English Law in Early Hong Kong: Colonial Law as a Means for Control and Liberation

SUMMARY

I. THE ROLE OF LAW IN EUROPEAN EXPANSION

A. Colonial Law for the Sake of the Colonizers and the Colonized

The basic chronology and extent of European colonialism and imperialism have been thoroughly explored, but considerable debate still surrounds the motives. Most scholars point to the familiar economic and strategic factors. Others point to religious conversion and the civilizing mission. More recently, some have examined psychological and biological factors.[1] Whatever the principal motivating forces, law was not among them.

1. *See* W. ROSS JOHNSTON, SOVEREIGNTY AND PROTECTION: A STUDY OF BRITISH JURISDICTIONAL

Nonetheless, law played an essential role as a means for achieving colonial ends by fortifying European control over the colonized, facilitating commerce,[2] and legitimizing colonial rule.[3] Typically, the Europeans would begin their colonizing efforts by instituting a system of criminal law in order to strengthen their hold over the territory. Then they would implement contract, commercial, land, and labor law in order to advance their commercial ambitions.[4]

Despite the self-serving ends behind the implementation of European law in the colonies, some scholars have praised (albeit grudgingly) this aspect of colonialism. The international lawyer L. C. Green, for instance, writes that

> [p]erhaps one of the least objectionable features of English imperialism has been the introduction into colonial territories of the English concept of the rule of law. This stems from the fact that, as is probably known to the veriest tyro in the legal world, when an Englishman goes abroad he takes his law with him.[5]

But why introduce English law with its emphasis on procedural safeguards? Why not institute a type of martial law that could control the colonized and favor trade more effectively? One reason is that the British attributed much of their economic and technological successes following the industrial revolution to their superior governmental and legal systems.[6] The mantra of the colonial administrators at Whitehall was "peace, order, and good government."[7] While martial law might assure order, it could not assure peace and good government. The British employed their law because they felt it best suited the needs of colonial governance. Furthermore, it made sense to adopt a law familiar to the British traders who flocked to commercial settings around the world.

English law also responded to the need to protect English subjects in foreign lands. The British, convinced of the justness and excellence of their laws, did not want to find themselves before foreign courts they considered primitive and unfair.[8]

In addition, law played an important role in Britain's perceived mission of spreading civilization to the unenlightened. An early British law review article expressed this sentiment: "We have our own Anglo-Indian Codes as examples of what may be done for an inferior race by a superior, which establishes equality before the law as the first step on the path which will eventually lead to something like equality in civilization."[9] The following statement, presented as evidence during the 1837 House of Commons committee on aborigines, manifests the British view that peace and good government (and consequently, law) had the same salutary effect on the natives as religion: "Can we suppose otherwise

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IMPERIALISM IN THE LATE NINETEENTH CENTURY 3 (1973).

2. *See* Jörg Fisch, *Law as a Means and as an End: Some Remarks on the Function of European and Non-European Law in the Process of European Expansion*, *in* EUROPEAN EXPANSION AND LAW 15, 33 (W. J. Mommsen & J.A. De Moor eds., 1992).

3. *See* YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 25 (1997).

4. *See* Fisch, *supra* note 2, at 31–32.

5. L.C. Green, *The Common Law and Native Systems of Law*, *in* INTERNATIONAL AND COMPARATIVE LAW OF THE COMMONWEALTH 81, 82 (Robert R. Wilson ed., 1968). W. J. Mommsen also acknowledges that the imposition of Western law on the colonized had some positive aspects: "[T]he introduction of elements of European law into indigenous societies . . . may be considered perhaps one of the few positive elements of the imperialist heritage, even though this cannot serve as a justification of colonial rule." W. J. Mommsen, *Introduction* to EUROPEAN EXPANSION AND LAW 2 (W. J. Mommsen & J.A. De Moor eds., 1992).

6. *See* JOHNSTON, *supra* note 1, at 11–12.

7. *Id.* at 9.

8. *See id.* at 12–13.

9. Harold A. Perry, *Justice in Egypt*, 1 L.Q. REV. 342, 353 (1885).

than that it is our office to carry civilization and humanity, peace and good government, and, above all the knowledge of the true God, to the uttermost ends of the earth."[10] Like religion, the rule of law was believed to have universal validity.[11] And, like missionaries, British lawyers and judges could improve the lot of the unenlightened by propagating the rule of law.[12] In this respect, law took on characteristics of an end in itself, as opposed to mere means. When the British justified their interventions abroad by the moral imperative of eliminating purported savage and inhuman customs[13]—such as suttee (widow-burning), slavery, infanticide, polygamy, ritual suicide, and torture[14]—the concepts of legal equality and human rights constituted the very reason for intervention.

English law would further benefit the colonized by protecting them against the colonizers. The Colonial Office sought to prevent the colonizers from engaging in the slave trade[15] or inflicting excessive punishment on the colonized.[16] British officials also worried that the British colonizers would swindle the colonized out of their lands. The 1837 report of the House of Commons concluded that natives needed the protection of the British government and recommended that Europeans in British territories be prohibited from occupying or using native lands.[17] Finally, the possibility of bloodshed should the better-equipped British take to arms against the natives prompted Lord Grey, the Colonial Secretary, to write in 1852 that if law and order did not protect Europeans from the "fierce barbarians" around them, ". . . measures of self-defence will degenerate into indiscriminate vengeance, and will lead to the gradual extermination of the less civilized race."[18] While on the one hand law promoted the goals of European expansion, on the other it moderated this expansion by imposing certain limits on European conduct toward the colonized.[19]

This desire to help the natives through English law arose not only out of humanitarian impulses, but also out of commercial impulses. The British recognized that successful trade required a peaceful colony and respect from one's trading partners.[20] In the Crown Colony of Hong Kong, the British concluded that the best way to earn the respect of the Chinese was to treat them civilly and fairly. Resorting to force would only worsen matters, explained the following article offering the British advice on how to deal with the Chinese, who continued to refer to foreigners as *fan gwei* (outlandish devil) or *kwei tsi* (devil):

> [S]ome people [think that] . . . as the mandarins, when they . . . talk of us contemptuously, and even behave rudely and coarsely to us, we ought to treat them in like manner. But this is a very mistaken notion. It must be considered, that if they speak and occasionally act thus, it is because they *really* think we are a coarse, rude people; now shall we convince them of the contrary by acting rudely, or perhaps coarsely? We may by doing so silence them, and if we go so

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10. JOHNSTON, *supra* note 1, at 9.
11. *See* COLIN N. CRISSWELL, THE TAIPANS: HONG KONG'S MERCHANT PRINCES 71 (1995).
12. *See* JOHNSTON, *supra* note 1, at 11–12.
13. See LORD LUGARD, POLITICAL MEMORANDA, REVISION OF THE INSTRUCTIONS TO POLITICAL OFFICERS ON SUBJECTS CHIEFLY POLITICAL AND ADMINISTRATIVE 84 (1970). In this primer for colonial administrators, Lord Lugard writes that his administration of Nigeria prohibited native punishments deemed "repugnant to natural justice and humanity." *See id.* at 83.
14. *See* Fisch, *supra* note 2, at 34–35.
15. *See* D.B. SWINFEN, IMPERIAL CONTROL OF COLONIAL LEGISLATION 1813–1865: A STUDY OF BRITISH POLICY TOWARDS COLONIAL LEGISLATIVE POWERS 123–37 (1970).
16. *See id.* at 139–40.
17. *See* JOHNSTON, *supra* note 1, at 16.
18. *Id.* at 15.
19. *See* Fisch, *supra* note 2, at 15–16.
20. *See* CHINA MAIL, Apr. 5, 1849, at 54.

> far as to threaten, or even to use violence, they may feel fear, or affect to feel it, in order to appease us; but they leave us, not merely believing from report, but thoroughly convinced from their own experience, that we *are* rude and coarse barbarians. The proper way to meet them is with steady urbanity . . . .[21]

Just as kindness and propriety will convince the insolent to reform, applying the same just English laws to all will convince the Chinese of the rightness of the British colonial endeavor and improve relations in the colony.

B. A Dual Legal System for the Colonizers and the Colonized

In short, the British instituted English law in their colonies because they thought it was best for governing, promoting trade, protecting the British, and simultaneously controlling and advancing the colonized. One problem, however, was that, if fairly applied, the facially neutral principles of English law were perhaps too just and too fair for colonialism; indeed, how does one people rule over another when all are subject to a legal system based on equality before the law? Faced with this problem, colonial administrators rejected the ideal of legal equality. They felt that the damage caused by even a single Westerner falling to the level of the natives or a single native rising above his colonial masters would be too great.[22] In rationalizing their refusal to grant the natives the blessings of superior western laws, the Europeans invoked the goal of preserving the natives' way of life.

