exactly was shipped* at the time of departure from the port of origin. In this case, that specifically meant determining the goods at the time they were loaded off the SS *Van Rebeck* and into the care of the Ban Ann Hoh in Singapore, before their final delivery to Hong Kong.[61]

In signing the bill of lading provided by the *British India*, the plaintiff had, inadvertently or otherwise, marked the shipment as "weight, contents and value unknown." This meant that the

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[60] *Man Shun Wo v The British India Steam Navigation Co Ltd*, 1905 HKSC 229, [1842-1910] HKC 226. A bill of lading is basically a contract between the owner of a shipment and the party responsible for transporting that shipment, which, among other terms and guarantees, stipulates the conditions under which the transporter is liable for losing or damaging the goods. To his credit, much effort was given by Chief Justice Piggott in defining the terms used in this specific bill of lading, and thus the contract's meaning as a whole. This was certainly critical to the case, as it is common knowledge that the nuances of a typical contract vary, depending on the parties which sign it.

[61] Why Piggott chose to focus on Singapore rather than Batavia as the port of origin is not exactly clear, but this distinction was apparently of little significance to the court.

defendants, the shipowners, were certainly responsible for delivering *something*, but they could not really ensure that the *exact items* were delivered, as they did not know what those items were. In other words, the shipping company could have only been forced to pay damages if it was proven, *by the plaintiff*, that the crates had *only ever* contained birds' nests and not peanuts, because this (and only this) would have denoted that negligence during transit was the root cause of the shipment's alteration.

Consequently, the onus fell on the plaintiff to prove that the defendants had failed to uphold their end of the contract, which he was unable to do. Piggott thus declared "judgement for the defendants with costs," but not before mentioning that

> It was strongly pressed upon me that there was a charge of fraud involved, and that it must be proved to the full. I do not think that it is essential to the determination of this case to find fraud. What is essential is that the plaintiff must satisfy me that the cases contained birds' nests when shipped on board the *Patiala* at Singapore. This he failed to do.[62]

Piggott did not take the "charge of fraud" too seriously, but nevertheless, we must ask *why* such an accusation was allowed in the first place. On one hand, it was reasonable to not only doubt the veracity of the plaintiff's claims, but to also ascribe to him fraudulent intent, given that he could not even properly identify the goods for which he was claiming damages. After all, it did not help the plaintiff's argument that the evidence tended to "show that the cases were [already] carefully filled with peanuts in Singapore," far before the shipment's final arrival in Hong Kong. It was therefore unlikely that a mistake (or intentional fraud) had occurred on the high seas; rather, Piggott believed that the swap between the birds' nests and the peanuts was conducted by Man Shun Wo's own representatives in Singapore, probably on the plaintiff's own instigation. The "charge of fraud" itself, for all its flaws, was therefore not completely based on speculation.

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[62] Ibid.

On the other hand, it is hard to believe that either Piggott, or the British court system in general, would have ever even entertained the idea of fraud if the roles had been reversed. The notion that a "respectable" European company, individual, or other entity would break British law in defrauding the Chinese population must have been, if not at the very least downright insulting, at least "beneath" typical colonial sensibilities of the time. As we have seen, Piggott did not shy away from hinting at stereotypes on more than one occasion, even if judicial procedure was successful in preventing what could have potentially become some of his worst excesses. For example, Piggott stressed in writing that Sun Shing Firm sold low-grade crackers. Thus, the firm's profits were likely slim. The implied stereotype is that Chinese parties were stingy and used whatever means were possible in increasing their own wealth; perhaps Piggott indeed believed that Sun Shing Firm's testimony was as sound as the quality of its products. Conversely, evidence provided by American customers in *Carlowitz & Co v Sun Shing Firm* was not vetted for, but Piggott permitted it because of a mere technical reason: it had not been subjected to cross-examination by the defendants, and was therefore simply held to be true, even though such an assumption would have made little sense outside of judicial procedure (or the "rules of the game," so to speak).

A last observation may be made that in *Man Shun Wo v. The British India Steam Navigation Co Ltd*, there was very little mention about natural deterioration and accidents, even though these problems clearly occurred in the shipping industry. It is possible that Piggott might have chosen to entertain the idea of fraud, rather than discuss deterioration, as a way of distracting the court from the idea that the *British India* was irresponsible in its actions. This, however, is a somewhat uncharitable and highly subjective interpretation of the case, so one ought to take it with some skepticism.

It is clear that parties to a case were often held to different standards of proof and care, and these double standards often lay across socioeconomic and ethnic lines. This did not mean that the Supreme Court consistently ruled against Chinese litigants: in some cases, these parties indeed won against their European counterparts.[63] Rather, it is to suggest that these Chinese parties faced an uphill battle in convincing the court, and that they had to dedicate a disproportionate amount of effort compared to Europeans.

From the sparse information that we gather about litigants through court records, there is also relatively little to suggest that Chinese companies or wealthy individuals were unaware of European legal culture and practices. The most logical explanation for this phenomenon is that in contrast to the "ignorant" Chinese underclass, which was overrepresented in criminal cases, parties to a civil property case were usually wealthy, or at least affluent enough to afford half-decent legal representation. They were themselves probably more educated than the average resident of Hong Kong, or at least more knowledgeable about trade, and by extent, the laws of trade and property. It appears that wealthy Chinese merchants were both willing and able to take their case to colonial courts, under the presumption that there they would be treated fairly as equals. Their disadvantage is instead perhaps mainly attributable to men like Piggott, who were evidently quite reluctant to treat these merchants fairly. Equality, in other words, was only formal in its implementation.

