

BRITISH EXTRATERRITORIALITY IN CHINA:
THE LEGAL SYSTEM, FUNCTIONS OF CRIMINAL JURISDICTION, AND
ITS CHALLENGES, 1833-1943.

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Abstract

Extraterritoriality – the extension of jurisdiction upon national subjects beyond the territorial limits of the metropolitan state – was a central part of the British presence in China from the arrival of larger numbers of British traders after 1757 through to 1943. This thesis explores the development of extraterritoriality and the exercise of jurisdiction in its criminal justice capacity. It asks: how can we understand the development of extraterritoriality as a system, as a set of practices and as a set of ideas? What were the main functions of consular jurisdiction? What challenges did extraterritorial jurisdiction face and how can we understand its demise? It demonstrates how extraterritoriality was constituted in the local, regional and global context, as well as putting it in comparative perspective. It shows how law was embedded in social and political processes, leading to its development, adaption and demise in the nineteenth and twentieth centuries, ending with its abolition in 1943. Through doing so it develops a number of themes that enrich the fields of legal history, colonialism and imperialism studies as well as treaty port China history.

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Glossary of Terms

Colony – where a foreign power exercises territorial sovereign power, usually granted through treaty, custom or usage.

Consul – an official representing Britain under the auspices of the Foreign Office. Consuls in China had both administrative roles and legal powers within their consular districts.

Consular Jurisdiction – the legal powers of consuls administering extraterritorial law over their subjects in a foreign territory.

Concession - leased land from Chinese government to a foreign power, which paid ground rent and could sublet plots to its own and, sometimes, other nationals

Extraterritoriality – the extension of a sovereign's legal powers upon its subjects beyond the territory of the sovereign.

Informal Empire – a term used to describe the legal, economic and political influence of an empire without holding sovereign claims to the territory.

Settlement – an area the Chinese Government set aside for foreign residence, where foreigners could lease plots from Chinese landholders.

Treaty Port – a place open to foreign trade, and sometimes settlement according to treaty.

Place Names

Pinyin	Wade-Giles
Beijing	Peking
Fuzhou	Foochow
Guangxi	Kwangsi
Guangzhou	Canton
Hankou	Hankow
Huangpu	Whangpoo
Jilong	Keelung
Jiujiang	Kiukiang
Nanjing	Nanking
Ningbo	Ningpo
Niuzhuang	Newchwang
Pudong	Pootung
Qingdao	Tsingtao
Qiongzhou	Kiungchow
Shantou	Swatow
Suzhou	Soochow
Tianjin	Tientsin
Wusong	Woosung
Xiamen	Amoy
Yangzhou	Yangchow
Yantai	Chefoo
Yichang	Ichang
Zhabei	Chapei

List of Abbreviations

BPP, HC	British Parliamentary Papers, House of Commons
JCPC	Judicial Committee of the Privy Council
FJA	Foreign Jurisdiction Act
FOA	Foreign Offenders Act
HMSC	Her/His Britannic Majesty's Supreme Court for China
NCH	North China Herald
OIC	Order in Council
SMA	Shanghai Municipal Archives
SMC	Shanghai Municipal Council
SMP	Shanghai Municipal Police
TNA	The National Archives

Note on Transliteration

There are two phonetically written Chinese forms: Pinyin and the older Wade-Giles. In order for standardization, names of individuals as they appeared in sources have been kept in Wade-Giles form. Maps and tables from primary sources also retain their original forms of Wade-Giles. However, in the main body of the texts pinyin is used. The abbreviations SMC and HMSC are used in footnote references in order to avoid confusion and make footnotes more concise.

Chapter 1

Introduction

Introductory overview

Extraterritoriality – the extension of jurisdiction upon national subjects beyond the territorial limits of the metropolitan state – underpinned the British presence in China from the mid-eighteenth century through to 1943.¹ Law was a central part of imperialist philosophy, was embodied as an evolving legal system, and exercised as a set of legal practices. In all three respects, British extraterritoriality in China was significant for what it symbolized, justified, and enabled through its exercise. Similar to other colonial and imperial contexts, English law was often considered by British officials, trade companies and merchants as a guarantor of ‘liberty’ (for example, freedom of trade), and a cultural marker of ‘civilization’. As such, British subjects and later officials in China used the rhetoric of law to justify their presence and extraterritoriality. As a system of law, extraterritorial rights were exercised on the China coast from the mid-eighteenth century, when the East India Company monopolised Sino-British trade. However it was in the nineteenth century that British extraterritoriality started to form into a more robust and consolidated set of institutions and practices. In 1833 the first piece of metropolitan legislation framed British jurisdiction in China followed by the Sino-British and Sino-foreign treaties, which reinforced and expanded extraterritorial rights after the conclusion of the Sino-British Opium War (1839-1842). British consuls could hear any case where a British subject was charged with crime. From 1865 onwards the legal system expanded with a new supreme court in Shanghai – Her Britannic Majesty’s Supreme Court for China and Japan (HMSC). Following the Second Opium War (1856-1860) more treaties opened ports for foreign trade and residence, which brought more stationed consuls who could hear cases in consular courts.

¹ See the glossary for a note on key definitions. Although there are subtle differences, ‘extraterritoriality’ is used interchangeably with ‘consular jurisdiction’ in this thesis.

Perhaps most importantly, extraterritoriality was vital because the exercise of extraterritorial jurisdiction allowed British legal officials considerable scope to adjudicate cases that had significant social, economic and political ramifications for Chinese, British, and other foreigners. Although the British presence was built upon commerce and the threat of force ('gunboat diplomacy') law supported, regulated and protected trading and property rights, gave British officials the powers to discipline wayward Britons, as well as the power to mediate disputes involving Chinese, foreigners and Britons, supporting trade and social stability. Legal rights also augmented and came hand in hand with other privileges that followed by virtue of the treaties. These included, *inter alia*, a range of concessions, leases and treaty ports, as well as the creation of foreign administrative bodies such as Municipal Councils.

This type of imperialism therefore involved a series of economic, political and legal privileges without conquering territory. This made China not a colony, but subject to indirect influence of foreign powers. The indirect nature of British power and partial infringement on China's sovereignty was therefore different to colonial settings where Britain had full sovereign rights over land and jurisdiction over all subjects and institutions in the territory. China also had a complex plural legal environment. Treaties containing extraterritorial jurisdiction were concluded with: Britain (1842), the United States (1843), France (1844), Russia (1858), Sweden (1858), Germany (1861), Denmark (1863), the Netherlands (1863), Spain (1864), Belgium (1865), Italy (1866), Austria-Hungary (1869), Japan (1871),² Peru (1874), Brazil (1881), Portugal (1887), Mexico (1899), and Switzerland (1918). These extraterritorial laws existed alongside Qing law for the large number of Chinese subjects, as well as a range of municipal regulations as applied by foreign municipal councils and Chinese administrative bodies in certain treaty port areas. The complex legal landscape coupled with the absence of borders in settlements facilitated crime and the evasion of laws in the treaty ports, especially Shanghai. Procuring nationality of some of the treaty power nations and the movement between territorial municipal jurisdictions was often too easy. Shanghai may not have been exceptional for its levels of crime, but successful legal and physical manoeuvring certainly

² Revised by the Sino-Japanese Treaty of Commerce and Navigation (1896).

contributed to the efflorescence of opium establishments and dens (when variously legalised or outlawed), gambling houses and brothels, forming one of the strongest legacies of the plural legal environment of foreign laws.

During the twentieth century, this complex layering of jurisdictions (and its defects) added to growing challenges towards the practice of consular jurisdiction. Extraterritorially was increasingly understood as an aberration in international law, which emphasised the territorial national sovereignty of nation-states. Alongside the series of political and economic rights that formed a collection of foreign powers and privileges, extraterritoriality became embroiled in the politics of the era. The Chinese authorities and many Chinese understood extraterritoriality as directly compromising China's national sovereignty. The May Fourth Movement (1919) and May Thirtieth Movement (1925) are both remembered as key dates in modern Chinese history as popular anti-imperialist protests. However, whilst aspects of foreign privileges were receded during the 1920s and 1930s, British consular jurisdiction remained. After diplomatic negotiations between Britain and China to abolish extraterritoriality stalled in the 1930s, the exigencies of the Second World War finally brought an end to British consular jurisdiction through treaty in 1943. It brought an end to a long era considered by China as the 'century of humiliation', and more broadly a period of imperialist power in East Asia.

Extraterritoriality was therefore a central part of foreign imperialism and power in China. The legacy of consular jurisdiction, its general importance bolstering trade rights, and negotiations for its abolition are well documented. However, there is not a comprehensive body of research on British consular jurisdiction, especially the *exercise* of British extraterritoriality, including its legal system and frameworks and function of the courts.

Given the paucity of research on the topic, this thesis therefore explores three fundamental questions. How was consular jurisdiction established and developed? What were the main functions of consular jurisdiction and why? What challenges did extraterritorial jurisdiction face, especially just before its demise? The thesis will examine law and the legal system, and focus on

importance of criminal jurisdiction as a vital function of extraterritoriality. By addressing the three questions, several themes link the chapters. Firstly, the chapters show how extraterritoriality was constituted in a local, regional and global context. Events, changes and people in all three contexts overlapped to shape law, the legal system and the exercise of jurisdiction. Secondly, it shows the connections between the extraterritorial legal system and that of neighbouring British colonial legal systems. Thirdly, the chapters show the importance of criminal jurisdiction, and its connection to social and political concerns. Finally, the chapters suggest how we can understand extraterritoriality in comparison with colonial legal systems.

1. Methodology

This thesis has benefitted from a rich array of sources in three primary forms: archival documents, newspaper reports and legal handbooks from the nineteenth and early twentieth centuries. The National Archives in London provides a wide range of documents including general and legal correspondence files of British China officials as well as judges' notebooks. There are several thousand general correspondence files dating from 1834 to 1942. They detail various issues arising between British officials in China, as well as from these officials to other institutions and personnel such as the Hong Kong authorities, Chinese authorities and the Foreign Office. They provide information on the British extraterritorial system, laws, legal changes and issues arising from court cases. Legal correspondence between HMSC, various China consuls, the Foreign Office and other bodies is specifically important to this research. The series FO656 contains 271 files dating from c.1862-1939. They include biannual court case returns, details of appeals, questions of law, and information on particular events that had legal or penal implications. The extraordinary range and richness of these documents directly relating to consular jurisdiction and provides an excellent opportunity to explore the development of the legal system, the transnational legal connections between various individuals and legal bodies. Judges' notebooks in the series FO1092 have also been an excellent source for both quantitative and qualitative analysis of court cases. The series contains 370 files

from 1865-1941 and provide recordings of cases heard by the HMSC and the summary court at Shanghai.³ Cases therefore include summary and high court criminal hearings, as well as civil, divorce and intestate cases, inquests, bankruptcy and probate, and admiralty cases. They also include those of the HMSC Chief Judge ‘on circuit’ – hearing cases in various treaty ports in China from 1865-1941. They contain details of the witness statements, court proceedings, verdicts and sentences. Except for a few incomplete records, the comprehensive scope of these notebooks – especially the summary court cases – are a rarity compared to the majority of other colonial records and other parts of the British informal empire.⁴ These documents are therefore excellent for both qualitative and statistical data analysis. The Shanghai Municipal Archives (SMA) has also provided documents relevant to this thesis. In particular, the foreign executive body of the International Settlement of Shanghai (The Shanghai Municipal Council) and its municipal police force (the Shanghai Municipal police) files (U 1- 4, 14, 16). They give a different perspective on legal issues because they include with correspondence that is absent in the National Archives files, principally correspondence with British consuls and judges and the Shanghai Municipal Council Chairman, as well as various statistics on arrests and policing issues.