The solution was to have two legal systems: one for the colonized and one for the colonizers. It is difficult, however, to determine the extent to which the humanitarian argument for non-intervention into the affairs of the colonized was a sincerely held conviction and the extent to which it was an after-the-fact rationalization for denying the colonized the procedural safeguards and legal equality guaranteed by English law. Both the humanitarian and authoritarian impulses were present in day-to-day policy, which sometimes led to violations of the dichotomy between English law for Europeans and traditional customs for the natives. The common practice of subjecting native criminals to English criminal law, for instance, can be attributed both to humanitarian and authoritarian concerns—humanitarian because native punishments may be deemed repugnant to western principles,[23] and authoritarian because native law may be deemed too lax.[24] This dual system reinforced colonial rule by divorcing the natives from concepts of equal rights, while also allowing the Europeans to feel they were pursuing a humanitarian policy of respecting native culture.[25]

Not only did the Europeans use law as a means for improving trade and strengthening their rule over colonized peoples, but they also used law as a means for enlightening and improving the colonized peoples' conditions. A tension existed between these two uses of the law, however. Focusing solely on the authoritarian aspect could lead to brutal regimes that deprived the colonized of any benefit, while focusing on the humanitarian aspect could destabilize the colony as more and more natives began to ask why they too should not benefit from the ideals emanating from Europe. Indeed, the principles of legal equality and human rights played a significant role in the collapse of the colonial empires in the

21. CHINA MAIL, Oct. 14, 1847, at 138.
22. *See* Fisch, *supra* note 2, at 26–27.
23. *See id.* at 31.
24. *See* Mommsen, *supra* note 5, at 10.
25. *See* Fisch, *supra* note 2, at 28–29.

twentieth century.[26]

II. CONFLICTING AIMS OF THE LAW IN HONG KONG

This tension existed in the British Crown Colony of Hong Kong. Over a century and a half of British rule has produced a remarkably successful commercial center whose residents currently live in safety and enjoy basic human rights. Many people have attributed Hong Kong's prosperity to the rule of law. Even critics point to the contributions of English law to the residents of Hong Kong—the protection of their lives and property, the notion that the government was not above the law, and the raising of public consciousness of rights and the importance of fair government.[27]

Such benefits, however, were not felt immediately by the majority of the Chinese living in Hong Kong. Furthermore, detractors charge that the colonial administrators' authoritarian rule hindered the development of a true modern democracy.[28] Peter Wesley-Smith, a contemporary expert on Hong Kong law, sets out the conflicts inherent in the earlier British enterprise.

> On the one hand, Hong Kong as a British colony was established and maintained as a trading post, and thus what was good for commerce, including if necessary the diminution or suppression of civil liberties, was regarded as good for Hong Kong. On the other hand, the proud boast of the British, and to some extent the purported justification of imperialist expansion in such places as Hong Kong, was the superiority of British jurisprudence . . . . An uneasy balance has prevailed between strong government and protection under the law.[29]

This paper will examine the uneasy balance between the role of English law[30] as a means for controlling the Chinese—its "authoritarian" function—and as a means for benefiting the Chinese—its "humanitarian" function—through studying some notable criminal cases between 1844 and the mid-1850's in Hong Kong.

III. LAW IN THE BIRTH OF HONG KONG

Law has played a central role in Hong Kong[31] since the colony's foundation.

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26. *See id.* at 38.

27. *See* GHAI, *supra* note 3, at 26.

28. *See id.* at 33.

29. Peter Wesley-Smith, *The Method of Protecting Civil Liberties in Hong Kong*, *in* CIVIL LIBERTIES IN HONG KONG 11 (Raymond Wacks ed., 1988).

30. This paper uses the term English law rather than British law because the common law imposed on Hong Kong was that of England and Wales. Scotland had (and has) a different legal system more similar to that of the continental civil law countries. *See* MICHAEL FISHER, CONTRACT LAW IN HONG KONG: CASES AND COMMENTARY xxix (1996).

31. Confusingly, Hong Kong refers to the entire former British colony that recently reverted back to Chinese rule, the island that the British acquired in 1842 with the signing of the Treaty of Nanking, and occasionally to the largest city, formerly called Victoria, on the island. *See* GEOFFREY ROBLEY SAYER, HONG KONG 1841–1862: BIRTH, ADOLESCENCE, AND COMING OF AGE 90 (Hong Kong University Press 1980) (1937). (This is similar to New York, which alternatively designates a state, a city, and one borough of that city). In this paper, Hong Kong shall designate only the island. The former British colony of Hong Kong is composed of Hong Kong island, twenty-nine square miles and ceded to Britain in perpetuity in 1842; Kowloon, a three-and-a-half square mile peninsula on the Chinese mainland located several hundred yards from the island of Hong Kong and ceded to

Although the underlying causes of the Opium Wars, which led to the British acquisition of Hong Kong, revolved around Chinese opposition to the smuggling of opium by the British into China, as well as around British dissatisfaction with restrictive trading conditions in China, the first hostilities arose out of a jurisdictional dispute. In the tense summer months of 1839, following a contentious seizure by the Chinese of over 20,000 chests of opium belonging to British traders, an Englishman killed a Chinese subject.[32] The Chinese authorities in Canton demanded that the killer be handed over for punishment, but the British refused.[33] Chinese fire-rafts attacked British ships in Hong Kong, and, soon afterwards, a British naval force entered the Pearl Estuary en route to Canton.[34] Three years of intermittent warfare later, with the signing of the Treaty of Nanking on August 29, 1842, the Chinese ceded in perpetuity the island of Hong Kong to the British.[35]

Fewer than 6000 Chinese lived on the island when the British took possession in 1841.[36] Various factors kept the Chinese from offering much resistance to the British during the colony's early days. First, the fact that many of the Chinese immigrants had sought refuge in Hong Kong from the poverty, hunger, and sociopolitical disturbances afflicting the mainland made them "willing subjects of a foreign government rather than involuntary slaves of a conquering colonial regime."[37] Furthermore, since the immigrants came from different parts of China, in Hong Kong they were strangers who spoke different dialects and had different customs. Finally, many immigrants were concerned more with earning a livelihood than with nationalism.[38]

The reason for Hong Kong's existence was trade.[39] The Opium Wars were fought over trade, and as the wars ended, Jardine Matheson and the other great trading companies urged the British to grab Hong Kong for use as a commercial base, which these traders then transformed into an economic power.[40] As a result, the merchants welcomed the protection of the British flag, but not its regulations. In the early days of the colony, the government served the interests of the merchants. Though it governed a minimalist state that assured health and sanitation and basic social services, the government nonetheless attached great importance to the rule of law,[41] not only for the facilitation of trade,[42] but also to benefit the

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Britain in perpetuity by the 1860 Convention of Peking; and the New Territories, a 365-square mile swath of land located behind Kowloon and leased to the British for 99 years by the 1898 Convention of Peking. *See* GHAI, *supra* note 3, at 5–6, 504, 508, 511.

32. *See* CRISSWELL, *supra* note 11, at 55–56.

33. *See* FRANK WELSH, A HISTORY OF HONG KONG 55–56 (1993); CRISSWELL, *supra* note 11, at 55–56.

34. *See* GEORGE POTTINGER, SIR HENRY POTTINGER: FIRST GOVERNOR OF HONG KONG 67 (1997).

35. *See* WILLIAM L. TUNG, CHINA AND THE FOREIGN POWERS: THE IMPACT OF AND REACTION TO UNEQUAL TREATIES 427 (1970).

36. Estimates of the Chinese population at this time range from 4000 to 15,000. *See* SAYER, *supra* note 31, at 119.

37. JUNG-FANG TSAI, HONG KONG IN CHINESE HISTORY: COMMUNITY AND SOCIAL UNREST IN THE BRITISH COLONY, 1842–1913 37 (1993).

38. *See id.*

39. *See id.* at 38.

40. *See generally* CRISSWELL, *supra* note 11. *See also* SAYER, *supra* note 31, at 124.

41. *See* IAN SCOTT, POLITICAL CHANGE AND THE CRISIS OF LEGITIMACY IN HONG KONG 41–42 (1989). One of the great ironies of the founding of Hong Kong is that while the British insisted on establishing the rule of law, they completely discarded it during the period leading up to the island's seizure. Attempts to halt the flow of opium into their territory led the Chinese to invoke domestic law (through the banning of opium) and international law as understood by westerners, but to no avail. The Imperial Commissioner in Canton, Lin Tse-hsu, arranged for the translation of parts of Vattel's *Le Droit des Gens*, which explained that each state has the right to prevent foreign subjects from introducing harmful substances into its territory by banning and seizing them. Commissioner Lin acted in accordance with Vattel's prescription that before banning and seizing these substances, the banning state notify the sovereign of the exporting state and request that such trafficking of the substances cease. Commissioner Lin sent Queen Victoria a letter stating: "Suppose there were people from another country who carried opium for sale to England and seduced your people into buying and smoking it; certainly your

Chinese living in Hong Kong. Examination of the Wong-ma-kok incident that the *China Mail*,[43] a local Hong Kong paper, described as having elicited "greater interest than any event that has occurred since the cession of Hongkong,"[44] will reveal how this tension between the practical imperative for control and the moral imperative of humanism played out in Hong Kong.