### *Courtroom discrimination as part of broader societal utilitarianism*

To what extent do these civil cases speak towards the greater relationship between the wealthier classes of Hong Kong and the colonial administration? In what ways was informal discrimination representative of this relationship? To answer this question, we must first turn our

[63] For instance, see *Hang Shing Firm v. W. R. Loxley & Co.*, 1907 HKSC 178, [1842-1910] HKC 273.

analysis towards another societal relationship, the one between the merchant elites and the lower classes. The clear socioeconomic distinctions that were present between criminal and civil cases correlated with the increasing stratification of society in the 1890s. By the last decade of the 19th century, the upper-class Chinese "found it increasingly difficult to control the lower class Chinese," and thus their interests began to align more with colonial imperialists than the social base from which they had traditionally drawn their support.[64] The turn of the century also saw increasing civil strife in the form of strikes, feuds, and boycotts, including the cargo boatmen's strike of 1888, the coolie feud of 1894, as well as the coolie strike of 1895. While the merchant elite continued to mediate on behalf of the underclass during these incidents, they also became increasingly irritated that the coolies' intransigence inflicted a significant financial cost on both the colony, as well as their own businesses.[65]

In fact, the historical tripartite relationship of underclass, merchant elite, and colonial administration had changed so dramatically that, by the 1890s, Chinese community leaders were more akin to apologists than respectful mediators. So spoke Ho Kai, a Chinese member of the Legislative Council, to the Governor of Hong Kong during the 1895 strike:

> We, as the leaders of the Chinese and their representatives, will not cease our efforts to bring them [coolies] to reason… We regret they are so pig-headed at this time… Your Excellency can rely upon those Chinese who have come to the help of the Government hitherto giving the Government their strong support on the present occasion.[66]

Nonetheless, coolies ultimately formed the backbone of Hong Kong's economy. For instance, the shipowner and businessman Michael Jebsen was only able to recover from his economic losses through a heavily reliance on Chinese ship crews. Such cheap labour was valued particularly in

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[64] Tsai, *Hong Kong in Chinese History*, 175.

[65] Ibid., 180-181.

[66] Ho Kai, in Tsai, *Hong Kong in Chinese History*, 177.

the aftermath of the global depression in the 1870s and 1880s, as well as the "devaluation of the silver dollar" in the 1890s.[67] Almost every aspect of life in Hong Kong relied heavily on coolie labour. Thus, the needs of the lower classes still had to be considered. Colonial leaders and their merchant allies usually attempted to induce coolies back to work, but only by the barest of means. In the context of the 1895 strike, this meant a proclamation "affirming that no poll tax or registration fees were to be imposed," as the strike had been borne out of rumours of new taxes that were intended to restrict overpopulation in coolie houses for hygiene purposes. This brief glimpse of leniency was quickly followed up by the swift arrest of ringleaders and other "strike agitators."[68] One cannot really help but think that coolies were protected, but only to the extent to which their labour was found to be useful.

In a similar fashion, the colonial administration's relationship with the merchant class can likewise be described as ambivalent and utilitarian. The government certainly relied on the Chinese resident elite to communicate effectively with the lower classes. With regards to the average entrepreneur, the British generally wanted to avoid stifling business, and had great incentive in maximizing economic growth: the constant, progressive enumeration present in the Administrative Reports demonstrate just that. This, however, was not synonymous with the loosening and transfer of political control. Formally, British Hong Kong had always possessed the concept of equality before the law, but Europeans held onto a disproportionate amount of power due to informal discrimination. The attitude of the Supreme Court, in cases such as the two we have discussed in this chapter, should demonstrate the effects that social attitudes and prejudices can have on the supposedly impartial nature of justice and governance. Discriminatory

[67] Becker, "Coastal Shipping in East Asia in the Late Nineteenth Century," 289.

[68] Tsai, *Hong Kong in Chinese History*, 180.

attitudes were often counterproductive towards efforts at economic growth and freedom, but the colonial government was evidently not willing to take any risks with regards to its own privileged position.

Lastly, the Chinese elites themselves also regarded the British as a convenient ally, not just with regards to subduing rebellious coolies, but also in achieving many of their own nationalistic aims. In Chapter 4, we will discuss how radical nationalism played a role in heightening fears in Hong Kong, as well as explore the colonial mindset as the administration became increasingly authoritarian, in the aftermath of the 1911 revolution in the Chinese mainland. However, radical nationalism was not the only type of nationalism that existed in this region.

Nationalism is a catch-all term which encompasses various strains of nationalistic ideology. Across the variants, the end goal of Westphalian-style sovereignty may be the same, but the reasoning and methods of achieving such sovereignty are markedly different. British Hong Kong was home to a specific kind of conservative nationalism which Tsai labels *collaborationist nationalism*, under which many educated Chinese elites collaborated intimately with the colonial government to achieve what we would nowadays variously call capitalist, classical liberal, or (in the United States) libertarian policies and ideals. The ambitions of these elites lay under the somewhat paradoxical belief, that these collaborationist economic and social policies would eventually strengthen the Chinese people enough to break free from British control.[69]

There was nevertheless a peculiar logic to the idea, and the Chinese merchant elite certainly possessed, and continued to foster, the economic capital necessary to back their

[69] Ibid., 160-163.