English and Chinese-language newspaper reports are also valuable sources. They provide non-official opinions, and reports on court cases, which can be used to corroborate case details found in judges’ notebooks. In particular, the most widely read English-language newspaper in treaty port China, *The North China Herald (NCH)* offers detailed reports on court case proceedings, witness statements, verdicts, and sentencing. The most widely read Chinese-language newspaper *Shenbao* provides reports of high profile Sino-British perspective court cases, providing a different perspective to English language newspaper reports.

³ Judges’ notebooks for all other consular courts except Shanghai do not exist, but there are biannual (but incomplete) returns of cases for most consulates.

⁴ E. Kolsky, ‘A note on the study of Indian legal history’, *Law and History Review*, 23, no.3, (2005), p. 706.

Finally, there are a number of nineteenth and early twentieth century English-language works on extraterritoriality that have been consulted. Most are handbooks published for legal scholars and jurists, elucidating a topic that most legal experts understood poorly. Several focus on the broad topic of foreign jurisdiction, whilst a number of others examine extraterritoriality in Asia more broadly, and a few specifically on China.⁵ They are mainly jurisprudential, focusing on specific issues of the legal framework concerning the exercise of extraterritoriality. They are useful for providing overviews of the key pieces of legislation and aspects of jurisdiction. They are especially helpful for understanding parts of the institutional history of the legal system and aspects of jurisdiction. This provides a basis through which to explore the legal system as it operated in more analytical detail. There are also English language works on aspects of China's foreign relations,⁶ and Chinese-language works on extraterritoriality.⁷ These give different legal and political viewpoints on the exercise of consular jurisdiction.

Use of sources and justification of the time frame

The types of sources and their use have both certain drawbacks and strengths. Archive documents are an excellent resource for legal studies, providing information on laws, and cases giving an opportunity to study a central aspect of British authority in China and everyday governance. The approach is therefore in many respects 'top-down', since many of the sources are written by the hand of the people in power: judges, consuls, officials. However, with a critical eye these

⁵ On foreign Jurisdiction, see for example: W. E. Hall, *A Treatise on the Foreign Powers and Jurisdiction of the British Crown* (Oxford, 1894); on consular jurisdiction in Asia: F. C. Jones, *Extraterritoriality in Japan* (Oxford, 1931); F. Piggott, *Exterritoriality: The Law Relating to Consular Jurisdiction and to Residence in Oriental Countries*, (Hong Kong, 1907); C. J. Tarring, *British Consular Jurisdiction in the East: With Topical Indices of Cases on Appeal from and relating to Consular Courts and Consuls also a Collection of Statutes Concerning Consuls* (London, 1887); on China specifically: G. Keeton, *The Development of Extraterritoriality in China* (2 vols) (London, 1928); Norton-Kyshe, *The History of the Laws and Courts of Hongkong: Tracing Consular Jurisdiction in China and Japan an including Parliamentary Debates: and the Rise, Progress and Successive Changes in the Various Public Institutions in the Colony from the Earliest period to the Present Time* (2 vols) (London, 1898); Edmund Hornby, the first Chief Judge of HMSC provided his perspective on his experience: E. Hornby, *An Autobiography* (London, 1928).

⁶ For example: W. Koo, *The Status of Aliens in China* (New York, 1912); H. B. Morse, *The International Relations of the Chinese Empire*, (2 vols) (London, 1910).

⁷ For example: L. Hao, *Lingshi caipan quan wenti [The Problem of Extraterritoriality]* (Shanghai, 1933).

drawbacks can be overcome; as Ann Laura Stoler has both warned and encouraged, colonial archives should and can be read ‘against’ and ‘along the archival grain’.⁸ Applying a critical eye to such sources can show the intentions as well as the failures of imperial governance. It can also reveal aspects of the nature of imperial rule that are otherwise obscured by official rhetoric of control and the language of formulaic regulations and governance. This thesis also touches upon ethnic minorities and the poor in the courts, and while there are recordings of their voices in a number of cases, this thesis cannot (and does not) attempt to speak for, or reflect their perspective in any comprehensive way. Cases can nevertheless give an excellent glimpse into how such people came to the courts, and their broader context in terms of legal governance and questions relating to extraterritoriality.

As there are a wide range of relevant files, a methodology for selection was necessary. Firstly, general and legal correspondence files were selected by subject matter and dates. Correspondence to and from the most important individuals and institutions were chosen rather than smaller treaty port correspondence. As such, files to and from the Ambassador at Beijing (the senior diplomatic representative of Britain in China), HMSC, the Foreign Office and the Crown Advocate’s Journal files were selected. They reported not only the most important issues of consular jurisdiction but also often summarized key legal issues from the smaller treaty ports. Files were then taken from the starting date of HMSC records (1865) to when the correspondence stopped (c.1938 – 1942). Judges’ notebooks were chosen per decade. In this way, the research was manageable but also drew upon a reasonable number of files so as to be representative of their era.

Newspapers were accessed through online databases using a keyword search. For example, *NCH* contains thousands of issues summarizing many of the British consular court cases. Using keyword search specific cases from archival research

⁸ L. A. Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton, 2009); Ranajit Guha has also expressed the ways in which one can glean information both about those who wrote about subalterns and subalterns themselves through colonial documents. See: R. Guha, *Elementary Aspects of Peasant Insurgency in Colonial India* (Durham, 1999).

could be pinpointed to corroborate certain details and other background information. Unlike the *NCH*, *Shenbao* did not frequently report British consular court cases unless there was a Chinese subject or interest. In this regard, *Shenbao* was consulted for reports on Sino-British court cases in the 1920s and 1930s when there was a significant political and social interest accorded to the Sino-British consular court cases.

The time frame for the thesis has been selected for a number of reasons. The scope of this study extends from 1833-1943, from the first piece of metropolitan legislation governing extraterritorial jurisdiction to its abolition through Sino-British treaty in 1943. The justification for taking a wider time frame rather than a select era reflects the objective of the thesis: to show change over time. Extraterritoriality was not a static system or set of practices, and significant events, as well as changing social, political and economic conditions shaped consular jurisdiction. This will be explored in the next section which considers how this thesis fits into a number of research fields, and adds a new perspective to each.

2. Literature Review

This thesis draws upon, bridges and enriches a number of themes from several fields: legal history, imperial and colonial history, and China and Asian studies. These will be explored in several related subfields: law and extraterritoriality in Asia; imperialism, colonialism and law; and treaty port China studies.

Law and extraterritoriality in Asia

In 2003, Sally Merry boldly proclaimed that ‘the study of law’s place in the colonial enterprise has finally come of age’, having become a ‘mature field with a rich variety of detailed case studies.’⁹ However, her remarks did not pertain to the research of law in East Asia or to consular legal studies in Britain’s informal

⁹ S. E. Merry [review], ‘Martin Chanock, *Law Custom and Social Order: The Colonial Experience in Malawi and Zambia* (New York, 1985)’, *Law and Social Inquiry*, 28, no.2, (2003), p. 569.

empire. In both regards, there have been surprisingly few legal studies.¹⁰ In the former case, the majority of studies in English and Chinese-language have explored the Shanghai Mixed Court.¹¹ Established alongside the consular courts for the trial of Chinese suspects of petty crime in the International Settlement in 1864, the court was often at the centre of jurisdictional and municipal disputes. Chinese magistrates presided over the court and administered Chinese law, but foreign assessors (usually junior consular officers) had a role in watching and sometimes aiding judicial decisions. After 1911, it was under foreign administration, and many works explore how Chinese and western legal principles either struggled to operate together or more successfully overlapped, as well as how the downfall of the Mixed Court was part of the wider political movement to erode foreign imperialism in China. Whilst these works provide useful insights into a critical part of law and order in Shanghai, foreign assessors in the Mixed Court were not exercising extraterritorial law.

Research on British consular jurisdiction in China and elsewhere (principally the Ottoman territories, north Africa, Siam, and parts of the Pacific) is however, even more limited in analysis.¹² The operation of extraterritoriality was a complex legal arrangement of informal empire, and thus far the majority of

¹⁰ On the Chinese legal and penal system as it adopted western ideas, practices and laws see: K. Bernhardt and P. Huang (eds), *Civil Law in Qing and Republican China* (Stanford, 1994); P. C. Huang, *Code, Custom and Legal Practice in China: The Qing and the Republic Compared* (Stanford, 2001); J. Kiely, *The Compelling Ideal: Thought Reform and the Prison in China, 1901-1956* (New Haven, 2014).

¹¹ For example, English-language works include: P. Cassel, 'Excavating extraterritoriality: the "judicial sub-prefect" as a prototype for the Mixed Court in Shanghai', *Late Imperial China*, 24, no.2, (2003), pp. 156-82; M. Eiichi, 'H. A. Giles v. Huang Chengyi: Sino-British conflict over the Mixed Court, 1884-85,' *East Asian History*, 2, no.1, (1996), pp. 135-57; M. Elvin, 'The Mixed Court of the International Settlement at Shanghai (until 1911)', *Papers on China*, 17, no.1, (1963), pp. 131-59; A. Kotenev, *Shanghai: Its Mixed Court and Council: Material Relating to the History of the Shanghai Mixed Court and the History, Practice and Statistics of the International Mixed Court* (Shanghai, 1925); T. Stephens, *Order and Discipline in China: the Shanghai Mixed Court 1911-27* (Seattle, 1992); Chinese-language works include, amongst others: Z. Hu, 'Qingmo minchu shanghai gonggong zujie huishen gongxie faquan zhi bianqian 1911-1912', ['The transformation of legal rights in the Shanghai Mixed Court in the International Settlement from 1911 to 1912'] *Shixue yuekan*, no.4, (2006), pp. 51-6.

¹² Exceptions include: H. Al Baharna, *British Extra-Territorial Jurisdiction in the Gulf 1913-1971: An Analysis of the System of British Courts in the Territories of the British Protected States of the Gulf during the pre-Independence Era* (Slough, 1998); T. Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (Cambridge, 2010); C. R. Pennel, 'Treaty law: the extent of consular jurisdiction in North Africa from the middle of the seventeenth to the middle of the nineteenth century', *Journal of North African Studies*, 14, no.2, (2009), pp. 235-56; C. Roberts, 'British extra-territoriality in Japan, 1859-1899', Ph.D. thesis, (School of Oriental and African Studies, 2010).

scholars working on the topic are not historians, but those from the legal profession or from a background in contemporary political-legal studies. Whereas legal expertise is important for understanding some of the finer details of consular jurisdiction, many of the works lack a firm grounding in, or do not address the historical, social or cultural aspects of the environment that shaped consular jurisdiction. In this regard, Pär Cassel's recent comprehensive and intricately researched study on extraterritoriality in Japan and China and its socio-legal approach is a welcome arrival.¹³ Cassel explores the establishment of extraterritoriality through the bilateral treaties between Japan, China and Britain in the nineteenth century, as well as mixed Sino-British, Japanese-British and Sino-Japanese cases. Cassel shows the different trajectories of extraterritoriality in Japan and China, presenting an alternative to viewing extraterritoriality as a monolithic system or transplant; extraterritoriality developed through local disputes, the local legal environments, treaty negotiation and the impact of wider regional developments. Drawing from Cassel, this thesis explores how British consular jurisdiction within China was also not monolithic; laws, the legal system and cases were constituted in different interlayered contexts of the local, regional and global. The thesis also resonates with Cassel's approach by showing how extraterritoriality was a process, demonstrating how the legal system and its exercise changed over time. Thus it takes a broad time frame to demonstrate how law was modified and consular jurisdiction shaped by social and political considerations.