IV. THE WONG-MA-KOK INCIDENT

On February 25, 1849, following a Sunday lunch at their barracks, Captain Da Costa of the Royal Engineers and Lieutenant Dwyer of the Ceylon Rifles went out for a walk.[45] They left the village of Stanley on the island of Hong Kong at four o'clock and headed east toward the village of Wong-ma-kok, but they did not return for dinner. This unusual absence worried their colleagues. At eight o'clock that evening, a small party went out looking for the two officers; they found nothing save a broken spear and an old Chinese man who claimed not to have seen any Europeans. The next morning, the search resumed with the assistance of the Hong Kong police and 100 British troops. Daylight revealed drops of blood on a stone. These drops led to Wong-ma-kok, as described by one of the participants:

> There may be about 12 houses in the village, the two principal ones, recently whitewashed and decorated on the exterior, having quite a respectable appearance; other three or four were small dirty places, the rest being miserable, and I should think uninhabitable, mud huts. Everything had evidently been deserted at an instant's warning . . . . A few drops of fresh blood were shown me on a stone at the door of one of the best houses.[46]

As the group searched the houses, they found freshly washed clothing still dripping wet, some from which blood stains had not been completely removed. They also found an old man who had a fresh scar on his head. He explained that he had fallen head first on a rock.

The drops of blood also led to the beach. The party scoured the surroundings, but in vain. Then, the following afternoon, a police boat happened upon a body floating 200 yards from the shore. Inspection identified the corpse of Captain Da Costa bearing horrible gashes all over its head and on its hip and a badly beaten arm. The watch and gold rings worn by Captain Da Costa had disappeared.

The authorities arrested several villagers and brought Captain Da Costa's body to the Military Hospital in the island's principal city of Victoria.[47]

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honourable ruler would deeply hate it and be bitterly aroused," but the Queen never replied. *See* GHAI, *supra* note 3, at 3–4.

42. *See* CRISSWELL, *supra* note 11, at 76; GHAI, *supra* note 3, at 22.

43. The Hong Kong government began reporting cases in the Hong Kong Law Reports in 1905. Before that date, the English-language newspapers in the colony reported some cases, often including a complete, though by current American standards cursory, record of the evidence, arguments, and judgment. *See* Peter Wesley-Smith, AN INTRODUCTION TO THE HONG KONG LEGAL SYSTEM 55–56 (1987). The *China Mail*, which served as an official source of governmental information, was published from 1844 to the 1860's.

44. CHINA MAIL, Mar. 13, 1851, at 42.

45. *See* CHINA MAIL, Mar. 1, 1849, at 34. The events related in this section are all contained in this edition of the *China Mail*.

46. *Id.*

47. The *China Mail* does not state whether or not Lieutenant Dwyer's body was ever found, but as the coroner's inquest does not address his death and after the inquest the *China Mail* mentions Lieutenant Dwyer's

The *China Mail* cautioned its readers not to jump to hasty conclusions: "[T]he village of Awong-ma-kok[48] was entirely deserted by its inhabitants; which however is not necessarily a proof of guilty knowledge on their part."[49] Nonetheless, this same article surmised that the attack that ended in the death of the "unfortunate gentlemen . . . must have originated in the hamlet."[50] The article concluded by informing its readers that "all the military, officers and men; Naval officers, both British and American; and a large proportion of the civilians, including H. E. the Governor, the Judge, most of the Government officials, the American Consul, and people of all classes" had attended Captain Da Costa's funeral.[51]

On March 1, doctors, members of the search party, the Chinese prisoners, six jurors (all European, and judging from their names, all British), an interpreter, and a judge gathered or were brought to the Central Police Station for the coroner's inquest. The doctors testified that Captain Da Costa had been beaten to the point of losing consciousness. Though the beating did not kill him, putting him in the water had caused him to drown. The various members of the search party, which included friends of the two officers from the barracks in Stanley and police officials from Victoria, recounted that when they last saw Captain Da Costa and Lieutenant Dwyer, the two were in high spirits but not inebriated. The witnesses then related their discovery the following day of Captain Da Costa's corpse, of spears, of blood leading to a deserted Wong-ma-kok, and of Chinese villagers who appeared to be hiding something. Then came the testimony of the Chinese villagers. Eleven had been imprisoned and compelled to testify; one, Lo-chaw-she, came of her own volition during the inquest to testify and was promptly arrested. Mr. Caldwell, who, as the Assistant Superintendent of Police, had participated in the investigation of the two officers' disappearance and who had just testified in that capacity during the inquest, served as the Chinese witnesses' translator. Lo-asse and the other witnesses explained that Captain Da Costa and Lieutenant Dwyer had attempted to interfere with the women in the house of a neighbor, Chui Apo. Having had no success there, the pair entered Lo-asse's house, and one of them embraced his eighteen-year-old daughter-in-law, Lo-chow-she, around the waist and breasts. Lo-asse and his wife tried to get the officers to leave, but one of them hit Lo-asse on the head with a walking stick. Lo-chow-she's cries attracted the neighbors. The neighbors tried to get the officers to leave, but they struck back. Finally, Chui Apo and six of his men, armed with spears, entered, and a fight broke out. The struggle moved the mass of men outside, where the villagers prevailed. The villagers then slung the fallen officers on bamboo poles covered with fishing net, carried them half a mile down to the beach, and threw them into the water.

Following the four-day inquest, on March 5, the jury returned a verdict: Chui Apo and the six other Chinese identified by the witnesses, as well as any others who had participated in this affair, "feloniously, wilfully, and of their malice aforethought did make an assault upon . . . Da Costa . . . [and] did Kill and Murder" him.[52] The villagers accused of murder had all fled, however. The authorities could only levy the ancient penalty on fugitives: seizure of chattel, in this case Chui Apo's ten cows. The Chinese witnesses were released.

One noteworthy element of this incident is the orderliness of its disposition. Two officers of the Royal forces, who were very popular judging by the number and quality of persons who attended their funeral, were killed by Chinese, the culprits escaped, and yet

name only in connection with Captain Da Costa's murder, it is probable that the body was not found.

48. The *China Mail* refers to this village variously as Awong-ma-kok, Wong-ma-kok, and Wong-maou-kok.

49. CHINA MAIL, Mar. 1, 1849, at 34.

50. *Id.*

51. *Id.*

52. CHINA MAIL, Mar. 8, 1849, at 39.

not even a hint of desire for retribution against the village surfaced, though it would have been easy to detain the witnesses or levy a reprisal against the whole village. Another noteworthy element is the effective workings of a legal system. Officials investigated the incident, collected evidence, questioned witnesses, and performed a judicial inquest before a judge and jury who, with the help of a court translator, heard evidence from both colonial officials and Chinese witnesses. Few long-settled countries, let alone colonies only six years old, could boast such an effective judiciary in the late 1840's.

V. A COMPROMISED DUAL LEGAL SYSTEM IN HONG KONG

From the outset, law held a privileged position in the British plan for managing Hong Kong.[53] The first official act by the British upon the start of their occupation of the island on January 26, 1841, over one-and-a-half years before the signing of the Treaty of Nanking, was the issuance, three days later, (but dated February 2, 1841)[54] of a proclamation providing

> that, pending Her Majesty's further pleasure, the natives of the island of Hongkong, and all natives of China thereto resorting, shall be governed according to the laws and customs of China, every description of torture excepted . . . . And I do further declare and proclaim, that, pending Her Majesty's further pleasure, all British subjects and foreigners residing in, or resorting to, the island of Hongkong, shall enjoy full security and protection, according to the principles and practice of British law . . . .[55]

Thus was conceived a dual legal system based on race; Chinese law covered the Chinese, English law covered the westerners. Though the procedural irregularity of this proclamation led to its prompt disavowal by the Foreign Secretary, Lord Palmerston,[56] the views it expressed eventually prevailed.

Following the proclamation's demise, a debate ensued about how to treat the Chinese living in Hong Kong. Three variations of the respect-for-native-culture argument lay behind the British decision initially to subject Westerners and Chinese to their respective laws. First, the practice, since the early days of British trade in the city of Canton, of the British and Chinese living apart, with each community respecting the other's customs and each community punishing its own criminals according to its own laws; second, the insistence by the Chinese during the negotiations of the Treaty of Nanking that Chinese in Hong Kong be subject to Chinese laws and appear before Chinese magistrates; and third, the more general recognition by the British of the importance of allowing the Chinese to enjoy their own customs, laws, and way of life. The Foreign Secretary, Lord Aberdeen, stressed this last factor in particular.[57]

A practical concern for placating China and observing reciprocity between the two nations lay behind the second factor, which responded to the Chinese argument that, just as the British had insisted on trying their own subjects on Chinese soil prior to their acquisition of Hong Kong, so should the Chinese have jurisdiction over their subjects in

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53. *See* WELSH, *supra* note 33, at 17.