ideology. Stephanie Chung notes that, upon the "outbreak of the First World War in 1914," the outward flow of capital from East Asia to a desperate Europe made the now-Republican Chinese mainland government "increasingly dependent on domestic loans," many of which were funded by Chinese conservative nationalists in Hong Kong.[70] At the same time, "British colonists commanded some, but not the final, authority over the colonial Chinese," and so the British were ultimately unable to control the conservative nationalists' subsequent acquisition of greater political capital.[71]

Conservative and collaborationist nationalism is a topic which deserves its own discussion. As this thesis is one that deals primarily with the colonial point of view, although acknowledging the agency of individuals great and small, I must stop my analysis here. Simply put, we lack the sources to discuss collaborationist nationalism in the context of a legal case study. If these nationalists were already so acquiescent towards the colonial government by the turn of the century, and relatively quiet compared to their radical counterparts, it is hard to imagine that whatever nationalistic sentiment they *did* express would not have been downplayed or even subjected to complete censure. Perhaps more important, however, is the reason that hypothetically, if conservative collaborationist nationalism had been the only type of nationalism to have ever existed in Hong Kong, it is entirely possible that the sort of social and economic tug-of-war that characterized the late 1890s and early 1900s would have largely continued unimpeded, but also without much fanfare. Boycotts and riots by coolies would have certainly continued to occur from time to time, and these protests would have been quite a nuisance for both the elites and the government. Yet, there would not have been the ideology necessary to

[70] Chung, "Business Investment in Politics," 198.

[71] Ibid., 196.

politicize the lower classes in any meaningful sense. We border on counterfactual history with this approach, however, so we ought to continue no further.

### *Conclusion*

The aim of this chapter has been to describe the ways in which informal means of discrimination reinforced a low-key, but important, struggle between Chinese merchant elites and colonial administrators in Hong Kong. Within institutions such as the Supreme Court, this discrimination could be seen in the inconsistencies between cases such as *Carlowitz & Co v. Sun Shing Firm* and *Man Shun Wo v. The British India Steam Navigation Co Ltd*. Part of this was to ensure a sense of British or European superiority, or a projection of imperial control. Again, this was the "glass fortress" in action. In some ways, informal discrimination actively worked against British narratives of economic cooperation and growth. But such discrimination was never violently blatant, at least not towards the wealthy Chinese, who bore these indignities with some degree of silence. There were also times when the interests of both parties aligned, as was the case with the suppression of rebellious coolies. I argue that consequently, the relationship between the colonial government and the Chinese elite was occasionally cordial, but also generally ambivalent, highly utilitarian, and ultimately self-serving for both parties involved. The turn of the century was indeed quite conservative: these were two factions which collectively strove to maintain the status quo against radical change, while simultaneously competing against each other upon the gradual, but inevitable, altar of progress.

# IV

## Colonial Tyranny: A Reaction to Change

### *1911: A year of paranoia*

"Nothing in connection with crime calling for special mention occurred… until the outbreak of the Revolution in China."[72] So wrote the Captain Superintendent of Police in the 1911 Administrative Reports, imputing most of that year's trouble to a small number of "bad characters" and "hooligans" from the Chinese mainland. On the eve of the new republic, the Chinese community in Hong Kong was in a state of great excitement and "jubilation." November 9th of that year saw crowds gathering to celebrate and discharge firecrackers in the streets, after a false rumour spread that the Qing government in Beijing had fallen. According to the Captain Superintendent, these festivities were "for the most part quite good natured," with the exception of a single "attack on the office of a Chinese newspaper which [rightfully] ventured to deny the truth of the rumour." Even the most cautious of government officials reluctantly permitted the celebrations to occur, albeit under stringent restrictions. Firecrackers were only to be set off between "12 to 2 p.m., on the understanding that this was to signify joy at the absence of bloodshed in Canton," where the new republic had been declared with surprisingly little violence.[73]

One might be forgiven for initially thinking that the colonial government was finally relaxing its authoritarian stance, after many tense years of relations with the Qing government, and that the "hooligans" were more of an easily corrigible nuisance than a substantive threat.

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[72] "Appendix J: Report of the Captain Superintendent of Police for the Year 1911," in the *Administrative Reports*, 1911.

[73] Tsai, *Hong Kong in Chinese History*, 248.

Without context, the tone of the Captain Superintendent's report certainly lends credence to this idea:

> Many instances occurred of attacks on, and organised resistance to the Police in the execution of their duty, and on several occasions European ladies were hustled and insulted in the streets by rowdies… Prompt measures were taken to put an end to this state of things… It is satisfactory to record that the epidemic of insults to ladies was short-lived, but cases of resisting the Police continued to occur, though with decreasing frequency for a considerable period.[74]

What were these "prompt measures"? As the Captain Superintendent explained, they were centered around the enforcement, as well as expansion, of the 1886 *Peace Preservation Ordinance*. In 1911, provisions were amended to the Ordinance which allowed magistrates to impose floggings for virtually any crime.[75] Meanwhile, the colonial government used pre-existing clauses in the Ordinance to conscript "special constables," who were threatened with punishment if they refused to comply when called upon to serve. Part I of the Ordinance set the penalty for non-compliance, or "neglect" of the office of "special constable," at either up to two months of imprisonment "with or without hard labour," or a "penalty not exceeding one hundred dollars," or both.[76]

In practice, such legislation was mainly used to impress lower-class Europeans into service. Europeans and Indians were generally overrepresented in the police force; the colonial government often viewed unemployed and poorer Europeans as an embarrassment to the colony's prestige, and thus actively sought to give them (or rather, force them into) at least

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[74] "Appendix J," in the *Administrative Reports*, 1911.