An exclusive focus on the exercise of British jurisdiction has only been taken by two researchers. In his unpublished thesis, Christopher Roberts has provided the most comprehensive examination of some of the intricacies of the British legal system, its jurisdiction and legislative framework in Japan (and its interconnection to China) from 1859-1899.¹⁴ This provides a good background to the legal establishment in both China and Japan, with emphasis on the metropolitan laws framing jurisdiction, and some of the functions of the courts. However, his study excludes an analysis of the important era of 1833-1859. He

¹³ P. Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (New York, 2012).

¹⁴ Roberts, 'British extra-territoriality in Japan'.

also focuses on the nuances of the developing professionalism of the system. As such, part one of this thesis provides greater analysis of law, the early legal system as well as its later formation, and aspects of law-making and jurisdiction.

Roberts' examination of the British court cases in Japan is closely modelled upon Richard Chang's *Justice of the Western Consular Courts*.¹⁵ Both assert that the criticisms of the British consular system as unprofessional and racially biased are largely unfounded. However, both works analyse court cases with little social context, and thus their assertions of the racial impartiality of consular adjudication is strongly challenged in this thesis. Through looking at criminal jurisdiction this thesis will show how verdicts and sentences could be strongly contingent upon the race of the perpetrator and that of the victim. The courts functioned to augment existing racial prejudices that were inherent in everyday Sino-British social relations.

Whereas the exercise of British consular jurisdiction remains largely unexplored, its acquisition and abolition have generated far more interest for scholars. This is unsurprising given the need to question why extraterritoriality took hold and why it ended when it did. Laying aside the long-standing claim that Western and Chinese legal systems were incompatible (and thus extraterritoriality inevitable), Lydia Liu and Li Chen explore how a clash of empires, as well as the (re)interpretation of international law by western nations was integral to the establishment of extraterritoriality.¹⁶ Cassel demonstrates how extraterritoriality was incorporated within the Qing's plural legal philosophy, complementing the demands from Europeans for consular rights.¹⁷ He shows how in Japan, by contrast, extraterritoriality was challenged from an early date; the Japanese government instigated legal reforms and pursued diplomatic negotiations to end

¹⁵ R. T. Chang, *The Justice of the Western Consular Courts in Nineteenth-Century Japan* (London, 1984).

¹⁶ L. Chen, 'Law, empire, and historiography of modern Sino-western relations: a case study of the "Lady Hughes" controversy in 1784', *Law and History Review*, 27, no.1, (2009), pp. 1-53; L. Liu, *Clash of Empires: The Invention of China in the Modern World Making* (Cambridge, 2004); also see: C. Munn and D. Roebuck, "Something so un-English": mediation and arbitration in Hong Kong, 1841-1865,' *Arbitration International*, 26, no.1, (2010), pp. 87-102; A. Guofei, *Xifeng Luori: lingshi cai pan quan zai jindai zhongguo de queli* [*Consular Jurisdiction: Its Background and Course of Establishment in China*] (Shanghai, 2012).

¹⁷ P. Cassel, *Grounds of Judgment*.

extraterritoriality from the 1870s onwards. This was accompanied by the pursuit of Japanese-British incidents as they were heard in the British consular courts that galvanized media interest and popular support for the abolition of extraterritoriality. In relation to abrogation, Turan Kayaoğlu shows how the development of the Chinese legal system helped China's cause for abolition.¹⁸ K. C. Chan, Wesley Fishel and Shian Li, argue that diplomatic negotiation, Japanese imperialism, the Sino-Japanese war (1937-45) and the US and British declaration of war against Japan, aided the demise and abolition of consular jurisdiction.¹⁹ Although not focusing specifically on the abolition of British extraterritoriality, Robert Bickers and Eileen Scully have also argued that from 1925 there was a narrowing of metropolitan interests in China, reducing the interest of Britain and the US in protecting extraterritorial rights at the cost of political and financial imperatives.²⁰ These works tend to focus more on diplomatic negotiation and local politics to assess the decline of western imperialism and extraterritoriality. This thesis augments these studies, showing how British court cases demonstrate how the exercise of British extraterritoriality was challenged before its abolition.

British jurisdiction was one set of jurisdictional practices in a plural legal environment. A far greater number of works, in both English and Chinese language, have examined the American consular court system in Shanghai.²¹ These studies can allow for a comparative analysis and perspective, especially in regard to the functions of the courts. Eileen Scully's work is the most

¹⁸ T. Kayaoğlu, *Legal Imperialism*.

¹⁹ K. C. Chan, 'The abrogation of British extraterritoriality in China 1942-3: a study of Anglo-American-Chinese relations', *Modern Asian Studies*, 11, no.2, (1977) pp. 257-91; S. Li, 'The extraterritoriality negotiations of 1943 and the New Territories', *Modern Asian Studies*, 30, no.3, (1996), pp. 617-50; Wesley Fishel provides some analysis of British diplomatic negotiations regarding abolition although his main focus is on American extraterritoriality: W. Fishel, *The End of Extraterritoriality in China* (Berkeley, 1952).

²⁰ R. Bickers, *Britain in China: Community, Culture and Colonialism 1900-1949* (Manchester, 1999), pp. 4-5 and pp. 115-62; E. Scully, *Bargaining with the State from Afar: American Citizenship in Treaty Port China, 1844-1942* (New York, 2001), pp. 168-9.

²¹ T. Lee, 'The United States Court for China: a triumph of local law', *Buffalo Law Review*, 52, no.4, (2004), pp. 923-1075; T. Ruskola, 'Colonialism without colonies' *Law and Contemporary Problems*, 71, no.1, (2008), pp. 217-42; T. Ruskola, 'Canton is not Boston: the invention of American imperial sovereignty', *American Quarterly*, 57, no.3, (2005), pp. 859-84; Scully, *Bargaining*; in Chinese language scholarship, the most comprehensive is Mengzhen Wu: M. Wu, *Meiguo zai hua lingshi caipanquan bainian shi* [*One Hundred Years of American Consular Jurisdiction*] (Beijing, 1992).

comprehensive to date.²² Of special interest are the functions of the courts. Scully argues that there were three main functions of the US Court for China. They were disciplinary: keeping wayward Americans in check; tutelary: to provide China with a lesson in American-style jurisprudence; and protective: to support America's economic interests, which became the court's most pressing challenge by 1924.²³ Upwards of 75 per cent of US consular court criminal cases did not involve Chinese litigants, but were between and among treaty port foreigners.²⁴ Regarding criminal justice more specifically, Scully offers two main insights. Firstly, the courts did not punish crimes that could hinder economic opportunity. As such, the court often turned a blind eye to trafficking opium and arms, but focused more on punishing petty crimes.²⁵ Secondly, the US court attempted to rein in wayward Americans, targeting mainly poor whites and augmented shipboard discipline of sailors. During and after the First World War, the function of the courts was also to target political dissidents.²⁶ Scully also argues that the courts were an arena of contestation between race, gender and class, and also notes the openness of the American courts to prostitutes and black Americans.²⁷

This thesis draws some parallels with Scully's analysis in terms of the main functions of the consular courts. It shows how the British courts in their criminal justice capacities were largely mechanisms for disciplining sailors and lower class white men, usually for insobriety, violence and shipboard offences. However, this thesis examines in more detail racial violence and how juries and judges overlooked violent crime towards Chinese subjects. At the same time, poor Britons were the main target of the consular authorities, with the courts punishing vagrancy when it undermined British prestige. The role of race and political offences also had different dynamics in the British criminal justice system. This can principally be seen through the presence of British Indian subjects in China, who formed a majority of the defendants and plaintiffs in the twentieth century, and presented law and order issues to the British authorities

²² Scully, *Bargaining*.

²³ *Ibid.*, pp. 109-10 and p. 172.

²⁴ *Ibid.*, p. 8.

²⁵ *Ibid.*, p. 152.

²⁶ *Ibid.*, pp. 154-5.

²⁷ *Ibid.*, p. 8 and pp. 74-6.

following the First World War and the rise of Indian nationalism. The courts became mechanisms for punishing labour strikers and political dissidents that held many similarities to the British Indian and other colonial legal systems. The thesis adds a different complexity to the ways in which the British justice system understood race relations, political dissent and the connections of empire than the American system.

British consular jurisdiction also came into close contact, and sometimes overlapped with neighbouring British jurisdictions. The crown colony of Hong Kong (established after 1842) and the leased territory of Weihaiwei (1898-1930) in the north east of China had British courts and legal powers. Studies have so far explored these legal systems in relation to governance over the local populace in the settlements.²⁸ Paul Katz, Carol Tan and Christopher Munn all show how the local populace shaped law and legal governance. In Munn's work, law is shown to be a draconian tool of social management over a large and often mobile population. This thesis adds a new perspective on governance between Hong Kong and China showing how the jurisdiction of Hong Kong and consular jurisdiction was over layered for transnational legal governance over suspects and maritime trading companies in the borderlands and the seas. Similar aspects of transnational legal governance also existed in the western regions of China, in connection to British Indian and Burma colonial legal systems, which will also be explored in this thesis.

In sum, given the paucity of studies on British consular jurisdiction, there is significant scope for studying consular laws, the legal system and consular legal governance. There is also scope for comparing British jurisdiction with American jurisdiction, as well as providing a deeper understanding of issues concerning the abrogation of British extraterritoriality. Finally, there is also opportunity to explore how extraterritoriality related to neighbouring colonial jurisdictions. In the next section, themes from the broader field of colonial and

²⁸ P. Katz, 'Ritual? what ritual? secularization in the study of Chinese legal history, from colonial encounters to modern scholarship', *Social Compass*, 56, no.3, (2009), pp. 328-44; C. Munn, *Anglo-China: Chinese People and British Rule in Hong Kong, 1841-1880* (Richmond, 2001); C. Tan, *British Rule in China: Law and Justice in Weihaiwei, 1898-1930* (London, 2008).

imperialism studies will show where this research can fit into empire studies more broadly.

Colonial studies and law

To understand the concept, development, role and demise of extraterritoriality it is necessary to put it into context; what differences and similarities did extraterritoriality and its exercise share with colonial legal systems and jurisdiction? Law, despite playing an important role in colonial expansion and governance, was not richly explored in colonial studies until the 1980s.²⁹ Moving beyond the understanding of law as a mere tool of colonial governance through the subjugating indigenous people, Martin Chanock showed the complexity of law in colonial contexts. In his seminal work, Chanock demonstrated how colonial elites created indigenous law, how British law overlapped with indigenous customs, and how law was shaped by its local environment rather than being a transplanted form of the metropolitan system.³⁰ Chanock thus showed that laws and legal systems were highly adaptive and malleable sets of practices, ideas and institutions in colonial contexts.

The richness of colonial legal studies following Chanock's work came alongside an efflorescence of studies on the interrelated topic of colonial rule, particularly its interplay between political, economic, social and cultural concepts and norms. One aspect that has particular resonance with this research is work upon aspects of governance that intersect with race. Partha Chatterjee argues that British colonial discourses of the principles of liberalism and universalism were not applied in practice.³¹ Race mediated colonial governance alongside other social constructions. More recently, scholars have turned to the ways this was embodied in law, and as a central process to sustaining Empire.³² Bonny

²⁹ On pioneering work on law in the 1980s see: M. Chanock, *Law Custom and Social Order: The Colonial Experience in Malawi and Zambia* (New York, 1985); S. F. Moore, *Social Facts and Fabrications: Customary Law on Kilimanjaro, 1880-1980* (New York, 1986).

³⁰ Chanock, *Law, Custom and Social Order*.

³¹ P. Chatterjee, *The Nation and its Fragments: Colonial and Postcolonial Histories* (Princeton, 1993), p. 10.