54. *See* PETER WESLEY-SMITH, THE SOURCES OF HONG KONG LAW 87 (1994).

55. 1 JAMES WILLIAM NORTON-KYSHE, THE HISTORY OF THE LAWS AND COURTS OF HONG KONG 4–5 (Vetch and Lee Ltd., 1971) (1898) (quoting a proclamation by Charles Elliot, Esq.).

56. *See* G. B. ENDACOTT, GOVERNMENT AND PEOPLE IN HONG KONG 36 (1964).

57. *See id.* at 28–29.

Hong Kong.[58] Sir Henry Pottinger, the first Hong Kong Governor, who favored granting China jurisdiction over transient Chinese and Chinese accused of serious crimes in the Crown colony, agreed with Chinese demands for Chinese courts on the island or in nearby Kowloon.[59] The Law Officers in London, on the other hand, preferred to extend English law to all, advising that Chinese residents of Hong Kong were British subjects, and therefore, fell under English law.[60] Others in the Foreign Office, however, agreed with Pottinger and overruled the Law Officers.[61]

Soon afterwards, moral considerations for the welfare of the Chinese and practical considerations for control over them led to extending British law to the Chinese.[62] Both Pottinger and members of the Foreign Office began to reconsider the wisdom of subjecting the Chinese to Chinese courts and laws.[63] Secretary of State Lord Stanley expressed concern over the harshness of Chinese laws[64] by noting that any such law "repugnant to those immutable principles of morality which Christians must regard as binding on themselves at all times and in all places"[65] did not belong in a Crown Colony. The British viewed the Chinese demand as an infringement on their sovereignty over Hong Kong and, therefore, rejected it.[66] The British also thought that an increase in crime by Chinese on the island could not be stemmed unless British courts exerted full control over the colony.[67] As a result, local Ordinance No. 10 of 1844, which established the Hong Kong Supreme Court, also provided that the laws in force in England as of April 5, 1843 would apply to Hong Kong, with the significant proviso that, in criminal cases, the British courts were to apply Chinese punishment to Chinese criminals.[68]

This exception to the general applicability of English law was not motivated by concerns for respecting Chinese autonomy and tradition. Rather, it originated in the Hong Kong authorities' belief that British punishment was too lenient to prevent the Chinese from committing crimes. British officials thought that Chinese punishments such as flogging and wearing a yoke deterred the Chinese from acting criminally, whereas a fine would not affect the destitute Chinese and a spell in jail with meals would actually improve their living conditions.[69] An 1847 editorial in the *China Mail*, for instance, recommended flogging over imprisonment because the "substitution of imprisonment for flogging, instead of checking crime, has encouraged it, by holding out, at worst, the prospect of house-room, regular meals, and light labour to idle rogues and vagabonds . . . ."[70] Others believed that the poverty in which the Chinese lived had blunted their sensation of pain, a theory that V. G. Kiernan compares to anglers who convince themselves that fish have no feelings.[71] The Colonial Office objected, presumably because the severity of Chinese laws did not belong

58. *See id.* at 30–32.
59. *See id.*
60. *See id.*
61. *See id.*
62. *See id.*
63. *See id.*
64. Chinese criminal punishments did not differ significantly from English ones, but Chinese criminal procedure offered few of the safeguards provided for in English criminal procedure. Chinese courts resorted to torturing parties and witnesses in order to ascertain the accuracy of testimony, and the right of appeal was very limited. *See* GEOFFREY MACCORMACK, TRADITIONAL CHINESE PENAL LAW 77, 83–86 (1990).
65. ENDACOTT, *supra* note 56, at 32.
66. *See id.* at 29–34.
67. *See id.* at 38.
68. *See id.* at 36; NORTON-KYSHE, *supra* note 55, at 20, 103.
69. *See* ENDACOTT, *supra* note 56, at 36; NORTON-KYSHE, *supra* note 55, at 141–42.
70. CHINA MAIL, May 6, 1847, at 36.
71. *See* V.G. KIERNAN, THE LORDS OF HUMAN KIND: EUROPEAN ATTITUDES TOWARDS THE OUTSIDE WORLD IN THE IMPERIAL AGE 159 (1972).

on British soil, but the practical concerns of the administrators in the field won out.[72] Chinese custom, on the other hand, would be respected unless it conflicted with Hong Kong laws.[73]

These exchanges highlight the tensions between Hong Kong laws designed to advance the colonial enterprise and those designed to temper abuses arising therefrom. The Law Officers in London, who favored granting the Chinese the full blessings of English law, presumably did so in the best interests of the Chinese. Ironically, the administrators who favored the opposite solution—granting Chinese officials in Canton jurisdiction over Chinese in Hong Kong—also invoked the best interests of the Chinese, this time in the form of cultural and social autonomy. It is possible that the underlying motivation for both groups of officials was control. The extension of English law to all would only add to the grandeur of the British Empire, while limiting the protections of English law to Chinese in the colony would make it easier to rule over them. Ultimately, both sides compromised in a way that hurt the Chinese. In the name of British sovereignty and native welfare, British courts, rather than Chinese courts, would have jurisdiction over the Chinese. Also in the name of native welfare, Chinese customary law, as interpreted by British courts, would serve to adjudicate disputes among Chinese,[74] except that customs contrary to Christian morals were to cease. In the name of control, however, British criminal law would judge and Chinese criminal law would punish the Chinese.

VI. ENFORCING THE LAW IN HONG KONG

A. Establishment of a Penal System

The British lost no time in establishing an infrastructure for implementing these legal principles. One of Britain's earliest acts in Hong Kong was the appointment of a chief magistrate in May of 1841. That year also saw the completion of the first two buildings erected in Hong Kong: the offices of the magistracy and the prison. By 1842, attorneys[75] had hung out their shingles, land was being sold and registered, and the magistracy functioned and meted out punishment.[76]

The British paid particular attention to police matters. In addition to the typical concerns for control, the British authorities feared the crime accompanying a wave of Chinese immigrants that increased the island's native population from 6000 in 1841 to 21,000 in 1848 and 39,000 in 1853.[77] This influx of newcomers threatened the peace of the colony because, as Crisswell and Watson explain in their history of the Hong Kong police, these immigrants:

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72. Since humanitarianism had a big influence on British politics during this period, the Colonial Office showed much concern for the welfare of the colonized. Ultimately, however, the sterner views of the local officers, whose daily administrative work reinforced these officers' perceived need for control, generally prevailed. *See* SWINFEN, *supra* note 15, at 123.

73. *See* ENDACOTT, *supra* note 56, at 38; *Ho Tsz-tsun v. Ho An-shi*, 10 Hong Kong L.Rep. 69, 74–75 (K.B. 1915).

74. Any case involving a British subject would be judged according to British law. *See Ho Tsz-tsun*, *supra* note 73 at 76.

75. As in England, the bar was divided into barristers and solicitors. There were so few barristers in the colony's early days (rarely more than two, and often only one, before 1856), however, that solicitors often acted as counsel before the courts. *See* NORTON-KYSHE, *supra* note 55, at 302, 371.

76. *See id.* at 11–12, 16–17.

77. *See* TSAI, *supra* note 37, at 37, 47.

> were free from the restraints of village life and like everyone else, their main concern was to make as much money as they could in the shortest possible time. Most of them were male, so the restraints of family life were also absent and brothels, gambling dens and opium dens proliferated . . . there was undoubtedly a large criminal element who were attracted by the opportunity of pursuing their nefarious activities beyond the reach of the Chinese authorities.[78]

Hong Kong was so dangerous that a supposed diary from 1844 reads: "Town very unsafe; people compelled to sleep with loaded pistol at hand."[79] The Canton Press reported in 1841 that as soon as the jail opened in October of that year, it was "already filled with pirates awaiting trial."[80] The Hong Kong authorities responded by establishing a police force through the enactment of the Police Force Ordinance on May 1, 1844.[81] The government expended considerable sums in maintaining this judicial and police apparatus. In 1849, for instance, the £21,000 annual budget for judicial establishments, jails, and the police force was twice as large as the colony's land rents and came within £3000 of the colony's entire revenues.[82] The police was always to be the largest department in the Hong Kong government. Nevertheless, serious doubts as to the police officers' competence and honesty surfaced.[83]

B. Incorporation of the Chinese in the Hong Kong Legal System

The British in Hong Kong devoted much energy to incorporating the Chinese into their legal system, initially as parties and witnesses, then as jurors, and, many years later, as lawyers and judges.[84] In doing so, the British faced administrative difficulties; some they overcame, others they did not. One instance of successful integration was the recognition of Chinese testimony. Chinese witnesses were seen as presenting a theoretical problem: how does one swear-in witnesses who do not believe in a supreme being capable of inflicting divine retribution in the afterlife to those who lie on the witness stand? The English law of evidence at the time disqualified such individuals from testifying.[85] The Hong Kong authorities recognized the impossibility of applying the English rule, and they avoided this difficulty by appealing to the witnesses' spiritual side[86] and then by threatening

78. Peter Morrow, *Police Powers and Individual Liberty*, *in* CIVIL LIBERTIES IN HONG KONG 243, 245 (Raymod Wack ed., 1988) (quoting C. CRISSWELL & M. WATSON, THE ROYAL HONG KONG POLICE (1841–1945) 6 (1982).