[75] Ibid.

[76] "Peace Preservation Ordinance, 1886 (No. 15 of 1886)," *Historical Laws of Hong Kong Online* (1890 consolidation), pp. 1987-1988. Available at http://www.hklii.hk/eng/hk/legis/HKHistLaws/1890/79.html.

gainful, if menial, employment.[77] Indians, on the other hand, were valued as a reliable source of manpower with little personal investment in the colony. The effects of this overrepresentation could still be seen in 1911, when the Ordinance was used to enlist "20 soldiers from the King's Own Yorkshire Light Infantry as special constables," while an additional "twenty-five extra Indian Police were engaged" in maintaining order.[78] One wonders whether the conscription of Europeans was truly necessary: given colonial insecurities, it is entirely possible that many Europeans might have otherwise volunteered on their own accord. Regardless, it is quite revealing that the colonial government took no chances at the moment of crisis.

As in the Report of the Registrar, which we discussed in Chapter 3, the Captain Superintendent's comments also reflect on a perceived notion of progress. While the Registrar presented statistics so as to create a sense of economic expansion, the police report portrays law enforcement as an efficient and effective force, capable of easily maintaining the peace in spite of the proliferating difficulties associated with a growing and modernizing population. However, the "prompt measures" enacted under the *Peace Preservation Ordinance* also reveal that the colonial government was actually heightening its authoritarian stance in 1911, while simultaneously attempting to pass off some semblance of normalcy. Although the possibility of ideological subversion certainly posed a risk towards Hong Kong's security, the government's response to that risk in 1911 was considerably disproportionate, especially for a colony that was supposedly dedicated towards liberal values.

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[77] Munn, *Anglo-China*, 356. Employment within the police force often served as cover for the unsavoury behaviour of some individuals, as was in the case of a "former policeman in the naval dockyard," John Thompson, who was "convicted of robbery and of having administered a stupefying drug" (i.e., chloroform) against a Chinese woman, Lea-akow.

[78] "Appendix J," in the *Administrative Reports*, 1911.

***Tyranny through corporal punishment***

In Chapter 2, we briefly mentioned the resurgence of violent corporal punishment in the aftermath of the 1911 revolution. In fact, this resurgence is attributable to the reintroduction of flogging under the terms of the *Peace Preservation Ordinance*, Part II of which stipulated that

> All persons remaining unlawfully, riotously, or tumultuously assembled after having been warned by a Justice of the Peace under section 7 [of the Ordinance], and all persons found carrying arms contrary to the provisions of section 8 in either case during the existence of any proclamation under section 5, shall be liable to whipping… Such whipping shall be inflicted with a rattan not exceeding half-an-inch in diameter, and shall not exceed thirty strokes.[79]

Section 5 of the Ordinance allowed any government proclamation to remain in effect indefinitely, unless overturned by the administration itself. This provision is what allowed the government to impose countless floggings well into 1912. Section 7 protected constables (including special constables) against indemnification in the event of the accidental injury or death of offenders, "except on evidence of gross carelessness, wantonness, or malice." Lastly, Section 8 seemed to apply a very broad definition of prohibited "arms," preventing all persons, save those "authorized thereto by the Governor," from possessing not just "offensive arms" (e.g. guns, rifles) but also any "arms or instruments *capable of being used* as offensive arms." As a result, it is almost certain that numerous undocumented miscarriages of justice must have occurred during this period. The phrase "offensive arms" is left so intentionally vague that, using this definition, almost anything could have been construed as a dangerous weapon. One found to be in possession of a potential weapon could instead argue that it was instead a tool "for some lawful purpose," such as his own profession, but the burden of proof fell on him to demonstrate that this was indeed the case. [80]

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[79] "Peace Preservation Ordinance, 1886," pp. 1990.

[80] Ibid., pp. 1989-1990.

Although the language of ordinances was officially neutral, in practice, certain clauses were obviously written to control one specific demographic or another. This often meant that legislation was not just racially charged, but also biased along class lines. While Part I of the *Peace Preservation Ordinance* was meant to force lower-class Europeans into service, Part II was clearly designed to prevent the colony's lower-class Chinese from forming not just public assembly, but *any assembly at all*, as constables were permitted entry into any building or "dwelling" without a warrant. The reason for such restrictions was fairly straightforward: coolies did not have much of a voice in colonial society, despite the mediation of the Chinese elite. They thus sought strength in numbers, as the greatest means through which they could politically voice their collective displeasure. In turn, such gatherings only enhanced British fears of insurrection, encouraging crackdowns on unauthorized assembly, and fueling the colonial government's willingness to resume flogging *en masse* without a moment's hesitation.

***Extradition as a tyrannical reaction***

Today, flogging is still one of the most iconic and evocative forms of punishment, in part due to its fascination in the public eye as a relic of harsher times. Its legacy can still be seen in other former British colonies such as Singapore, where judicial caning continues to be a legal sentence. In this chapter, however, we will focus on another prominent mode of punishment: extradition, an understanding of which is necessary for the main case study of this chapter, *Rex v. Sun Ah Wan*. Like flogging, the use of extradition was part of the broader, historical colonial fear of internal subversion. While the colonial response in 1911 appeared shockingly sudden and disproportionate, the response in fact held some basis in decades of legislation and judicial precedent. In particular, judicial cases involving extradition tended to draw parallels between

Chinese subjecthood and criminality, which only served to "other" Hong Kong's Chinese underclass in the eyes of the colonial community.