³² B. Ibhawoh, *Imperial Justice: Africans in Empire's Court* (2003); B. Ibhawoh, 'Historical globalization and colonial legal culture: African assessors, customary law, and criminal justice in British Africa', *Journal of Global History*, 4, no.3, (2009), pp. 429-51; also see: N. Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor, 2006); B. Owensby,

Ibhawoh for example, argues that British legal universalism was juxtaposed to the ‘othering’ of African subjects in the ‘adjudication of colonial difference’.³³ Elizabeth Kolsky likewise demonstrates how the rule of colonial difference in India was evident in the exercise of criminal jurisdiction and in legal codification.³⁴ Other studies have sought to uncover how race and other discourses of governance were sometimes blurred and subverted in practice. Ann Laura Stoler’s work is particularly influential on the ways in which racial, gendered and class ‘difference’ was built into notions of sovereignty, citizenship and governance.³⁵ The creation, contestation and ambiguities of social identities were common ‘tensions’ of colonial rule.³⁶ Other studies have explored the interlinking aspects of race, class and gender in imperialism and colonialism.³⁷ ‘Tensions’ and ‘colonial differences’ were also mediated by law, and the courtroom was an important site for understanding these social identities such as race, class, gender.³⁸

Most studies discussed so far, have, with a few recent exceptions, focused overwhelmingly on the interaction of indigenous subjects with the law in courts, and a struggle for recognition of indigenous rights in civil law (i.e. land rights, citizenship). This is unsurprising given the small population of British and

Empire of Law and Indian Justice in Colonial Mexico (Stanford, 2008); on its application to early colonial Hong Kong, see: Munn, *Anglo-China*; Laura Ann Stoler has also explored aspects of colonial governance in regard to mixed race sexual relations, families and citizenship. See: A. L. Stoler, *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule* (Berkeley, 2002).

³³ B. Ibhawoh, *Imperial Justice: Africans in Empire’s Court* (Oxford, 2013), p. 4.

³⁴ E. Kolsky, *Colonial Justice in British India: White violence and the Rule of Law* (Cambridge, 2010).

³⁵ F. Cooper and A. L. Stoler (eds), *Tensions of Empire: Colonial Cultures in a Bourgeois World* (Berkeley, 1997); A. L. Stoler, *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule* (Berkeley, 2002).

³⁶ *Ibid.*, *Tensions*.

³⁷ Anne McClintock for example shows the relationship between capitalism, race, class and gender as products of local experiences constructed and interrelated into a matrix of colonial power: A. McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Context* (New York, 1995); for gender and sexual relations in colonial contexts on the same theme, see for example: D. Ghosh, *Sex and the Family in Colonial India: the Making of Empire* (Cambridge, 2006); P. Levine (ed.), *Gender and Empire* (Oxford, 2004).

³⁸ See: C. Anderson, *Subaltern Lives: Biographies of Colonialism in Indian Ocean World* (Cambridge, 2012), pp. 56-92; J. Comaroff, ‘Foreword’ in M. Lazarus-Black and S. F. Hirsch, *Contested States: Law Hegemony and Resistance* (New York, 1994); L. Erikson, *Westward Bound: Sex, Violence, the Law, and the Making of Settler Society* (Vancouver, 2011); B. Ibhawoh, ‘Stronger than the maxim gun: law, human rights and British colonial hegemony in Nigeria’, *Journal of the International African Institute*, 72, no.1, (2002), pp. 55-83; Kolsky, *Colonial Justice*; K. Mann and R. Roberts (eds), *Law in Colonial Africa* (Portsmouth, 1991).

European subjects in colonial contexts, as well as the significance of law as a legacy of the post-colonial era for indigenous subjects. This leaves a large gap on the role of European communities, their interaction with the legal system, and how they shaped codification and the justice system. Fortunately, recent studies are beginning to explore criminal jurisdiction and ‘white’ European crime. Martin Weiner has examined interracial murder cases across the British colonial world: India, Africa, the south Pacific and Caribbean.³⁹ He shows that racial tensions were an important aspect of criminal jurisdiction; interracial violence (European violence towards indigenous subjects) was a common feature of colonial life, juries often acquitted perpetrators, and legal officials had to negotiate being bound by jury decisions and settler politics that threatened to undermine the values of legal universalism.

On a similar theme, Elizabeth Kolsky explores everyday white violence and its role in the codification of law in colonial India.⁴⁰ Kolsky demonstrates how race, class and gender were integral to British colonialism and how poor white men were both the perpetrators of racial crimes in the courts and the object of concern for authorities more generally considering law and order. Central to her argument is the role of everyday violence as underpinning the colonial experience, and how the European settler community protected European racial privileges through legislation. Both Weiner and Kolsky’s research resonate with Sally Engle Merry’s assertion that as laws evolve and develop they mirror the power structure within which they are formed.⁴¹ As race, class and gender asymmetries were prominent in colonial and imperial contexts it is pertinent to ask in what ways the local treaty port China context shaped such reflections. To this end, the thesis draws parallels with the work of Kolsky and Weiner about the integral nature of everyday violence and how the courts overlooked violence towards Chinese subjects. It also draws parallels to the ways in which British legal

³⁹ M. Wiener, *An Empire on Trial: Race, Murder, and Justice under British Rule, 1870-1935* (Cambridge, 2009); for other studies on race and violence see more broadly, see for example: C. Elkins, *Imperial Reckoning: The Untold Story of Britain’s Gulag in Kenya* (London, 2005); J. McCulloch, *Black peril, White Virtue: Sexual Crime in Southern Rhodesia 1902-1935* (Indianapolis, 2000); S. Pierce and A. Rao (eds), *Discipline and the Other Body: Correction, Corporeality, Colonialism* (Durham, 2006).

⁴⁰ Kolsky, *Colonial Justice*; E. Kolsky, ‘Codification and the rule of colonial difference: criminal procedure in British India’, *Law and History Review*, 23, no.3, (2005), pp. 631-84.

⁴¹ Merry, [Review] Chanock, *Law Custom and Social Order*, p. 583.

governance in China understood the problems of vagrancy and the problems posed by sailors in the nineteenth century. Legal governance in China thus shared many similarities with colonial contexts and port cities.

Legal studies and transnationalism in colonial context

Law and legal systems however rarely operated in isolation, and recent studies with a global perspective have enriched the field of colonial legal research.⁴² Lauren Benton has explored plural legal environments where law was integral to social, political and cultural relationships and issues between multiple actors and institutions.⁴³ ‘Jurisdictional jockeying’ between colonial authorities was integral to this complex matrix of relationships and to the formation of colonial rule and global legal structuring.⁴⁴ The treaty ports (like many other settings) were indeed places where laws and jurisdictions overlapped and contested, in this thesis, chapters two and three explore the overlapping of jurisdiction between British consular jurisdiction in China with British colonial jurisdictions (Hong Kong, India and Burma). Rather than contestation, extraterritorial law and colonial law were made malleable in order to achieve a complementary transnational jurisdiction. Although the borderlands have been a popular focus of China studies recently, there is no existing analysis of how British extraterritoriality mediated borders or jurisdictions between Chinese, colonial and extraterritorial authorities. Some of these connections were through penal practices linking China with India, Hong Kong and Burma. Therefore this study adds both to the legal studies field and China studies field on how consular jurisdiction was important to the western frontier regions and for the formation of overlapping transnational jurisdiction.⁴⁵

Transnational connections have also been richly explored in broader colonial and imperial studies. Scholars in the so-called ‘New Imperial History’ school are

⁴² For example: L. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge, 2002); L. Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge, 2010).

⁴³ *Ibid.*

⁴⁴ *Ibid.*, p. 3.

⁴⁵ For example on the China borderlands: P. K. Crossley (eds), *Empire at the Margins* (Berkeley, 2005); D. Lary (ed.), *Chinese State at the Borders* (Vancouver, 2008); J. C. Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* (New Haven, 2009).

taking new analytical approaches to understanding imperial and colonial history by emphasizing transnational networks between people and organizations across borders and colonies.⁴⁶ By focusing on the interaction between these ‘webs’ of empire, New Imperial historians emphasize the local, regional and global contexts of movement and connection.⁴⁷ Connections have been shown in trade, colonial administrators, communication, ideas, convict transportations and migrations.⁴⁸ These studies have helped break down the traditional national and territorial lens of historical studies.⁴⁹ Within the colonial and semicolonial studies field, this focus is a particularly welcome development as colonialism and empire were intrinsically about western nations going beyond their nation states, about ambiguous and contested spaces, and about people and goods that crossed borders.

However, there are comparatively fewer pieces of research on how law, legal jurisdiction and legal knowledge travelled through transnational networks. Thomas Metcalf has shown how Indian law spread to the Middle East and East Africa.⁵⁰ Bonny Ibhawoh has explored the transfer of common law via the Judicial Committee of the Privy Council, with special focus on Africa.⁵¹ Focusing on transnational crime, Eric Tagliacozzo has researched how illegal trafficking created geopolitical borders between the Dutch and British regimes in

⁴⁶ See for example: T. Ballantyne, *Orientalism and Race: Aryanism in the British Empire* (Basingstoke, 2007); D. Ghosh and D. Kennedy, (eds), *Decentering Empire: Britain, India and the Transnational World* (New Delhi, 2006).

⁴⁷ Z. Laidlaw, *Colonial Connections, 1815–1845: Patronage, the Information Revolution and Colonial Government* (Manchester, 2005); D. Lambert and A. Lester (eds), *Colonial Lives Across the British Empire: Imperial Careering in the Long Nineteenth Century* (Cambridge, 2006); others have shown how colonies affected the metropole as much as vice versa, most prominently: C. Hall, *Civilizing Subjects: Metropole and Colony in English Imagination 1830-1867* (Chicago, 2002); M. Fisher, *Counterflows to Colonialism: Indian Travellers and Settlers in Britain, 1600-1857* (Delhi, 2006).

⁴⁸ For example of migration and convict transportation: C. Anderson, *Subaltern Lives: Biographies of Colonialism in the Indian Ocean World, 1790-1920*. (Cambridge, 2012); C. Anderson, ‘Sepoys, servants and settlers: convict transportation in the Indian Ocean, 1787-1945’, in F. Dikötter and I. Brown (eds), *Cultures of Confinement: the Prison in Global Perspective* (London, 2007), pp. 185-220.

⁴⁹ In regard to China, Duara has most prominently elucidated this concept. See: P. Duara, *Rescuing History from the Nation: Questioning Narratives of Modern China* (London, 1995).

⁵⁰ T. Metcalf, *Imperial Connections: India in the Indian Ocean Arena, 1860-1920* (Berkeley, 2007).

⁵¹ B. Ibhawoh. ‘Historical globalization and colonial legal culture: African assessors, customary law, and criminal justice in British Africa’, *Journal of Global History*, 4, no.3, (2009), pp. 429–51; Ibhawoh, *Imperial Justice*.

Southeast Asia, and how colonial legal systems tried to adapt to such non-territorial threats.⁵²

There remains scope for a study that shows the connections within and between parts of the non-colonial world where British jurisdiction existed – such as China. This thesis also shows in more detail how transnational legal connections were made through jurisdiction and how borders shaped these considerations. In China historiography, studies of the transnational, regional and global have yet to richly explore legal connections.⁵³ This thesis shows that the consular court system was therefore part of this web of (legal) empire. This included not only connections to colonial legal systems but also within the extraterritorial system itself which encompassed consular courts in China, and at various points also Taiwan, Korea and Japan.