79. SCOTT, *supra* note 41, at 43 (quoting J. Chailley-Bert, THE COLONISATION OF INDO-CHINA: THE BRITISH AT HONG KONG).

80. SAYER, *supra* note 31, at 118 (quoting CANTON PRESS, Oct. 16, 1841).

81. *See id.*

82. *See* CHINA MAIL, Oct. 22, 1849, at 186.

83. *See* SCOTT, *supra* note 41, at 42–43.

84. The first Chinese resident became eligible for jury service in 1858. *See infra* p. 17. A Chinese, Ng Choy, was first admitted to the bar in 1877; four years later, he became acting police magistrate. *See* II JAMES WILLIAM NORTON-KYSHE, THE HISTORY OF THE LAWS AND COURTS OF HONG KONG 261–62, 303 (Vetch and Lee Ltd., 1971).

85. *See* POWELL, POWELL'S LAW OF EVIDENCE 28 (3d ed. 1868); *see also Maden v. Catanach*, 31 L.J. 118 (Q.B. 1862) (holding that a person who does not believe in a god is barred from testifying).

86. The British invoked the oath of paper-burning, which required the witness—or the interpreter in the case of an illiterate witness—to write on sheets of yellow paper that the witness would tell the truth with the Court of Heaven as his witness. The interpreter then read the writing back to the witness, after which he burned the paper. *See* The Hong Kong Almanack of 1848, *quoted in* I NORTON-KYSHE, *supra* note 55, at 313. One observer noted that the Chinese found this form of oath-taking so ludicrous that they burst out in laughter whenever it was performed. Paper-burning oaths lasted in Hong Kong from 1843 to 1856. *See* II NORTON-KYSHE, *supra* note 84, at 146.

temporal means for assuring truthful testimony, such as prosecutions for perjury.[87] There were a few cases where juries refused to convict on "mere Chinese evidence"[88] or where contradictory evidence by the same Chinese witness caused the release of an accused, but, on the whole, Chinese witnesses became integral participants in the Hong Kong judiciary.

C. *Difficulties Faced by Chinese Participants in British Courts*

1. Failure to Understand the Proceedings

Many difficulties remained for Chinese participants in the Hong Kong courts. One of the most serious was the inability of the Chinese to comprehend legal proceedings. They did not understand the very language in which proceedings were conducted and interpreters were few. In 1849, for instance, no interpreters were available for civil proceedings, which had the practical effect of keeping Chinese claimants out of the courts. In criminal cases, the only interpreter, Mr. Caldwell (who was also the interpreter in the coroner's inquest of the Wong-ma-kok incident), was also the Joint Superintendent for Police. As a result, he often served as the main witness against the defendant for whom he also interpreted.[89] Between 1850 and 1852, discussion about this "public scandal" of having so few competent interpreters grew heated,[90] but the deficiency persisted. The lack of interpreters often led to the adjournment of cases,[91] and sometimes to more drastic results, as in 1856 when the entire Criminal Sessions had to come to a halt.[92] The reason for this chronic shortage of interpreters was that those civil servants who undertook the arduous task of learning Cantonese were destined to spend the rest of their days in the lowly regarded position of interpreter in an undesirable colony.[93]

2. Lack of Counsel

The fact that Chinese defendants rarely had counsel[94] lowered their odds even more. Criminal defendants had the right to hire counsel, but they were few, mediocre, and costly. Only six attorneys practiced in Hong Kong between 1842 and 1849, of whom one had been forbidden to continue practicing, two had been deemed incompetent, and one had left due to bad health.[95] The Chinese complained about the exorbitant fees of the colony's few attorneys,[96] but while the government agreed that legal fees were excessive,[97] it also recognized that lowering the fees would deter competent attorneys from joining the Hong Kong bar.[98] The courts would try to obtain counsel for defendants in capital cases, but it appears that this favor was extended primarily to European defendants.[99] At any rate, the

87. *See* CHINA MAIL, Apr. 18, 1851, at 62; CHINA MAIL, Jan. 9, 1851, at 6.
88. 1 NORTON-KYSHE, *supra* note 55, at 191.
89. *See id.* at 223.
90. *See id.* at 294, 327.
91. *See id.* at 454.
92. *See id.* at 381.
93. *See* CHINA MAIL, Dec. 26, 1850, at 206.
94. Defendants in criminal cases had the right to hire counsel, but most could not afford to.
95. *See* 1 NORTON-KYSHE, *supra* note 55, at 219–220.
96. *See id.* at 454.
97. *See id.* at 486, 493–94.
98. *See id.* at 238.
99. *See id.* at 325, 381.

records indicate an extremely small number of Chinese defendants represented by counsel.

3. Lack of Familiarity with British Law and Rules of Procedure

To make matters worse, the Chinese understood nothing of the rules of procedure used in the Hong Kong courts. In one case an undefended Chinese was found guilty of stealing clothes. Upon being asked at the sentencing stage why the sentence should not be passed upon him, the defendant for the first time realized that he was allowed to speak in his defense. Through the interpreter he stated that he had placed identifying marks on all of his clothes, and inspection would show that the clothes he was accused of stealing bore those marks. The Chief Justice dismissed this defense, however, concluding that it should have been asserted earlier. He sentenced the defendant to ten years of transportation.[100] The *China Mail* provided the following commentary:

> We cannot help thinking that an Englishman at home, tried by Englishmen, and defended by Counsel as conversant with the forms as the bench itself, is in a very different position from a Chinese coolie, before an alien Court and Jury, and ignorant alike of our language and judicial procedure.[101]

4. Absence of Chinese on the Jury

Chinese defendants were also denied the benefit of being judged by their peers. The British instituted jury trials from the colony's earliest days. They boasted the first jury trial in China on March 4, 1844.[102] The first Chinese name—that of Wong A Shing, "a well-known and respected Chinaman"—did not appear on a list of eligible jurors until 1858, however.[103] The next year, a second Chinese name was admitted to the Jury List following a six to three vote in the Council.[104] It is not clear why it took so long for Chinese to become eligible for jury service. A draft ordinance in 1851 proposing to make anyone who understood English eligible for jury service[105] indicates that the only obstacle was linguistic, though the encomium that qualified Wong A Shing as well as the debate that took place in the Council regarding the eligibility of the second Chinese juror suggest that jury service entailed requisites beyond language ability. Whatever the cause of the dearth of Chinese jurors, Chinese defendants were judged solely by Europeans for many years. The low esteem in which Europeans held the Chinese—perceiving them as deceitful, corrupt, and apathetic[106]—lessened the likelihood of their receiving the benefit of the doubt before an all-European jury.

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100. *See* CHINA MAIL, Apr. 18, 1850, at 62. For other instances of the Chinese defendants' unfamiliarity with English procedure costing them dearly, see CHINA MAIL, Jan. 27, 1848, at 14; CHINA MAIL, Feb. 21, 1850, at 30; CHINA MAIL, July 18, 1850, at 114. Transportation meant a trip to a penal colony, often Penang.

101. CHINA MAIL, Apr. 18, 1850, at 62.

102. *See* I NORTON-KYSHE, *supra* note 55, at 37.

103. *See id.* at 465.

104. *See id.* at 578.

105. *See* CHINA MAIL, June 26, 1851, at 102.

106. *See* I NORTON-KYSHE, *supra* note 55, at 275, 377, 334, 451.

5. Hostility in the Hong Kong Courts Toward the Chinese

While the Hong Kong courts were open to all, they were not a comfortable place for the Chinese, as the following incident shows. During the Criminal Sessions of April 1850, a British official not known for his enunciation gave instructions over the din of a boisterous courtroom to Fukee, a Chinese constable, about keeping order. When Fukee did not act as instructed, the official struck him in the face, nearly knocking him over, and then he fired him. The *China Mail* ends its account of this incident by wondering what penalties the official would have incurred had he acted similarly in an English court.[107]

The British tried in their fashion to accommodate the Chinese, but different languages, judicial customs, and a lack of respect prevented a successful insertion of the Chinese in the Hong Kong judiciary. British intentions may have been good, but as the *China Mail* noted, practical difficulties interfered: "[A]ny one who has been present during a trial, whether civil or criminal, in which a Chinese has been a party, cannot be surprised that he should be unable to understand or appreciate the excellencies of English law."[108] As a result, the judiciary fulfilled its practical function of keeping the Chinese in line, but achieved less success in its humanitarian mission of bestowing upon the Chinese the benefits of English law.