By the 1900s, the idea of removing "undesirables" from Hong Kong was already a well-established practice. In the sense of population control, the two punishments of banishment and extradition supplanted penal transportation, which had generally been phased out across the British Empire by the end of the 1840s. Exile was considered especially degrading towards Chinese criminals, as they viewed the punishment as a kind of death sentence in and of itself, never again being able to return to their homeland within their lifetimes.[81] In the Southeast Asia region, the practice of transportation continued to linger on for several more years. It finally ended in Hong Kong in 1858 and was replaced by penal servitude, not due to moral concerns, but instead economic worries; changes to shipping, and the reluctance of other colonies to accept Chinese convicts, had made the cost of transportation rather prohibitive.[82]

Penal servitude was still a painful and grueling experience, but it was not as humiliating as transportation. Never again did Hong Kong's colonial government deport common criminals for the paltriest of offences. However, for the most intolerable of wrongdoers, the government retained banishment and extradition as two means of control. Under the 1882 *Banishment and Conditional Pardons Ordinance*, an "order of banishment" was defined as "an order of the Governor-in-Council prohibiting a person from residing or being within [Hong Kong] for a term not exceeding five years," but only if the individual in question was neither a natural-born or naturalized British subject.[83] In Part III of the 1886 *Peace Preservation Ordinance*, banishment

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[81] Munn, *Anglo-China*, 221.

[82] Ibid., 225-226.

[83] "Banishment and Conditional Pardons Ordinance, 1882 (No. 1 of 1882), *Historical Laws of Hong Kong Online* (1901 consolidation), pp. 370. Available at http://www.hklii.hk/eng/hk/legis/HKHistLaws/1901/18.html.

was extended so that naturalized subjects were no longer immune, in the interest of "public safety."[84]

Extradition, on the other hand, was a slightly different punishment that shared functional similarities with banishment. The most important distinction between the two was that in Hong Kong, extradition was a sentence that was usually only specifically applicable to subjects of China (often simply referred to in official documents as "Chinese subjects"), not natural-born or naturalized ethnic Chinese subjects of the British Empire. Consequently, those who were punished with extradition tended to be lower-class Chinese subjects residing in Hong Kong. The judgement of extradition was the result of a unique merger between official imperial statutes and regional colonial legislation. In 1877, the imperial *Extradition Act* of 1870 was extended to Hong Kong; the Act allowed for extradition "where an arrangement [was] made with any foreign State with respect to the surrender to such State of any fugitive criminals."[85] This meant that a pre-existing treaty between Britain and a foreign nation had to be present for extradition to be viable. Later regional ordinances passed in Hong Kong were tailored to fit into the parameters of the original *Extradition Act*. For example, in the *Chinese Extradition Ordinance* of 1889, the definition of "fugitive criminal" was given as "any subject of China accused of an extradition crime committed within the jurisdiction of China or on board a Chinese ship on the high seas," who was "suspected of being in Hongkong [*sic*] or on board a British ship there." As for a pre-existing agreement between Britain and China, the *Chinese Extradition Ordinance* relied on none

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[84] "Peace Preservation Ordinance, 1886," pp. 1991.

[85] Janice M. Brabyn, "Extradition and the Hong Kong Special Administrative Region," *Case Western Reserve Journal of International Law* 20, no.1 (1988): 180. Also see "Act of 1870," in "A Selection from the Imperial Statutes Specifically Extended to Hongkong," *Historical Laws of Hong Kong Online* (1912 consolidation), pp. 120. Available at http://www.hklii.hk/eng/hk/legis/HKHistLaws/1912/225.html.

other than the Treaty of Tientsin itself, Article XXI of which had originally laid down the conditions under which Chinese authorities could "requisition" Chinese subjects.[86]

A couple of limitations must first be clarified on the use of *Rex v Sun Ah Wan* as our main source on extradition. It is unfortunate that not many Supreme Court records exist that deal with punishments such as flogging, transportation, banishment, and extradition. In addition to its primarily economic focus, which we discussed in Chapter 3, the Supreme Court simply never had the chance to deal with punitive cases extensively. Most punitive cases, particularly flogging cases, were concluded in the magisterial courts. Only with great difficulty and luck could common individuals like the accused, Sun Ah Wan, have hoped to bring their cases to the highest courts. Evidently, there also had to be some special circumstance attached to a case to warrant a review by Supreme Court justices.

Consequently, we cannot say that *Rex v. Sun Ah Wan* represents extradition cases in general. However, we *can* say that it represents an extradition case in its *ideal form*, and is useful in determining the more philosophical and moral premises and implications of extradition. In short, the case is useful because it demonstrates that the practice of extradition was fundamentally xenophobic in both its application and reasoning. For instance, the distinction between banishment and extradition was in part probably meant to protect British subjects from arbitrary expulsion (at least until the 1886 *Peace Preservation Ordinance*), a concept central to Western notions of citizenship and rights. However, as we have discussed, the same distinction was also used to alienate the Chinese underclass. Discussion of these matters would have almost certainly been impossible in the magisterial courts, where the more summary nature of their

[86] "Chinese Extradition Ordinance, 1889 (No. 7 of 1889)," *Historical Laws of Hong Kong Online* (1901 consolidation), pp. 658-659. Available at http://www.hklii.hk/eng/hk/legis/HKHistLaws/1901/25.html.

judgements also made magistrates more prone to error. In addition, cases in the magistrates' courts were recorded into aggregate statistics, and certainly did not receive the same level of treatment as Supreme Court cases.