Treaty port China studies

Extraterritoriality was of course an integral part of modern Chinese history. Alongside the contribution to imperial and legal studies, this thesis draws upon and enriches existing literature on Western imperialism in China. In the beginning of Sinology as an academic field in the 1950s until the 1980s, the western presence formed significant part of studies on modern China. Research focused on Sino-foreign economic and diplomatic relations as well as the role of missionaries.⁵⁴ Although dated, many of these works provide a detailed political

⁵² E. Tagliacozzo, *Secret Trade, Porous Borders: Smuggling and States along a Southeast Asian Frontier, 1865-1915* (New Haven, 2005); other legal borderland studies include: D. Margolies, *Spaces of Law in American Foreign Relations: Extradition and Extraterritoriality in the Borderlands and Beyond, 1877-1898* (Athens, 2011); E. Tagliacozzo, 'Ambiguous commodities, unstable frontiers: the case of Burma, Siam, and Imperial Britain, 1800-1900,' *Comparative Studies in Society and History*, 46, no.2, (2004), pp. 354-77; Z. Fahmy, 'Jurisdictional borderlands: extraterritoriality and "legal chameleons" in pre-colonial Alexandria, 1840-1870', *Comparative Studies in Society and History*, 55, no.2, (2013), pp. 305-29.

⁵³ See, amongst many others on political, economic, communication and social connections: A. G. Frank, *ReOrient: Global Economy in the Asian Age* (Berkeley, 1998); C. Markovits, *The Global World of Indian Merchants, 1750-1947: Traders of Sind from Bukhara to Panama* (Cambridge, 2000); K. Pomeranz, *The Great Divergence: China, Europe, and the Making of the Modern World Economy* (Princeton, 2000); E. Tagliacozzo and W. Chang (eds), *Chinese Circulations: Capital, Commodities, and Networks in Southeast Asia* (Durham, 2011).

⁵⁴ Notable examples include: J. K. Fairbank, *Trade and Diplomacy on the China Coast* (Cambridge, 1953); A. Feuerwerker, *China's Early Industrialization: Sheng Hsuan-Huai (1844-1916), and Mandarin Enterprise, vol.1.* (Cambridge, 1958); E. Reischauer and J. K. Fairbank, *East Asia: The Great Tradition, vol.1* (Boston, 1960).

and economic framework of the British presence in China and the treaty ports.⁵⁵ These included specific works on aspects of British governance, and the agents of informal empire in China, such as consuls.⁵⁶ P. D. Coates touches upon the consul's role as legal mediators and their punitive authority over sailors in the earlier years (1840-1865), however, there is no in-depth analysis on the consul's legal capacities. This thesis addresses this paucity and shows that mediation and punitive powers of summary criminal jurisdiction were critical for the British imperialist presence. These powers also helped to maintain social order in ports where encounters were often underpinned by violence both between British subjects, and between Chinese and British subjects.

The early works focusing on western imperialism in China have several drawbacks. Notable was their narrow focus on politics and economics and their uncritical analysis of imperialism. They also either explicitly or tacitly reinforced the assumption of the centrality of the western imperialism upon modern Chinese history. These criticisms are summarized in the influential work by Paul Cohen, who called for a 'China-centered approach' in China historical studies.⁵⁷ The new turn, sought to minimize the narrative of western imperialism. Aided by the opening of the Chinese archives in the 1980s and 1990s, studies explored Chinese subjects and governmentality, with particular emphasis on China's biggest entrepôt Shanghai, including - of particular interest to this thesis - studies on law and crime.⁵⁸ These studies gave a rich understanding of the life and

⁵⁵ On the treaty ports see for example: A. Feuerwerker, *The Foreign Establishment in China in the Early Twentieth Century* (Ann Arbor: Centre for Chinese studies, 1976).

⁵⁶ P. D. Coates, *The China Consuls: British Consular Officers in China, 1843-1943* (Oxford, 1988); D.C.M. Platt, *Cinderella Service: British Consuls Since 1825* (London, 1971); More recently, Raphael Israeli has researched French consuls in the nineteenth century, see: R. Israeli, 'Diplomacy of contempt: the French consuls and the mandarins in nineteenth-century China', *Modern Asian Studies*, 26, no.2, (1992), pp. 363-94;

⁵⁷ P. Cohen, *Discovering History in China: American Historical Writing on the Recent Chinese Past* (New York, 1985).

⁵⁸ There is an exhaustive amount of literature on treaty port Shanghai examining a range of cultural, social, economic and political aspects of life and governance which cannot be detailed here. Important studies concerning law and crime include: G. Hershatter, *Dangerous Pleasures: Prostitution and Modernity in Twentieth Century Shanghai* (Berkeley, 1997); F. Wakeman, *Policing Shanghai: 1927-1937* (Berkeley, 1995); F. Wakeman, *The Shanghai Badlands: Wartime Terrorism and Urban Crime, 1937-1941* (Cambridge, 1996); F. Wakeman, *Spymaster: Dai Li and the Chinese Secret Service* (Berkeley, 2003); B. Martin, *The Shanghai Green Gang: Politics and Organized Crime, 1919-1937* (Berkeley, 1996); C. Henriot, *Prostitution and Sexuality in Shanghai: A Social History, 1849-1949* (Cambridge, 2001); also see, as an example of other ports aside from Shanghai: P. Carroll, 'The place of prostitution in early twentieth

Chinese governance in the treaty ports, although they did not focus on western subjects or foreign governance. Christian Henriot and Gail Hershatter for example explored prostitution, which was a prominent aspect of the Shanghai nightlife. Hershatter demonstrated how discourses on prostitution and criminality were interlinked with wider socio-political concerns of Chinese national decline, modernization, westernization, disease, power, and agency. Henriot, meanwhile, detailed the diverse social history of prostitution in Shanghai. Brian Martin and Frederic Wakeman analysed the vibrant underworld of crime, including local gang politics, within the shifting relationships between the Chinese authorities and criminal groups in the Chinese city and French Concession of Shanghai.⁵⁹ These studies showed that crime was not only a significant factor in treaty port life, but its intrinsic relationship to politics, economics and social developments. The drawbacks of these works are that they all focused on the ways in which crime and policing were part of the history of Chinese politics, especially Chinese national reconstruction, and its relationship with broader themes of modernization. They focus overwhelmingly on the twentieth century and Nanjing period (1927-1937). Given the importance of crime in Shanghai as both a legacy of the treaty port and as it intersected with governance, there remains scope for a study that explores how British crime, factored into British presence and legal governance.

In recent years, research on western imperialism in China is becoming a resurgent field once more. Robert Bickers has most comprehensively explored the British presence and communities.⁶⁰ Bickers situates the British political and cultural presence in of his studies within the context of events and developments in China. He has focused especially upon the lives of lower class British communities and individuals. He has explored the formation of the interlinking

century Suzhou', *Urban History*, 38, 3, (2011), pp. 413-36; E. Lean, *Public Passions: the Trial of Shi Jianqiao and the Rise of Popular Sympathy in Republican China* (Berkeley, 2007).

⁵⁹ For an analysis on networks between Chinese and foreigners in Shanghai as well as the figure of Du Yusheng as part of the Green Gang in Shanghai, see: N. Dillon and J. Oi, *At the Crossroads of Empires: Middle Men, Social Networks and State-Building in Republican Shanghai* (Stanford, 2008).

⁶⁰ See amongst others: Bickers, *Britain in China*; R. Bickers, *Empire Made Me: An Englishman Adrift in Shanghai* (London, 2003); R. Bickers and C. Henriot (eds), *New Frontiers: Imperialism New Communities in East Asia 1842-1943* (Manchester, 2000); Also see for example: C. Betta, 'From Orientals to imagined Britons: Baghdadi Jews in Shanghai', *Modern Asian Studies*, 37, no.4, (2003), pp. 999-1023.

identities and social relationships concerning race, class, gender, as well as local and national identities of the resident ‘Shanghaiander’ community.⁶¹ In *Britain in China*, and in *Empire Made Me*, Bickers examines the social and political context of British communities and subjects, including that of an individual - Maurice Tinkler - in the Shanghai Municipal Police Force.⁶² His study in the latter not only provides an excellent background of policing that consular jurisdiction was dependent upon, but also touches on race and class, and the boundaries and transgressions of social relationships. Agency and identity are key themes in Bickers’ work on aspects of the British communities in China alongside others on different settler groups in China.⁶³ In a number of works, Bickers has also traced some of the key features of Shanghai as a treaty port, the politics of the era involving Britain, China and Japanese imperialism.⁶⁴ Finally, in *Scramble for China*, as well in a number of other works, Bickers explores the establishment of the British presence in China and emphasizes the connections to the broader British Empire.⁶⁵ Words, ideas, architecture, celebrations of the jubilee, policing, people, trade, all had strong links to and from British India,

⁶¹ Bickers, *Britain in China*; R. Bickers, ‘Shanghaianders: the formation and identity of the British settler community in Shanghai 1843-1937’, *Past and Present*, 159, no.1, (1998), pp. 161-221; R. Bickers, ‘Shanghaianders and Others’, in R. Bickers (ed.), *Settlers and Expatriates: Britons over the Seas* (Oxford: Oxford University Press, 2010), pp. 269-302.

⁶² Bickers, *Britain in China*; Bickers, *Empire Made Me*.

⁶³ Bickers and Henriot (eds), *New Frontiers*; B. Goodman and D. Goodman (eds), *Twentieth-Century Colonialism and China: Localities, the Everyday and the World* (London, 2012); European communities in the British Empire have also been explored by a number of others, see: D. Arnold, ‘European orphans and vagrants in India in the nineteenth Century’, *Journal of Imperial and Commonwealth History*, 7, no.1, (1979), pp. 104-27; H. Fischer-Tiné, ‘The drinking habits of our countrymen’: European alcohol consumption and colonial power in British India’, *Journal of Imperial and Commonwealth History*, 40, no. 3, (2012), pp. 383-408; H. Fischer-Tiné, ‘White women degrading themselves to the lowest depths: European networks of prostitution and colonial anxieties in British India and Ceylon c. 1880-1914’, *Indian Economic History Review*, 40, no. 2, (2003), pp. 163-90; A. Tambe and H. Fischer-Tiné (eds), *The Limits of British Colonial Control in South Asia: Spaces of Disorder in the Indian Ocean Region* (London, 2009).

⁶⁴ See for example: R. Bickers, ‘Incubator city: Shanghai and the crises of empires’, *Journal of Urban History*, 38, no.5, (2012), pp. 862-78; R. Bickers, ‘Settlers and diplomats: the end of British hegemony in the International Settlement, 1937-1945’, in C. Henriot, W. Yeh, (eds), *In the Shadow of the Rising Sun: Shanghai under Japanese Occupation* (Cambridge, 2004), pp. 229-56.

⁶⁵ R. Bickers, *The Scramble for China: Foreign Devils in the Qing Empire 1832-1914* (London, 2011); Bickers, *Britain in China*; on policing see, Bickers, *Empire Made Me*, esp. p. 54 and pp. 64-94; R. Bickers, ‘Ordering Shanghai: policing a treaty port 1854-1900’, in D. Killingray, M. Lincoln and J. Rigby (eds), *Maritime Empires: British Imperial Maritime Trade in the Nineteenth Century* (Aldershot, 2004), pp. 173-94.

Hong Kong and elsewhere in the British Empire.⁶⁶ The detail in Bickers' works on a variety of aspects on the British presence in China – political, cultural, social and economic - is of great importance in framing many aspects of this thesis. Drawing upon his works, this study seeks to show how legal governance was entwined within social and political aspects of life in China.

Finally, a number of recent studies are also exploring western organizations and the machinery of foreign governance. Some scholars, such as James Hevia and Lydia Liu have shown how discursive, linguistic and educational aspects of western domination were as much a part of imperialism as the apparatus of political and economic bodies.⁶⁷ Other research has focused on the complexities of various foreign and quasi-foreign institutions and organizations. Work on the Imperial Maritime Customs explores the political and economic aspect of extraterritoriality. Hans van de Ven and Robert Bickers amongst others have researched the Maritime Customs.⁶⁸ The institution was established in 1854 by British diplomats and staffed by a mixture of foreign and Chinese subjects. It fulfilled an important role collecting customs on China's foreign trade as necessitated by the Sino-foreign treaties. These works demonstrate how British (and other foreign) presence and governance was multi-faceted and multi-layered. This thesis will show how consular jurisdiction operated, and through doing so, will draw the relationship between the courts and the metropole and other legal systems as a critical part of its functioning.