VII. THE WONG-MA-KOK INCIDENT REVISITED

The Wong-ma-kok incident was not soon forgotten. Some observers began to reconsider the severity of the coroner's inquest verdict. The *China Mail* pointed out that if the testimonies of the Chinese witnesses were true, which was likely because the various accounts bore no discrepancies despite vagaries in translation and an absence of communication among some of the witnesses since the incident, then perhaps the verdict of willful murder with malice was unwarranted.[109] An editor wrote:

> [T]he two officers, by the exercise of a little prudence, might have escaped with their lives, if not unscathed, even after they had annoyed the timid girl, and struck her father and mother-in-law; their crowning act was wrenching the spear out of the pirate's [Chui Apo's] hands, and breaking it in the attempt to strike a blow at him, when he and others came to order, and if necessary to force, them out of the village.[110]

In the meantime, reports of Chui Apo's activities reached Hong Kong.[111] It appears that Chui Apo had been a notorious buccaneer well before the Wong-ma-kok incident and as such had been sought by the Chinese authorities.[112] With no place to go after the incident, Chui Apo joined Shap Ng Tsai's large pirate fleet and rose to command a band of pirates.[113] In November 1849, two British ships sank much of Chui Apo's fleet, but did not succeed in capturing him.[114] Piracy around Hong Kong was a continuing problem, but

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107. *See* CHINA MAIL, Apr. 18, 1850, at 62.
108. CHINA MAIL, Jan. 18, 1849, at 10.
109. *See* CHINA MAIL, Apr. 5, 1849, at 54.
110. *Id.*
111. *See* I NORTON-KYSHE, *supra* note 55, at 259–60.
112. *See id.*
113. *See id.* at 260.
114. *See id.*

during this period, one of the main motivations for the British expeditions against the pirates was Chui Apo's capture.[115] Hong Kong also pressured the Chinese authorities to search for Chui Apo[116] and declared a $500 bounty on him, as well as $250 on each of his accomplices.[117]

A. The Capture

On February 16, 1851, the Hong Kong authorities' efforts finally paid off as the H. C. steamer *Phlegethon* entered Hong Kong with Chui Apo on board.[118] One of Chui Apo's followers had succumbed to the lure of a reward and turned him in to the British in Canton.[119] The notoriety of Chui Apo, along with the fact that all of the witnesses from the coroner's inquest could still be found, led to the appointment of a Special Sessions to try the case. Almost immediately, however, the *China Mail* and some members of the public expressed doubts about the legitimacy of Chui Apo's capture. First, they asserted that it ran counter to Article 9 of the Supplementary Treaty (also known as the Treaty of the Bogue), which clarified some of the issues left unanswered by the Treaty of Nanking. Article 9 reads:

> If lawless Natives of China, having committed crimes or Offences, against their own Government, shall flee to Hong Kong . . . for refuge; they shall, if discovered by the English Officers, be handed over at once to the Chinese Officers for trial and punishment; or if, before such discovery be made by the English Officers, it should be ascertained, or suspected, by the Officers of the Government of China whither such criminals and Offenders have fled, a communication shall be made to the proper English Officer, in order that the said criminals and Offenders may be . . . delivered up. In like manner, if any . . . person . . . who is a Subject of the Crown of England, shall from any cause, or on any pretence, desert, fly, or escape into the Chinese Territory, such . . . person, shall be apprehended and confined by the Chinese Authorities, and sent to the nearest British Consular or other Government Officer.[120]

The *China Mail* and other critics of the Government's methods read Article 9 to prohibit the British from entering China and unilaterally grabbing a suspect.[121] To remove any ambiguity surrounding possible discrepancies in interpreting Article 9, the *China Mail* referred to correspondence between then-Governor of Hong Kong, Sir John Davis, and the Chinese Imperial Commissioner in Canton regarding a similar affair that had taken place a few years earlier.[122] In 1846, Chinese authorities had entered Hong Kong and seized a Chinese criminal who had escaped to the island.[123] The Hong Kong officials objected to this violation of their sovereignty and extracted from the Imperial Commissioner the following promise: "[W]hensoever there shall be subsequently occasion for despatching [Chinese] soldiers to Hong Kong for the purpose of obtaining criminals [we, the Chinese officials shall] first send an official note to the magistrate of your Honorable Country, that

115. *See id.* at 259–60.
116. *See id.*
117. *See* CHINA MAIL, Apr. 3, 1851, at 54.
118. *See* I NORTON-KYSHE, *supra* note 55, at 296.
119. *See* CHINA MAIL, Aug. 14, 1851, at 130.
120. TUNG, *supra* note 35, at 436–37.
121. *See* CHINA MAIL, Feb. 20, 1851, at 30.
122. *See id.*
123. *See id.*

they may cooperate according to the Treaty [Article 9 of the Supplementary Treaty]."[124] This correspondence indicates that the capture of Chui Apo violated both the spirit and the letter of the Supplementary Treaty.

The *China Mail* pursued its criticism of the government by putting forth an argument grounded in the international law principle of reciprocity. The *China Mail* invoked Article 13 of the General Regulations of Trade appended to the Supplementary Treaty, which reads: "Regarding the punishment of English criminals, the English Government will enact the laws necessary to attain that end, and the Consul will be empowered to put them in force; and regarding the punishment of Chinese criminals, these will be tried and punished by their own law . . . ."[125] The paper's editor interpreted this article as providing for British subjects captured in China to be tried and punished by the British, and, likewise, for Chinese subjects captured in Hong Kong to be tried and punished by the Chinese.[126] The language of the General Regulations favor the former proposition, but not the latter. The second half of Article 13 of the General Regulations merely provides that Chinese accused of crimes in China are to be judged by Chinese courts applying Chinese law.[127] Article 13 and the 1842 and 1843 treaties are not based on the principle of reciprocity; rather, they simply announce British extraterritoriality.[128] The *China Mail* adds that the principle of reciprocity of international law mandates such a reading, but it must be remembered that the Treaty of Nanking and the Supplementary Treaty were not meant to be fair; they were drafted by the British unilaterally and imposed on a defeated China.[129] It must also be remembered that, as demonstrated by their drug trafficking trade, the British did not always follow international law when it did not suit their needs.[130]

In addition to jurisdiction, another concern had to do with the likelihood of Chui Apo's receiving a fair trial. A reader who identified himself as "A Common Juror"[131] wrote to the *China Mail* that the *Register*, another Hong Kong newspaper, had reported that Captain Da Costa and Lieutenant Dwyer had been murdered in cold blood.[132] He added that there was a rumor that some of the jurors had already made up their minds to condemn Chui Apo.[133] Common Juror reminded his compatriots that "before an English tribunal the accused is entitled to fair play" and urged the Chief Justice to remind the jurors of "the awful responsibility [they] take upon themselves, when they swear by the 'Almighty God to give their verdict *according to the evidence brought before them.*'"[134] In addition, the fact that everyone in Hong Kong knew the accused only as the pirate Chui Apo who had murdered two officers did not improve his chances of receiving an impartial trial.[135] Alarmed by a tendency among the general population to pre-judge the case, just before the trial, the *China Mail* reprinted part of the coroner's inquest of 1849 in an attempt to provide

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124. *Id.*

125. CHINA MAIL, Mar. 13, 1851, at 42.

126. *See id.*

127. *See* Paul H. Chen, *The Treaty System and European Law in China*, *in* EUROPEAN EXPANSION AND LAW 83, 86 (W.J. Mommsen & J.A. De Moor eds., 1992).

128. *See* TUNG, *supra* note 35, at 32; Chen, *supra* note 127, at 86.

129. *See* TUNG, *supra* note 35, at 32; GHAI, *supra* note 3, at 2.

130. *See* GHAI, *supra* note 3, at 3–4.

131. CHINA MAIL, Mar. 6, 1851, at 38. Lest readers believe that the Common Juror and the editor of the *China Mail* were the same person as a result of their similar views, the editor expressly denied this possibility in an editorial. *See id.*

132. *See id.*

133. *See id.*

134. *Id.*; *see also* CHINA MAIL, Feb. 27, 1851, at 34 (emphasis in the original).