*Rex v. Sun Ah Wan* was a 1909 case in which extradition proceedings were contested by the prisoner's defense based on two key factors. Sun Ah Wan's counsel, a man by the name of Slade, argued that the defendant firstly could not be extradited because, at Sun's first appearance before a magistrate, the prosecution had not proven that the defendant was indeed a Chinese subject. In fact, by the time the case went to the Supreme Court, Sun's subjecthood had still not been definitively determined. Because extradition to China was only applicable if Sun was both a Chinese subject *and* had committed a crime within Chinese jurisdiction, Slade argued that it was also necessary for the Crown to prove that a formal accusation had been "laid in China."[87] The Crown prosecutor, Sir H. Berkeley, responded that there was actually enough *prima facie* evidence[88] to demonstrate Sun's subjecthood, that *prima facie* evidence was all that was needed to extradite, and that the onus thus fell on the *defendant* to prove that he was *not* a Chinese subject, which he had up to this point failed to do.[89] Decisions to the case were written by the Acting Chief Justice, William Rees-Davies, as well as Justice Henry Gompertz. Although Chief Justice Piggott did not retire until 1912, he did not oversee this case, a peculiarity which we might imagine was in part the result of mounting criticism of his tenure.

As the story goes, in 1908, a robbery had occurred in the village of Ai Ping in the Chinese mainland. Sun Ah Wan was arrested shortly afterwards in Hong Kong, on suspicion of having committed the crime. A district magistrate, Kwai Sin Un, first heard his case. After some time,

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[87] *Rex v Sun Ah Wan*, 1909 HKSC 5, in *The Hong Kong Law Reports*, pp. 33-35.

[88] i.e., initial evidence that creates a first impression; considered correct until proven otherwise.

[89] *Rex v Sun Ah Wan*, 1909 HKSC 5, in *The Hong Kong Law Reports*, pp. 36.

the case reached the Supreme Court, where evidence against Sun was provided by three individuals who claimed to have known him. The first, Sui Fuk, reported to the authorities that he had known Sun since "the 8th or 9th Moon of the same year,"[90] 1908, despite never having actually "spoken to him." According to Sui, he had learned of Sun's identity through gossip in the local marketplace. Further cross-examination by the Crown revealed that Sui had not heard any discussion of Sun being a "reformer," or a member of the "Reform party" in China. As for the second witness, Chan Chau claimed to have known Sun since 1903, having been "engaged to take trees to [Sun's] master." He heard that Sun was "a robber and a thief," a rumour which continued to influence Chan, well after his subsequent sporadic encounters with Sun in 1904 and 1905. A third witness, Ho Lin, was questioned during cross-examination as to his knowledge of Sun's origins. Ho could only respond that he did not know "what part of the country the prisoner came from." This was an unhelpful statement for the prosecution, not the least because of Ho's ignorance, but also because the term "country" was highly ambiguous. Rees-Davies nonetheless concluded that by "country," Ho probably meant the Chinese mainland, although "the fact in itself [did] not establish [Sun's] nationality." This was because there were "numerous Chinese in China, Hongkong and the New Territories" who were "British subjects."[91]

The fact that "reform" (i.e., radicalism) was even brought up during cross-examination is interesting to historians. Sui's testimony was prompted by a question that the court most likely considered to be irrelevant and prejudicial. Unfortunately, Rees-Davies did not record the question verbatim in official court records. In almost every context, however, it appears that the question must have been somewhere along the lines of, "did you, Sui Fuk, at any point learn of

[90] This is referring to the Chinese lunar calendar.

[91] Ibid., 36-37.

Sun Ah Wan's involvement with reformers?" The problem with such a question is that it is loaded: by associating *robbery* (Sun's alleged offence) with *reform*, the implication is that reformers were inherently dangerous. For Rees-Davies, the question was completely inappropriate in the way it was delivered by the Crown, mainly because the prosecution had not provided a sufficient justification for it.

In fact, it is interesting that a justification was instead provided by Rees-Davies himself (through one Mr. Alabaster),[92] who suggested that "the whole object of the cross examination was to establish the prisoner's association with the Reform party," but only because this would create "a *prima facie* presumption that the Reform party [were] subjects of China."[93] However, Rees-Davies was only playing devil's advocate. He ultimately doubted that the implied accusation of reformist sentiment, "even if well founded," could "be of much avail." Simply put, there was insufficient evidence for a *prima facie* case to be made.[94] One wonders *why* Rees-Davies even allowed the question to be asked in the first place, particularly when considering that he and Alabaster were the ones providing its justification, *not* the Crown.

This is not to say that Rees-Davies' leniency towards the Crown was actually based in prejudice against Sun Ah Wan. He ultimately opined that the existing evidence could neither

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[92] Unfortunately, we do not know much about Alabaster other than that he held some role in the case. An educated guess would put him as part of the defense counsel.