⁶⁶ The connections of migration, and the interlinking features of the local, regional and global in western communities in the treaty ports have been explored in, for example: R. Bickers and C. Henriot (eds), *New Frontiers*; B. Goodman and D. Goodman (eds), *Twentieth-Century Colonialism and China*.

⁶⁷ J. Hevia, *English Lessons: The Pedagogy of Imperialism in Nineteenth-Century China* (Durham, 2003); L. Liu, *The Clash of Empires*.

⁶⁸ H. van de Ven, *Breaking with the Past: The Maritime Customs Service and the Global Origins of Modernity in China* (New York, 2014); amongst other works, Robert Bickers has also explored the Customs Service: R. Bickers 'Purloined letters: history and the Chinese Maritime Customs Service', *Modern Asian Studies*, 40, no.3, (2005), pp. 691-723; D. Brunero, *Britain's Imperial Cornerstone in China: The Chinese Maritime Customs Service, 1854-1949* (London, 2006).

It was the partial control of institutions such as these, that some scholars have considered the ways in which China could be deemed ‘semicolonial’.⁶⁹ This is a term used to describe the multi-layered indirect influence of foreign powers over aspects of China’s sovereignty. Although the term is somewhat nebulous and explored analytically by various scholars, the term semicolonial will be used in this thesis as a descriptive term to mean this indirect influence of power Britain or British China organisations, persons or institutions, including over aspects of Chinese legal sovereignty. It will be used descriptively to distinguish it from colonial settings which had different legislative formats. Although some scholars distinguish between ‘semicolonial’ and ‘informal empire’ this thesis makes no distinction as it uses both terms to describe the partial and indirect nature of foreign legal power in China.⁷⁰

In sum, this research is significant in several ways. Firstly it covers a large historiographical gap on the system and exercise of extraterritoriality. Through doing so it shows how we can conceptualize extraterritoriality in comparative context. Secondly, it provides a new perspective on the ways in which law, the legal system and jurisdiction were shaped in the local, regional and global context. Thirdly, the research is on the lower-class British community who were the majority of people in the courtroom: sailors, vagrants, working class white men and women, and British Indians. These subjects have not been explored comprehensively in relation to legal governance. This thesis uncovers what these court cases can tell us about legal governance and how various social and political ideas, events and processes, shaped legal governance.

⁶⁹ For discussion on ‘semicolonialism’ in China, see for example: T. Barlow, ‘Colonialism’s career in postwar China studies’, *Positions*, 1, no.1, (1993), pp. 224-67; B. Goodman and D. Goodman ‘Introduction: colonialism and China’ in Goodman (eds), *Twentieth-Century Colonialism and China*, pp. 1-22; I. Jackson, ‘Managing Shanghai: the International Settlement administration and the development of the city, 1900-1943, Ph.D. thesis (University of Bristol, 2012); J. Osterhammel, ‘Semi-colonialism and informal empire in twentieth century China: towards a framework of analysis’, in: W. J. Mommsen and J. Osterhammel (eds), *Imperialism and After: Continuities and Discontinuities* (London, 1986), pp. 290-314; R. Rogaski, *Hygienic Modernity: Meanings of Health and Disease in Treaty Port China* (Berkeley, 2004).

⁷⁰ For an in-depth discussion on the concepts of, and historiography relating to ‘informal empire’ and ‘semicolonialism’, see: Jackson, ‘Managing Shanghai, pp.2-29.

3. Structure of Thesis

The thesis is split into two parts. The first part explores the establishment of the legal system, aspects of its legal framework and constitution. It addresses the development of the legal system, through analysing legislation and correspondence relating to administration and jurisdictional powers. In particular, chapter two explores the establishment of the system from 1833-1865, and the connections to colonial Hong Kong. Chapter three explores the development of consular jurisdiction as it spread inland and westwards in late nineteenth and early twentieth century. Analysing two case studies in western China - Xinjiang and Yunnan – the chapter charts the establishment and development of jurisdiction, alongside the legal and penal connections with British India and Burma.

The second part of the thesis containing the fourth, fifth and sixth chapters analyses the operation of extraterritoriality through the exercise of criminal jurisdiction. It addresses the question of the functions of British jurisdiction and some of the challenges it faced. Criminal cases formed the bulk of the legal caseload from 1865-1943, and the chapter show what crimes were commonly heard in the courts and the people who came into the courtroom and gaols. It shows how criminal jurisdiction was integral to British governance, as crime and law were intimately tied to ideas on race, class and gender. Chapter four examines 1865-1900 showing how violence, drunkenness and misdemeanours characterised everyday life. The courts not only functioned to keep wayward Britons in check but were also institutions that were critical for upholding asymmetries of power based on race. At the same time, poor white men and sailors could also be fundamentally challenging to British governance by undermining discourses of class and race that supported imperialism. Chapter five explores court cases involving British Indian subjects between 1900 and 1942. Indian subjects formed the bulk of the defendants and litigants in the consular courts in this period, and the chapter asks why this was, how the legal authorities understood British Indian subjects in regard to criminality, and the legal and penal strategies the British authorities used in response to British Indian ‘criminality’. Through doing so, the chapter explores the interconnections

to British India, the issue of race, and how events such as the Great War shaped British jurisdiction in relation to British Indian subjects. Finally, chapter six explores Sino-British court cases 1900-1942 and the demise of consular jurisdiction.

Taken together, several overarching themes tie and shape the formation of the chapters. Firstly, consular jurisdiction was a dynamic and malleable set of laws and practices. It was shaped by events, people and ideas, and continually redefined through court cases, treaties and amendments to extraterritorial legislation. As such, it was shaped by events, people and processes in the local, regional, and global contexts. Chapters two and three show how law was made suitable for the local frontier regions between Hong Kong and China and that of the western borderland areas. In chapter five, local concerns over British Indian strikes and Indian nationalism shaped extraterritorial law. Law was further shaped by political events in British India, and regional migration from India that saw more Indians in China. Finally, global events such as the Great War shaped jurisdiction. In chapter four, the local, regional and global is considered in terms of the people involved in crime and the British courts and gaols.

The second theme that emerges is British consular jurisdiction as both a system and a process that was inherently transnational. Extraterritorial law and jurisdiction often merged, overlapped or reflected colonial and metropolitan law and legislation. As flows of people, goods, and ideas spanned across territorial boundaries, it was necessary to make extraterritoriality flexible. This included accommodating the jurisdiction of colonial law into the territory of China, and the formations of overlapping jurisdictions to allow extraterritoriality to be exercised outside of China and along the southern Chinese coast. Penal practices also connected China to Hong Kong, Burma and India; prisoners were regularly deported or sent for terms of imprisonment from China to these places. They reflected the exigencies of Britain in China. A lack of finances and prison space coupled with a need to rid of 'troublesome' individuals resulting in the prioritisation of deterrence and frequent resort to deportation.

Thirdly, the thesis shows how criminal cases were often connected to race, class, and gender power relations, tensions and boundaries. Court cases provide snapshots into everyday life reflecting contested social, cultural, political and legal borders, and how these tensions were resolved through court hearings, verdicts, sentencing and punishment. There were inherent tensions for the British consular authorities; the need to uphold asymmetrical power relationships of race, class and gender but also the need to punish the same individuals if it threatened to harm Sino-British relations or undermine British authority. This was apparent from the earliest years, but by the twentieth century, these tensions were compounded by the politicization of extraterritoriality weakening its legitimacy in the decades before its abolition.

Finally, the thesis suggests how we can understand extraterritoriality in comparative contexts. In many ways, extraterritorial jurisdiction shared much in common with British consular legal systems elsewhere and was shaped by metropolitan legislation. However, China also had some unique aspects to its laws and jurisdictions. In terms of legal governance, especially concerning criminal jurisdiction the thesis suggests that there were many similarities with other colonial regimes, especially British India. This was because the British legal authorities understood challenges to law and order in the same way that other colonial authorities did and faced the same demographics and types of people – principally sailors in the nineteenth century and British Indian subjects in the twentieth. The thesis also suggests that by incorporating the western regions in its analysis that extraterritoriality was not just linked to maritime trade and the east coast.

The thesis therefore provides an examination of a crucial aspect of the British presence and governance over British subjects in China from 1833-1943. Chapter two will therefore draw out the development of the legal system, the laws and court structure. This will give a strong basis upon which to understand some of the nuances of the system, and, in addition it will also put into context the operation of extraterritoriality as a framework for the rest of the thesis.

Chapter 2

Laws, Court Structure, Administration and Jurisdiction

Introduction

From the arrival of larger numbers of merchants after 1757, until 1943, principles of extraterritorial jurisdiction formed an important part of Sino-British legal arrangements in China and on its coast. Although the exemption of British nationals from Chinese law is well known as a legacy of foreign imperialism in China, there is little research into extraterritoriality as a legal and administrative system, or as a set of jurisdictional practices. Part one of the thesis is comprised of two chapters exploring this aspect of extraterritorial jurisdiction – its administration, legislation and jurisdictional powers. This chapter explores the development of the consular system and legal practices. It focuses on the legal framework, court structure and the fundamental principles that underpinned extraterritorial jurisdiction in China. It analyses the nineteenth century, as it was during this era that the foundation of the legal system and main jurisdictional powers were established and developed, with more minor adaptations to basic features occurring in the twentieth century. It also explores the system as it operated primarily on the east coast with its connections to Hong Kong. Chapter three explores the spread of extraterritoriality to China's central and western regions in the twentieth century, with special reference to Xinjiang and Yunnan.

This chapter has two aims. Firstly, it provides an institutional narrative of the development of the legal system, which is largely absent from the existing literature. Recent studies on extraterritoriality do not comprehensively focus on the development of the legal system; they take a more limited temporal frame, and focus on specific nations or colonies such as the interconnected consular system in Japan.¹ Significantly, the legislation and rules governing the exercise

¹ R. Chang, *The Justice of the Western Consular Courts in Nineteenth Century Japan* (Westport, 1984); C. Roberts, 'British extra-territoriality in Japan, 1859-1899', Ph.D. thesis, (School of Oriental and African Studies, 2010); Pär Cassel has examined bilateral treaty negotiation with China and Mixed Court cases. See: P. Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (New York, 2011).

of jurisdiction and courts in China - the Orders in Council and metropolitan Acts – have not been comprehensively analysed. This chapter fills these historiographical gaps, piecing together an institutional history of the changing structure of the British legal system. It addresses the key ways in which it changed, demonstrating some of the fundamental aspects of the administration of the legal system and the nature of extraterritorial jurisdiction. This will provide a framework for the rest of the thesis.

Secondly, this chapter shows how these legislative changes are vital for understanding extraterritoriality. Whilst China historiography emphasises the treaties with China - especially the Sino-British Treaty of Nanjing (1842) and the treaty of Tianjin (1858) – as significant as a framework for understanding consular jurisdiction, the chapter demonstrates how metropolitan-initiated legal changes in 1833 and 1865 were equally important for understanding the legal system and nature of British extraterritorial jurisdiction.²

Finally, the chapter shows how legislation and regulations connected the extraterritorial system both to the metropole and its nearest colonial neighbour - Hong Kong. From 1842-1865 the consular courts in China were a part of the Hong Kong legal system. However, despite the institutional link with Hong Kong ceasing after 1865, extraterritoriality remained part of a transnational and interconnected system. Connections were made in a number of ways: through institutional ties, legal personnel, penal practices, legislation and overlapping jurisdictions.