135. *See* CHINA MAIL, Apr. 3, 1851, at 54.

a balanced portrait of Chui Apo.[136]

Common Juror and the *China Mail* understood that this trial concerned more than the fate of one man's life. The *China Mail* observed that the trial had elicited "greater interest than any event that has occurred since the cession of Hong Kong."[137] The main reason for this interest had to do with the fact that this trial challenged the jurisdictional authority of the Hong Kong courts: "[T]he trial of a Chinese freebooter, however notorious, would have attracted comparatively little attention had the result not involved the reputation of our countrymen, the justification of whose memories, and not vengeance on their slayer, was the essence of the question at issue."[138]

B. The Trial

The trial of Chui Apo for the willful murder of Captain Da Costa, first by stabbing, then by drowning, took place on Monday, March 10, 1851, in a courtroom crowded with Europeans and Chinese.[139] Upon being asked to enter a plea, Chui Apo returned no answer and Mr. Gaskell, his attorney, announced that his client intended to remain silent.[140] Mr. Gaskell began by objecting to the court's jurisdiction over Chui Apo in violation of the Supplementary Treaty, adding that it violated the principle of reciprocity, but the judge was not receptive.[141] Mr. Gaskell then argued that Chui Apo's capture—"[h]e had been treacherously waylaid and kidnapped"—was illegal.[142] The Chief Justice summarily dismissed this point saying that it "was a question to be decided between Her Majesty's Plenipotentiary and Governor-General Sü of Canton—[the Court] . . . had the prisoner in the dock, and would try him."[143] With the aid of Mr. Caldwell as interpreter—who later testified as a witness for the prosecution in this trial—Mr. Gaskell called several witnesses who had testified at the coroner's inquest in 1849.[144] He first showed that the two officers were the aggressors and instigators, arguing that no jury could find willful murder since there could not have been malice aforethought.[145] Mr. Gaskell then pressed for acquittal based on the medical examiner's testimony that Captain Da Costa's death was the result, not of wounds inflicted by Chui Apo, but of drowning.[146] Since none of the witnesses saw Chui Apo throw Captain Da Costa into the water, he argued, Chui Apo should be acquitted.[147]

In his charge to the jury, the Chief Justice stressed the fact that Captain Da Costa and Lieutenant Dwyer had started the altercation and urged the jurors to rid their minds of any preconceived notions against Chui Apo and treat him in the same way they would treat a British accused of killing a Chinese.[148] The slightest doubt in the jurors' minds should exonerate the accused, stressed the Chief Justice.[149] He added that he believed that the jurors should return a verdict of manslaughter—which they did after a fifteen-minute

136. *See* CHINA MAIL, Mar. 6, 1851, at 38.
137. CHINA MAIL, Mar. 13, 1851, at 42.
138. *Id.*
139. *See* CHINA MAIL, Apr. 3, 1851, at 54.
140. Mr. Gaskell was a solicitor who regularly pleaded before the courts, to the consternation of some barristers. *See* I NORTON-KYSHE, *supra* note 55, at 302.
141. *See* CHINA MAIL, Mar. 13, 1851, at 43.
142. *Id.*
143. *Id.*
144. *See id.*
145. *See id.*
146. *See id.*
147. *See id.*
148. *See* CHINA MAIL, Apr. 3, 1851, at 54.
149. *See id.*

deliberation.[150] The Chief Justice approved, declaring that even if the jury had rendered the verdict of murder, based on the evidence, he could not have passed the death sentence.[151] Nevertheless, the Chief Justice condemned Chui Apo to transportation for life—the punishment just below death in the colonies—so that, as a practical matter, Chui Apo received the same sentence he likely would have received had he been found guilty of murder.[152] Rather than spend the rest of his days in the penal colony of Penang, several days later, Chui Apo hanged himself in his jail cell.[153] At the coroner's inquest for Chui Apo's death, the jury returned a verdict of suicide, with no censure of the prison officials for negligence.[154]

VIII. A BALANCING ACT

Right after the trial, the *China Mail* expressed doubts about the verdict:

> [I]f Englishmen had killed Chinese under the same circumstances as detailed in the evidence, the act would almost certainly not have been pronounced Wilful Murder [as was the case at the coroner's inquest of 1849], nor perhaps even Manslaughter [as was the case in the trial]. The minority who thus viewed the question, perceiving the strong current of public opinion, and knowing that some of those likely to be summoned to try the case had openly expressed their determination to "hang Chui-apo," hardly expected that six men indifferently balloted for could so far divest their minds of prejudice as calmly to weigh the evidence of the charge, and after a very brief deliberation return a verdict of *Manslaughter*, with the full approbation of the Judge.[155]

The *China Mail's* protests notwithstanding, Chui Apo's trial was a compromise between the authoritarian and humanitarian aims of colonial law. On one hand, the British had to punish this threatening breach of the peace; condoning the murder of British troops could unsettle the colony's stability and ultimately Britain's trade in East Asia. The willful murder verdict pronounced at the coroner's inquest conveyed this imperative. The colonial administrators further emphasized the authoritarian aspect when they seized Chui Apo in China in violation of the Supplementary Treaty and when the judge summarily cast aside this argument during the trial. Finally, the judge's suggestion that the jury find Chui Apo guilty of manslaughter can also be viewed as an attempt to ensure that someone be punished for the deaths of Da Costa and Dwyer and, therefore, as an appeal to the law's authoritarian strain.

Chui Apo's trial was not a mere show trial to appease the Europeans and intimidate the Chinese, however. On the contrary, the trial also evinced a commitment to the law's humanitarian imperative. Despite already having in hand a verdict of willful murder, the British judiciary offered Chui Apo a re-trial, and it appointed him the rare luxury of counsel.[156] As for the judge's hints to the jury, it can also be seen as a means of protecting Chui Apo. Perhaps, in suggesting what he thought to be the appropriate verdict, the judge was responding to concerns that the sensational quality of the trial had clouded the jurors'

150. *See id.*
151. *See id.*
152. *See id.*
153. *See id.*
154. *See id.*
155. CHINA MAIL, Mar. 13, 1851, at 42.
156. *See* CHINA MAIL, Apr. 3, 1851, at 54; CHINA MAIL, Mar. 13, 1851, at 42.

impartiality. At any rate, the verdict of manslaughter better reflected the evidence brought forth against Chui Apo than willful murder.

It is unlikely that in conducting the coroner's inquest and Chui Apo's trial the British authorities consciously balanced the factors for controlling the Chinese against those for advancing them at the expense of following the law. Rather, they applied the rule of law that already incorporated these factors, though with some modification—by offering Chui Apo a trial, by appointing him counsel, by disregarding the jurisdictional issue, and by suggesting a verdict to the jury—in order to reach an outcome acceptable to all. The colonial authorities showed both sides that British rule would not be challenged with impunity and that the Chinese were to be treated fairly. This study now turns to some other criminal cases—some sensational, some mundane—to see how this tension between authoritarianism and humanism in the law played out in other contexts.

A. An Emphasis on Authoritarianism

The first case to cause a stir in Hong Kong was the 1845 trial of Ingwood, which ostensibly stood for the proposition that the criminal laws of Hong Kong applied equally to all. The jury found Ingwood guilty of murder for having tied up a fellow European and thrown him into the sea.[157] The judge sentenced Ingwood to death, making him the first British subject to suffer this fate since the founding of the colony.[158] Much debate followed in the local press concerning the sentence. Many readers who did not want to see an Englishman hanged in Hong Kong argued for mercy.[159] The Colonial Chaplain expressed his view that Ingwood was not a hardened offender and that he displayed good character on the ship. Others argued that Ingwood had committed cold-blooded murder warranting hanging.[160] Few paid attention to Chun Afoon, however, who, a couple of days earlier, had received the same sentence for shooting with intent to murder.[161] Chun Afoon was noticed only to the extent that his presence next to Ingwood before the hangman's noose served as a lesson to keep other British subjects in line: "The miserable wretch [Ingwood] has been doomed to the farther indignity of suffering in company with the Chinaman, Chun Afoon,"[162] wrote the *China Mail*. The newspaper concluded its account of the affair in a hortatory manner:

> It having been determined to carry both sentences into execution, the ends of justice and of good government are likely to be best promoted, so far as such public exhibitions can effect their purpose, by hanging the English murderer and the Chinese ladrone on the same gallows. This will at least convince the people we have come amongst that equal justice will be meted out to all, without respect to birth, or to any consideration except the heinousness of the crime and the proof of guilt.[163]

This was a message case to the British community, for the colony's stability depended also on the behavior of the British. Perhaps the twin hangings also succeeded in promoting the law's humanitarian imperative, though it is more likely that the spectacle of a Chinese

157. *See* I NORTON-KYSHE, *supra* note 55, at 84–85.
158. *See id.*
159. *See* CHINA MAIL, July 3, 1845, at 78; I NORTON-KYSHE, *supra* note 55, at 84–85.
160. *See* CHINA MAIL, July 3, 1845, at 78; CHINA MAIL, June 10, 1845, at 82; I NORTON-KYSHE, *supra* note 55, at 84–85.
161. *See* CHINA MAIL, July 3, 1845, at 78.
162. *Id.*
163. *Id.*

attempted murderer hanging next to an English murderer only showed the Chinese the law's authoritarian character. It should be noted that most of those in attendance at the hanging were Chinese.[164]

Reactions to the next extraordinary case brought forth the necessity of balancing the law's authoritarian and humanitarian missions. On the evening of October 15, 1848, stones were thrown from a Chinese junk toward a boat carrying a party of British merrymakers.[165] The police investigated, but the Chinese refused them entry upon their junks, purportedly because Chinese pirates often employed the ruse of impersonating the police in order to board junks.[166] The police returned with reinforcements, a fight broke out, and two Chinese were killed.[167] At the inquest, the jury returned a verdict tantamount to manslaughter.[168] The *Spectator*, one of several metropolitan and Indian papers to comment on this incident, expressed concern for the impact the verdict would have on trade:

> Our colony of Hong Kong was founded for the encouragement of trade: our Government of Hong Kong has the oddest way imaginable of performing that function . . . . It is not to be hoped that the crying injustice which was obvious to English jurymen will be less glaring to the Chinese; who will doubtless have their own opinion as the mode in which trade is "encouraged" by the "outside barbarians," to the sincerity of British diplomatists, and the value of their assurances.[169]

The verdict reached by the jury was arguably correct—how can the state punish someone for a crime if it cannot identify the perpetrator? Nonetheless, the editorial reminded its readers of the fact that for Hong Kong to be a successful trading colony, it had to earn the respect of the Chinese.