[93] At least in the way it is presented in court records, the logic here is convoluted and circular. It is possible that Rees-Davies failed to record a critical piece of information. Assuming that records are complete, however, it appears that the prosecution's goal in this case was to ultimately demonstrate that there existed enough *prima facie* evidence to show that Sun was, in fact, a Chinese subject. To do this, it drew the connection between Sun and the reformers. However, if Rees-Davies' assessment is correct, the prosecution then tried to prove that the connection could be considered *prima facie* evidence of Sun's subjecthood, because the reformers themselves were presumed to be Chinese. This presumption was in turn based on the assumption that Sun was a Chinese subject. It should be no surprise that Rees-Davies rejected this argument.

[94] *Rex v Sun Ah Wan*, 1909 HKSC 5, in *The Hong Kong Law Reports*, pp. 36.

satisfactorily determine Sun's nationality, nor the presence of an accusation against the defendant in the Chinese mainland, and was thus insufficient to order an extradition. At least in *Rex v Sun Ah Wan*, Rees-Davies appears to have been a relatively impartial justice of the Supreme Court, a quality which many of his predecessors arguably did not possess. Other, less responsible members of the judiciary presumably played on colonial fears of radicalism on a more frequent basis. Rees-Davies promoted an atmosphere of fairness to the extent that Gompertz, writing after the Acting Chief Justice's decision, tempered his own writing style, which (as we discussed in Chapter 2) was at times quite inflammatory. Gompertz argued that there was ample evidence of an accusation in mainland China: he believed that the original written report to the District Magistrate, accusing Sun of robbery, was sufficient. He nevertheless conceded to Rees-Davies that there was indeed "not even a *prima facie* case of Chinese nationality set up."[95]

### *Conclusion*

Colonial tyranny, as represented through judicial extradition, forms the last component in our analysis of the "glass fortress." 1911 saw the colonial government react to nationalist events in mainland China by imposing authoritarian rule in Hong Kong. Colonial fears centered around the possibility of insurrection among coolies and other lower-class workers. Official documents attempted to portray the colonial situation as safely and easily under the control of the government, even as harsh punishments were reintroduced into the colony. I argue that, although the colonial response seems sudden and disproportionate, it was in fact based in years of legislation and judicial decisions. The use of extradition was one example of authoritarianism in the judiciary which played on colonial fears of internal ideological subversion, as can be seen in

[95] Ibid., 43.

*Rex v. Sun Ah Wan*. These fears only served to alienate the lower classes in portraying them as the "other." It was only by the efforts of individual men like Chief Justice Rees-Davies that the judiciary maintained some impartiality, but other members of the judiciary were not as fair to Chinese defendants. One wonders just how many Chinese in the colony were not allowed proper due process as a result, given that most cases were not recorded as anything but a minor statistic. These Chinese are the forgotten faces who lived under British colonial authoritarianism at its worst. Their cases have mostly been lost to history.

# V

## Shattering the Glass Fortress

Colonial fears of a catastrophic loss of Hong Kong were still alive decades after the 1911 revolution in China. In the 1930s, a new security threat in Hong Kong materialized as a result of the second Sino-Japanese War. The young Republic of China, which the colonial government of British Hong Kong had once viewed with a suspicious eye, was now struggling to halt and defeat the Japanese invasion of the Chinese mainland. In Hong Kong, similar colonial fears as those in 1911 began to resurface in the colony, but this time due to Japanese imperialist aggression. Originally, the colonial community maintained some hope of safety, as can be seen in the letters of Lieutenant Commander Hugh Dulley, better known as Peter Dulley, to his friend and mother figure, Lizzie Blunt, in the summer of 1939:

> Hong Kong perseveres in spite of the war. If the naked truth be told we are doing rather well out of it, and all this talk in the papers about British trade in China being killed by the Japanese is so much eyewash.[96] Admittedly they are trying to terminate the foreign (non Asiatic) trade but to date their success has not been very great.[97]

Peter Dulley, a member of the Hong Kong Royal Naval Volunteer Reserve, was a travelling British expatriate who lived in Hong Kong during the late 1930s. He married Therese Sander in 1936, and was also employed by the international trading company Jardine Matheson. Dulley's son (also named Hugh), writing his father's biography, notes that it was as a result of this employment that Dulley was at first optimistic. Jardine Matheson thought too logically about Japan, believing that the "Japanese lacked raw materials" and thus could not afford to declare

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[96] i.e., the rumours were nonsense.

[97] Hugh Dulley, *A Voyage to War: An Englishman's Account of Hong Kong 1936-1941* (London: Uniform, 2016), 110. Letter dated 6 July 1939.

war on Britain. As Dulley crudely put it, if Japan attacked, it would no longer be able to "export to the Empire, which would blow her [economy] up in about three to six months."[98]

Unlike the disproportionate British response to insurrection in 1911, however, colonial fears of a British catastrophe were far more substantial in 1939. By 1940, Dulley's own perspective had shifted dramatically, and he no longer considered a war with Japan preventable. His wife Therese, pregnant at the time, was evacuated from Hong Kong to the Philippines for the first time in July 1940, where their son Hugh was born in the same month. The family was only reunited in December 1940, for a few months, before Dulley did not so much as hesitate to have his family evacuated a second time in March 1941, this time to Australia. By November 1941, a month before the Japanese attack on Hong Kong, Dulley's mood was far more pessimistic. As he wrote to Therese,

> As regards the prospects of your coming back here, at the moment with the uncertainty of the Japanese, I will be quite frank and say I don't think there is a hope in hell. But don't let that discourage you; for the time being, until things clear up here, I think you are much better off down in Australia. I don't agree with these lads who say it will be a long war.[99]

Even as he tried to console and reassure his wife in his letters, Dulley knew by this point that there was realistically no hope for the colony in the event of Japanese invasion, which was now considered inevitable. Hong Kong's defenders were "under-equipped and not ready for an aviation war," while the Imperial Japanese Army was "battle hardened and experienced" as a result of Japan's campaigns in China and Manchuria.[100]

Dulley's sentiment was echoed across the colonial administration and even back in the imperial government in Britain. Winston Churchill famously remarked that there was "not the

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[98] Ibid., 255-257.