The chapter is split into three broadly chronological sections. Section one explores the period 1833 to 1865. It provides the background of extraterritorial practice before 1833, the key change brought by 1833, followed by its development through the unequal treaties and opening of the treaty ports after

² Although nineteenth and early twentieth century legal handbooks provide a background to legal changes emphasising 1833 as a watershed moment in the development of British extraterritoriality, this chapter will explore in more detail and with analysis aspects of the court system, laws and principles of jurisdiction in its development from 1833 onwards. For example, on the consular ordinances from 1842-1865, based on early Hong Kong newspaper reports, see: J. Norton-Kyshe, *The History of the Laws and Courts of Hongkong: Tracing Consular Jurisdiction in China and Japan and including Parliamentary Debates: And the Rise, Progress, and Successive Changes in the Various Public Institutions in the Colony from the Earliest Period to the Present Time* (vols 1 and 2) (London, 1898).

1842. The second section explores the post-1865 system, starting from the legislation passed that year to reorganise the legal system through the creation of Her Britannic Majesty's Supreme Court for China and Japan in Shanghai (hereafter HMSC). Although there were minor changes to the legal system after this date, in jurisdictional form and practice it remained largely the same from 1865 until the abolition of extraterritoriality in 1943. In the third section, a closer look at legislation reveals the extent of networks between China, Hong Kong, the metropole and the wider empire in legal and penal practices.

1. 1833-1865

Extraterritorial jurisdiction was a familiar concept and legal practice to both the British and the Chinese authorities during the eighteenth century when British merchants came in larger numbers to the China coast. For Britain, the capitulations in the Ottoman dominions from the seventeenth century provided a suitable arrangement for British trading companies to resolve legal disputes between their subjects. Although the development of international law emphasised the principle of territorial nation-state sovereignty, European merchant trading companies often viewed this as inapplicable in non-Christian environments. By custom, usage and, - where possible – treaty, they attempted to acquire types of extraterritorial jurisdiction.³ When British traders came to the China coast, their assertion of European extraterritorial powers was reinforced by the legal philosophy and practice of Qing China. China had a long tradition of according foreigners on China's borderlands customary rights to resolve disputes amongst their subjects. Russians and Central Asian traders had been conferred such privileges in the northern and western borderland regions.⁴ This philosophy of legal pluralism, based on cultural and racial distinctions, was a core principle in the main legal code of Qing China, *The Great Qing Legal Code (Da Qing Lü*

³ C. J. Tarring, *British Consular Jurisdiction in the East: with Topical Indices of Cases on Appeal from and Relating to Consular Courts and Consuls, also a Collection of Statutes Concerning Consuls* (London, 1887), pp. 4-6.

⁴ Cassel provides an in depth background to some of these customary legal rights conferred to foreigners, including those with Russia and the Uzbek khanate of the Khoqand from the seventeenth to nineteenth centuries. See: Cassel, *Grounds of Judgment*, pp. 43-6.

Li) which distinguished different laws and punishments for Mongol, Manchu and Han ethnic groups.

As such, when the Qing authorities allowed a restricted trade with foreign merchants in Canton from 1757, customary rights were accorded to British and other foreign merchant organisations to resolve disputes amongst themselves. This *modus operandi* was thus a familiar and acceptable legal understanding and arrangement to both Europeans and Chinese authorities. The English East India Company (EIC) held a monopoly on the British-China trade, and as a royal charter in 1660 accorded it criminal and civil jurisdiction, it was invested with legal authority over British subjects. However, the Qing placed certain restrictions on foreign traders and the practice of extraterritoriality. These limitations included attempting to prevent the movement of foreigners outside of Canton, and demanding Qing legal sovereignty over British subjects charged with cases of serious injury or homicide offences when the victim was a Chinese subject.⁵ These restrictions came alongside a refusal to open diplomatic relations with Britain or British representatives; two envoys, the Macartney embassy in 1793 and the Amherst embassy in 1816 both failed in their bids to achieve such any such recognition or to sign treaties.

However, the limitations of customary extraterritorial privileges coupled with foreign crime caused a significant amount of friction between the British and Chinese authorities. Increasing numbers of foreign sailors ventured outside of the confines of the space designated for foreigners in Canton, sometimes becoming embroiled in violent incidents with local Chinese. It was, however, cases of murder that caused the most serious fractures to Sino-British relations and the legal *status quo*. After the Chinese authorities execution of the British gunner of the *Lady Hughes* in 1784, (who the EIC claimed did not intentionally kill a Chinese subject), the EIC asserted its right to refuse handing over British subjects accused of killing Chinese subjects. The EIC's stance was reinforced after American authorities handed over the sailor Francis Terranova for allegedly

⁵ Cassel, *Grounds of Judgment*, p. 42; L. Chen, 'Law, empire, and historiography of modern Sino-western relations: a case study of the "Lady Hughes" controversy in 1784', *Law and History Review*, 27, no. 1, (2009), p. 10.

accidentally killing a Chinese subject in 1821, and he was also executed.⁶ The political and legal environment by 1833 was therefore one of rising tensions; despite an initial compatibility between China and Britain over the use of customary extraterritoriality, it was one that was based on a fragile balance of negotiation and accommodation over surrendering suspects for murder cases. Adding to the issues of the illegal opium trade and lack of diplomatic recognition, legal disputes over mixed murder cases strained Sino-British relations.

Order in Council 1833: a nascent legal system

Although there was no diplomatic recognition of British representatives in China or an ease on the restrictions on where foreigners could trade until 1842, customary extraterritoriality in contrast fundamentally changed in 1833. It was not negotiations with the Chinese authorities that provoked change, but the demise of the EIC – the chief delegated legal authority over British subjects. After the failure to renew the EIC’s charter in 1833, the EIC could no longer claim legal authority over British subjects on the Canton coast. In response, a ‘bill to regulate the trade to China and India’ later given royal assent as an Act of Parliament dated the 28 August 1833 and an Order in Council on 9 December 1833 (hereafter OIC1833) rectified the legal powers on the Canton coast.⁷ The former transferred the legal powers and authority of the EIC to newly appointed British official representatives in Canton - the Superintendent of Trade and two other superintendents – who were empowered to create courts and delegate legal authority onto others to hold courts (sections V and VI). Section VI specially

⁶ George Lanning and Samuel Couling claimed that there were in total sixteen cases of alleged murder or manslaughter between 1689-1833 on the China coast between British and Chinese subjects: G. Lanning and S. Couling, *History of Shanghai* (Shanghai, 1921), p. 214; Meanwhile, Koo claims there were no more than six in the century leading up to 1833: W. Koo, *The Status of Aliens in China* (New York, 1912), p. 98.

⁷ BPP, HC: 1833, [528] *A bill to regulate the trade to China and India*; L. Hertslet: *A Complete Collection of the Treaties and Conventions, and Reciprocal Regulations, at Present Subsisting between Great Britain and Foreign Powers, and of the Laws Decrees, and Orders in Council, Concerning the Same; so far as they Relate to Commerce and Navigation, to the Repression and Abolition of the Slave Trade, and to the Privileges and Interests of the Subjects of the High Contracting Parties, Volume V* (London, 1840) ‘Act of Parliament to Regulate the Trade of China and India 28 Aug., 1833’; L. Hertslet, *A Complete Collection of the Treaties and Conventions, and Reciprocal Regulations, at Present Subsisting between Great Britain and Foreign Powers, and of the Laws Decrees, and Orders in Council, Concerning the Same; so far as they Relate to Commerce and Navigation, to the Repression and Abolition of the Slave Trade, and to the Privileges and Interests of the Subjects of the High Contracting Parties, Volume V* (London, Butterworth, 1840) , pp. 82-7.

allowed for a creation of a Court of Criminality and Admiralty Jurisdiction for serious cases in Canton, with a Superintendent to preside over it. The OIC1833 specified that the court was to correspond in practice and proceeding of His Majesty's Courts of *oyer and terminer* (Courts of Assize) in England and have a jury of twelve.⁸ In due course, a Seaman's Court at Whampoa (located near to Canton) was also created at the anchorage for the purpose of hearing cases connected with indiscipline of sailors.⁹

The Chinese authorities objected to the creation of the latter court, which they claimed infringed Chinese legal sovereignty, and British jurists queried its legality given the absence of consent from the Chinese authorities.¹⁰ Although the court only formed once to hear a case prior to the Opium War (1839-42), it was of great importance. Several English sailors were charged with killing a Chinese man, Lin Weixi. Finding the suspects innocent of murder, however, the assumption of these jurisdictional powers and the verdict was the spark bringing increasing tensions between China and Britain over a number of issues including the opium trade to a head, expediting the start of the Opium War. The new court established through the OIC1833 and jurisdictional politics was therefore an important factor in the decline of Sino-British diplomatic relations, contributing to war.¹¹

Alongside the new courts and the exercise of jurisdiction, principles of jurisdiction within the OIC1833 were equally significant in the shaping of British extraterritoriality. Included in the OIC1833 were two key principles of

⁸ As its name suggests, it did not have the powers of civil adjudication as in English Assize courts, which remained in the realm of informal arbitration resolution. See: D. Roebuck and C. Munn, "'Something so un-English': mediation and arbitration in Hong Kong, 1841-1865", *Arbitration International*, 26, no. 1, (2010), p. 88; the issue of a court with civil powers with additional powers to expel British subjects was raised during 1833-1838, but it was rejected in parliament because it was thought that it may cause disputes between China and Britain and the powers were too arbitrary: W. C. Costin, *Great Britain and China 1833-1860* (Oxford, 1968), pp. 42-3.

⁹ Lanning and Couling, *History of Shanghai*, p. 218; although Costin appears to suggest that Superintendent Elliot in 1838 did not have the disciplinary powers necessary to control rowdier elements of merchant seamen: Costin, *Great Britain and China*, pp. 43-5.

¹⁰ W. Koo, *The Status of Aliens in China*, p. 98; E. Scully, *Bargaining with the State from Afar: American Citizenship in Treaty Port China 1844-1942* (New York, 2001), p.40 original citation: *Law Officers' Opinions to the Foreign Office 1793-1860* (Westmead, 1970), 19, no.22, p. 66.

¹¹ There are only a select few scholars who explore the law and cases in depth, for example in the led up to the First Opium War, see: Cassel, *Grounds of Judgment*; Chen, 'Law, empire, and historiography', pp. 1-53.

extraterritorial jurisdiction that would remain until the abolition of extraterritoriality in 1943. The first was the territorial underpinning of extraterritoriality. The OIC1833 extended the British jurisdictional geographical limit to anywhere ‘within the dominions of the Emperor of China.’¹² This allowed, without bilateral treaty agreement, the jurisdictional principle that British extraterritorial jurisdiction was not territoriality limited to Canton and its coast, but followed a British subject anywhere within the Chinese empire’s territorial borders. Such changes would not have been a concern to the Chinese authorities at the time as British subjects were still restricted in trade and movement to the Canton coast. Further, although those venturing out of Canton were still considered to be under British jurisdiction, the OIC1833 embodied the principle of the extension of extraterritoriality to follow subjects. Hence although later commentators would highlight the territorial notion of extraterritoriality as placed within the later treaties with China,¹³ the notion of territoriality in extraterritoriality was actually already embedded in the OIC1833 without bilateral treaty negotiation.