Most Hong Kong cases, however, did not attract much attention from the overseas or local papers. These routine cases show law as a mechanism for control. Punishment was swift, brutal, and impersonal. On January 27, 1848, for instance, the *China Mail* allocated just four lines to the passing of the death sentence on twelve Chinese pirates.[170] In August of the following year, the *China Mail* informed its readers of another six Chinese pirates receiving the death sentence, but the paper could not elaborate because "the crowded state of our columns prevents our giving a full report."[171] The next year, three more pirates were sentenced to hang and nine others to transportation for life.[172] Three months later, a three-line statement in the *China Mail* reported that another nine Chinese pirates had been sentenced to death.[173]

It is difficult to imagine that the condemnation of an Englishman to death would betray such indifference on the part of the Hong Kong public. Recall the amount of controversy stirred up by Ingwood's fate. In order to get an idea of the public reaction to such an occurrence, one must wait until 1859, the second time in Hong Kong's history that

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164. *See id.*
165. *See* CHINA MAIL, Apr. 5, 1849, at 54.
166. *See id.*
167. *See id.*
168. *See id.*
169. CHINA MAIL, Apr. 5, 1849, at 54.
170. *See* CHINA MAIL, Jan. 27, 1848, at 14.
171. CHINA MAIL, Aug. 24, 1849, at 135. The Chief Judge did add, however, that it was likely their sentences would be commuted to transportation for life. *See id.*
172. *See* CHINA MAIL, Apr. 18, 1850, at 62.
173. *See* CHINA MAIL, July 18, 1850, at 144.

an Englishman—or a European, for that matter—was put to death.[174]

The July 1851 Criminal Sessions are instructive, because they contain two cases trying a Chinese and a European for similar crimes. Gillighan, an American, was found guilty of stabbing with intent to kill for his attack on another American.[175] Had the knife been sharper and the victim's pants less stiff, the *China Mail* pointed out, he would have died.[176] For this, Gillighan received a sentence of one year's imprisonment with hard labor, which, for Europeans, did not require working on the chain gang.[177] A Chinese man, Heong Awa, on the other hand, received a sentence of two year's imprisonment with hard labor for striking someone on the arm with a chopper (without the loss of limb).[178]

Despite these seeming inequalities, one finds the following statement in the *China Mail*: "The thing [inconsistencies of the Attorney General to issue indictments] is worthy of notice, not only as affording another instance of those 'technical loopholes,' through which so many villains escape, but also shewing how much more important it seems to be considered to convict British subjects than Chinese."[179] This assertion followed an article pointing out that half of the cases sent for trial by the Chief Magistrate fall apart as a result of technical flaws.[180] In this aspect, it appears that the courts did not reserve these procedural safeguards only for Europeans. The incident that provoked the *China Mail*'s indignation, for instance, involved a Chinese accused of theft who got off because an error in the indictment attributed ownership of the stolen property to the wrong person.[181] An indictment with a similar flaw marred the next case as well. This case involved a British defendant, but the judge said the trial could proceed.[182] These cases demonstrate that British judges followed the law, even if doing so meant releasing the occasional criminal. In this context, the preceding cases where Chinese pirates were hanged routinely can be seen not only as instances of judges sending Chinese to death for the sake of control, but rather, of instances where the judges applied the laws before them. These cases also suggest that it was not always the judges who decided what balance to strike between the law's authoritarian and humanitarian tendencies; instead, they tended to apply laws that had already decided this distribution.

B. An Emphasis on Humanitarianism

There were times, however, when the colonial authorities consciously decided to emphasize the law's humanitarian aspects in order to appease the Chinese. This occurred in 1859 in response to anger of the Chinese population over the murder of a Chinese boy by British sailors.[183] Three British sailors stole money from an English ship's captain.[184] In order to avoid suspicion, they strangled and threw overboard the captain's servant, a Chinese boy, to make it appear that he had stolen the money and fled.[185] A week later, a

174. *See infra* pp. 32-33; 1 NORTON-KYSHE, *supra* note 55, at 579–80.

175. *See* CHINA MAIL, July 24, 1851, at 118.

176. *See id.*

177. *See id.*; CHINA MAIL, Apr. 21, 1850, at 30.

178. *See* CHINA MAIL, July 24, 1851, at 118; *see also* CHINA MAIL, July 18, 1850, at 114 (reporting that a Chinese was sentenced to fifteen years of exile for a crime that landed an Englishman a mere one year in prison).

179. CHINA MAIL, November 22, 1849, at 186.

180. *See id.*

181. *See id.*

182. *See id.* For other cases where Chinese defendants were released due to technical flaws, see CHINA MAIL, May 1, 1845, at 41; CHINA MAIL, Oct. 22, 1849, at 186; CHINA MAIL, July 18, 1850, at 114.

183. *See* 1 NORTON-KYSHE, *supra* note 55, at 579.

184. *See id.*

185. *See id.*

singular coincidence brought the boy's floating corpse to the boat.[186] The judge sentenced one to life in jail and the two others, Gibbons and Jones, to hang, making them the first Europeans sentenced to death in fifteen years.[187] Nearly two thousand persons, mostly Chinese, attended the hanging.[188] They rejoiced to see such strict justice applied to British subjects for murdering a Chinese.[189] The authorities sought to capitalize on this event with the issuance of the following notice:

> In adopting this measure [the execution], His Excellency [the Governor] is influenced by the desire to make known to the Chinese inhabitants in and beyond the Colony that, by Her Most Gracious Majesty's Government and under the authority of British law, equal justice is dealt to all persons without regard to nation, to blood, or to any accidental circumstances whatsoever.[190]

IX. CONCLUSION

British justice in the early days of Hong Kong was tough on all criminal defendants. The British had a colony to administer and they wanted peace and order for the sake of trade. The British insisted on having jurisdiction over all Chinese in Hong Kong and on subjecting them to English criminal law and Chinese punishment. Sentences were severe and the cost and scarcity of attorneys precluded representation for most defendants. Chinese defendants, who for the most part understood neither the English language nor English procedure and who were subjected to the prejudices of all-European juries, faced even greater odds than their European counterparts. Judicial discretion sometimes worsened the odds, as evinced by the decision of the judge in Chui Apo's trial to disregard a legal principle that should have freed the prisoner. In addition, British judges often handed down against Chinese defendants sentences that appear inordinately severe compared to those handed down against western defendants. Sentences levied against Chinese pirates, who presented the greatest threat to the disruption of trade and to the colony's peace, were especially harsh.

Despite this emphasis on order, the British took their perceived mission of enlightening the Chinese through the introduction of English law seriously. The British demanded that all Chinese in Hong Kong fall under British jurisdiction, in part to protect British sovereignty, but in part also to spare the Chinese from some of the arbitrary procedures of Chinese criminal courts. The British instituted the necessities for implementing English law: courts, juries, testimony from both sides, the right to hire counsel, and other procedural safeguards. The judge who let off a Chinese defendant but not a British defendant based on a technical loophole, and the judge who appointed Chui Apo counsel and advised the jury in Chui Apo's trial to display leniency, showed that British courts were not always inimical to the interest of the Chinese. Lo-chaw-she, by coming of her own volition to testify at the coroner's inquest following the Wong-ma-kok incident, showed that some Chinese had confidence in the workings of the Hong Kong courts. Finally, the British tried to create the impression of a legal system based on the principle of equality before the law even when it did not exist (the hangings of Ingwood and Chun Afoon) and capitalized on this principle when it did (the hangings of Gibbons

186. *See id.*
187. *See id.* at 579–80.
188. *See id.* at 580.
189. *See id.*
190. *Id.*

and Jones).

As the first decade of Hong Kong's judiciary demonstrates, English law succeeded in fulfilling its role of establishing peace and order. The judiciary performed this role by exercising strict control over the Chinese, but loosening it when necessary. From this legal system integrating all of the colony's inhabitants developed a tiny region whose tremendous financial success is attributed to the rule of law, whose administration ranks among the cleanest anywhere, and whose inhabitants enjoy the basic civil liberties possessed by so few in the world today.

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