[99] Ibid., 257. Letter dated 9 November 1941.

[100] Ibid., 258.

slightest chance" that Hong Kong could be defended or relieved. Sir Percy Selwyn Selwyn-Clarke, Hong Kong's Director of Medical Services, argued that "Hong Kong could not be held but it [had] to be defended." The Commander-in-Chief on the China Station, Admiral Sir Percy Noble, gave a rather discouraging "Outposts of Empire" speech to the Hong Kong garrison, which for Dulley meant that the British, Indian, and recently-arrived Canadian soldiers in Hong Kong were only fighting to delay the Japanese advance.[101] Their fight was to be one of sacrifice.

Despite the demoralizing nature of their situation, Dulley and his comrades ultimately gave their lives in defending Hong Kong. On December 8th, 1941, Japanese forces invaded the colony, the same day they attacked Pearl Harbor. Japan was now at war with both Britain and the United States. Hong Kong's outer defenses in the New Territories quickly fell in the onslaught. By December 11th, the Japanese army had almost reached Kowloon. On December 18th, Japanese forces crossed Victoria Harbour and landed on Hong Kong Island, which finally fell on the 25th. Lt. Cdr. Dulley was killed near midnight on December 19th, at a place called Postbridge in the south of Hong Kong Island, and was buried where he fell.[102]

### *Shattering the Glass Fortress*

Dulley, and Hong Kong's colonial leaders in 1941, knew what had always been the problem with Hong Kong. The colony was too small to be defended militarily. It was geographically defenseless; its armed garrison was too limited and outdated to be effective. The only difference was that in 1941, the British Empire had given up on trying to rectify the colony's vulnerabilities. Britain expected its colony, with its multiethnic population of Chinese, Europeans, and Indians, to fight for the Empire's honour, but little else.

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[101] Ibid., 257-258.

[102] Ibid., 263-267.

Between 1898 and 1911, however, the colonial government and judiciary of Hong Kong did try to protect the colony's territory through an adherence to British law and policy. As we have examined in this thesis, they attempted to accomplish this through a conservative and utilitarian approach to justice and governance. Justices of the Supreme Court differed in their approaches towards colonial protection, but the end goal for each of them nevertheless remained the same. In cases like the 1871 *Attorney General v. Kwok A Sing*, for example, the goal of Chief Justice J. J. Smale was to establish the moral superiority of British law, as a way of asserting the legitimacy of British rule in Hong Kong.

In this thesis, we examined case studies as part of our analysis of three broad types of colonial reactions to developments in Hong Kong: colonial restraint, colonial discrimination, and colonial tyranny. Cases such as *Ip Tsung Nin v. Kwong Tse King* and *Rex v Kwok Leung and Others* demonstrated that the colonial judiciary tried to restrain colonial governance at times, but such colonial restraint was only intended insofar as it prevented the government from acting overbearingly. On the other hand, economic cases such as *Carlowitz & Co. v. Sun Shing Firm* and *Man Shun Wo v. The British India Steam Navigation Co. Ltd.* showed that the judiciary was no stranger to colonial discrimination; the colonial community maintained an occasionally cordial but ambivalent relationship with Hong Kong's Chinese elite, in part to maintain control over the Chinese underclass. Colonial leaders, however, could also return to their prejudicial attitudes when cooperation with the Chinese elite did not seem advantageous. Lastly, the 1909 case *Rex v. Sun Ah Wan* demonstrated that the colonial government of Hong Kong never forgot the use of disproportionate violence and punishment in times of seeming insurrection, a tyrannical colonial reaction that was all too representative of the colonial situation during the 1911 revolution in China.

In these cases, the linking factor was that they all represented the colonial government's attempt to protect the colony of Hong Kong from internal and external threats. The truth, however, is that no amount of colonial effort could have altered the fundamental realities, particularly the geographical and military realities, which made Hong Kong vulnerable. When the colonial administration imposed all-round authoritarian control during the labour strikes in the 1890s, and again during the 1911 revolution, it was doing so in reaction to the apparent threat of insurrection among riotous coolies and lower-class workers, not the threat of an organized, invading Japanese army equipped with rifles, fighter planes, and machine guns.

From 1898 to 1911, British efforts were thus dependent on the *perception* of strength. If the image of safety was already starting to show cracks by the end of 1911, then it had totally shattered in the aftermath of the Japanese invasion in 1941. The fortress of Hong Kong, and the façade of protection which it afforded, was made of glass. Yet, the British colonial community had persisted in defending Hong Kong throughout the decades leading up to the colony's fall, despite its realization that this effort may have ultimately been futile. Perhaps an example of this heroic but fruitless struggle is best seen in the "Churchillian response" of the British home government to Sir Mark Aitchison Young, the Governor of Hong Kong in 1941, as he tried to surrender the colony during the last stages of the Battle of Hong Kong:

> "The eyes of the world are upon you. We expect you to resist to the end. The honour of the Empire is in your hands."[103]

[103] Ibid., 267.

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