The OIC1833 also contained the principle of the territorial limits of maritime extraterritorial jurisdiction. It expressly extended British extraterritorial jurisdiction to one hundred miles from the China coast.¹⁴ The provision was a curious concept as there was no precedent of one hundred miles as constituting the extent of a nation’s territorial waters in international law or indeed within English or Chinese law. Whilst China had no clear definition of its own territorial waters, most European nations including Britain usually understood territorial waters as encompassing somewhere between a one and three miles; the range of cannon defence for a country. The only reference to a one hundred mile jurisdictional limit can be found in a bill from 1812-13 for the EIC.¹⁵ Within it, a provision allowed for a special action in the jurisdiction of crimes committed by British subjects at a distance of more than one hundred miles from the British Indian Presidencies in Calcutta, Madras and Bombay. The implication was that

¹² L. Hertslet, *Treaties and Conventions Volume V*, ‘British Order In Council, relative to the regulation of the trade and commerce of British subjects at Canton in China’, p. 82.

¹³ Koo, *The Status of Aliens in China*, p. 195.

¹⁴ Hertslet, *Treaties and Conventions Volume V*, ‘British Order In Council, relative to the regulation of the trade and commerce of British subjects at Canton in China’, p. 82.

¹⁵ BPP, HC: 1812-13 [327] *Sess. 1812-13, A bill (as amended on re-commitment) for continuing in the East India Company*, p. 39.

one hundred miles was the ordinary limit of such legal powers. The OIC1833 itself derived from a bill regulating trade in *India* and China jointly. It therefore suggests that this key principle of extraterritorial jurisdiction was brought from jurisdictional practices in India and applied to China. The provision in legislation lasted until 1943, and there is evidence of its application in practice; a criminal case in 1884 for example reinforced the principle when a case of assault could not heard in the consular court as it occurred just beyond one hundred miles.¹⁶ No other British semicolonial or colonial part of Empire appears to have adopted this rule for maritime jurisdiction, making it a unique aspect to British extraterritorial jurisdiction in China - albeit borrowed and adapted from British Indian legal practice.

Finally the year 1833 was also significant because statutory legislative changes tied extraterritorial jurisdiction to that of the metropole and broader empire; the Judicial Committee of the Privy Council (JCPC) became the highest appellate court for all colonial settings and places exercising extraterritoriality.¹⁷ Whilst the JCPC and its colonial administrative connection between various parts of the British Empire have been explored, it is often forgotten that it included places where extraterritoriality was exercised, including China. This meant that the decisions of the JCPC were binding upon the British courts in China and decisions made on appeals from other parts of the British Empire could be applied and bound to extraterritorial jurisdiction in China; an early metropolitan and colonial link to the extraterritorial legal system.

The OIC1833 therefore had four main implications. Although the position of the British legal authorities did not change vis-à-vis the Chinese authorities, the Superintendent of Trade and his political and legal authority was more closely aligned with the metropolitan authorities of the Law Officers of the Crown and Foreign Office. The creation of the courts exercising criminal and admiralty powers formed the basis of the consular legal system until 1865. As shown by the *Lin Weixi* case, this also incorporated a *de facto* jurisdiction over mixed murder cases. The extent of such powers was extended to one hundred miles in

¹⁶ TNA: FO656/70 Nagasaki consulate to HMSC, 6 Jan., 1884.

¹⁷ For more on the role of the JCPC see: B. Ibhawoh, *Imperial Justice: Africans in Empire's Court* (Oxford, 2013).

maritime jurisdiction and encompassed the whole territorial empire of China. As such, much as the Republican diplomat Wellington Koo stated in 1912, there was indeed a ‘persistent, though slow and irregular, course of development’ of extraterritoriality prior to 1842.¹⁸ Although Koo suggested this was primarily through the ‘many battles with the Chinese authorities for its own existence, [having] undergone several stages of experimentation and [having] begun to assume an aspect of stability and appear inevitable’¹⁹ it was also because (as explored above and more below), it had started to form a nascent legal system with more robust metropolitan legislation and principles of extraterritorial jurisdiction that would remain for the next century. This meant that the Sino-foreign bilateral treaties that came next consolidated existing practices, as well as establishing new ones.²⁰

1842 Treaty of Nanjing: expanding and consolidating the British legal system and jurisdiction

Nine years after the promulgation of the OIC1833, Britain was given the opportunity to procure the basis of Chinese consent to extraterritoriality through treaty. The Sino-British Opium War (1839-1842) had ended with a resounding defeat for China, which agreed to sign treaties incorporating extraterritorial jurisdiction under duress. The legal reasons for British attempts to gain extraterritorial privileges are worth outlining, given that Britain was already forming a more consolidated extraterritorial set of practices as noted above.²¹ There was a perception of a ‘strong, fundamental and mutual distrust’ between the Qing and British authorities,²² and this manifested itself particularly in Sino-British murder cases. In turn, these cases could threaten to undermine diplomatic and trade relations. There was also, whether exaggerated or not, a discourse or assumption that Chinese and western jurisprudence was fundamentally too divergent. This included incongruent definitions of justice, evidence, and civil law.²³ This therefore made extraterritorial treaties outlining legal rights

¹⁸ Koo, *The Status of Aliens in China*, p. 63.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ This discussion leaves aside possible reasons that tied into wider political and economic aspects of imperialism - which are beyond the scope of this chapter.

²² Lanning and Couling, *History of Shanghai*, p. 214; T. Stephens, *Order and Discipline in China: the Shanghai Mixed Court 1911-27* (Seattle, 1992).

²³ See for example: Lanning and Couling, *History of Shanghai*, p. 216.

necessary, or indeed inevitable. More recently, some historians have argued that treaty-based extraterritoriality came about through the clash of ideas regarding sovereignty, and a need to control wayward nationals from undermining diplomatic and trade interests.²⁴ Others have shown how concepts of international law were reinterpreted during the early nineteenth century.²⁵ International law - once considered a legal framework reinforcing equal national territorial rights - was imbued with ideas of 'civilisation' and Christian morals that made certain nations and empires excluded from such rights. In particular, Henry Wheaton's *Elements of International Law* (1836), a celebrated handbook of international law during the era, thereby relegated places such as China as 'non-civilised', and hence removed the application of its territorial laws for foreign 'civilised' nationals.²⁶

Whether it was for one or all of these reasons, the treaties signed under duress by China provided for the consolidation and extension of extraterritorial rights. The Treaty of Nanjing (1842) contained two key features. Firstly, with the opening of new treaty ports for foreign trade and residence, British 'superintendents or consular officers' were designated as the medium of communication between the Chinese and British authorities, with such officials accorded administrative and legal powers within certain ports, or trading cities.²⁷ These were: Shanghai, Guangzhou, Fuzhou, Ningbo and Xiamen – all on the east coast - with Hong Kong ceded in perpetuity to Britain.²⁸ China also agreed to pay indemnities to Britain, abolish the former restrictions on trading with foreigners, create a 'fair and regular' tariff, release British prisoners and grant amnesty to Chinese subjects who had connections to British interests.²⁹

²⁴ On sovereignty see: Chen, 'Law, empire, and historiography', pp. 1-53; L. Liu, *The Clash of Empires: the Invention of China in Modern World Making* (Cambridge, 2004); on extraterritoriality for controlling wayward nationals, especially after 1833 onwards, see: Scully, *Bargaining*, pp. 39-41.

²⁵ Liu, *The Clash of Empires*, pp. 108-39; R. Horowitz, 'International law and state transformation in China, Siam, and the Ottoman empire during the nineteenth century', *Journal of World History*, 15, no.4, (2004), pp. 452-3.

²⁶ *Ibid.*

²⁷ Article II of Treaty of Nanjing, Aug. 29, 1842. See: Statistical Department of the Inspectorate of General Customs, *Treaties, Conventions, etc., between China and Foreign States* (2nd ed.) (Shanghai: Kelly & Walsh 1917), p. 352.

²⁸ Article III contained the ceding of Hong Kong. See: Customs, *Treaties*, p. 352.

²⁹ Article IV-X: Customs, *Treaties*, pp. 353-55.

The subsequent 'General Regulations of Trade' provided more specifically for the method of dispute resolution and extraterritorial rights. Article XII allowed a subordinate consular officer to control seamen and others at the anchorage of any port, and to exert himself to prevent quarrels between British seamen and Chinese.³⁰ Article XIII, however, was more important in that extraterritoriality was no longer partial. Extraterritoriality henceforth included British and other treaty power nationals as defendants in any crime, including homicide involving Chinese victims. Article XIII stated:

Whenever a British subject has reason to complain of a Chinese, he must first proceed to the Consulate and state his grievance. The [British] Consul will thereupon inquire into the merits of the case, and do his utmost to arrange it amicably. In like manner, if a Chinese have [sic] reason to complain of a British subject, he shall no less ... endeavour to settle it in a friendly manner ... If unfortunately any disputes take place of such a nature that the Consul cannot arrange them amicably, then he shall request the assistance of a Chinese officer that they may together examine into the merits of the case, and decide it equitably. Regarding the punishment of English criminals, the English Government will enact the laws necessary ... and the Consul will be empowered to put them into force; and regarding the punishment of Chinese criminals, these will be tried and punished by their own laws.³¹

A year later, the Treaty of the Bogue (1843) added more legal provisions. Article IX provided for the extradition of criminals of both nations if fleeing from their respective authorities.³² Article X provided for the stationing of an English cruiser to enforce order and discipline amongst the crews of merchant ships, and to support the authority of the consul.³³ Article VIII contained the principle of Britain's most-favoured-nation status.³⁴ This provision was significant as it accorded Britain the same privileges as outlined in any other Sino-foreign treaty. Indeed, the subsequent Sino-American Treaty of Wangxia (1843) (Treaty of Wanghia) and French Treaty of Huangpu (1844) (Treaty of Whampoa) outlined more clearly that national representatives could exercise criminal and civil jurisdictional privileges over their subjects, reinforcing and making more detailed and explicit the role of British consuls to perform judicial and

³⁰ Article XII, Customs, *Treaties*, p. 388.

³¹ Article XII of 'General Regulations of Trade', Customs, *Treaties*, p. 388.

³² Article IX Customs, *Treaties*, p. 393.

³³ Article X Customs, *Treaties*, p. 394.

³⁴ Article IX Customs, *Treaties*, p. 393.

administrative duties over British subjects.³⁵ This included, for example, Article XXVI in the Treaty of Huangpu for the regulation of the landing French sailors and a consul's jurisdiction when a subject travelled outside the ports, as well as Article XXIV in the treaty of Wangxia that expressly stated that even French debtors to Chinese were under the jurisdiction of the consul.³⁶

In sum, the 1842-43 treaties were significant for several reasons. They legitimised and codified existing extraterritorial practices, whilst securing civil law powers alongside pre-existing criminal and admiralty jurisdiction powers.³⁷ Second, the most favoured nation status clause accorded Britain further legal powers. It provided for the amicable resolution of mixed cases and for the extradition and discipline of British subjects by relevant British authorities. Finally, the treaties extended jurisdiction geographically to the newly opened ports, and put into formal agreement Britain's existing territorial principle of extraterritoriality that allowed for the exercise of jurisdiction accorded to consuls when subject went outside of the ports. As such the 1842-43 treaties were important for consolidating and expanding existing practices that emerged after 1833 as much as incorporating new ones.

Semicoloniality and British metropolitan legislative adjustments

After the 1842-43 treaties, metropolitan adjustments were needed to accommodate the treaties in a legal framework.³⁸ Parliament passed an important piece of legislation in 1843: the Foreign Jurisdiction Act (hereafter FJA).³⁹ It aimed 'to remove doubts as to the exercise of power and jurisdiction by Her Majesty within divers [sic] countries and places out of Her Majesty's dominions

³⁵ Treaty of Huangpu: Article IV, XXV, XXVI, XXVII, XXVIII; Treaty of Wangxia: Article X, XI, XXVI, XXVII, XXVIII, Customs, *Treaties*, pp. 677-91 and pp. 771-91.

³⁶ Treaty of Huangpu Article XXVI, Customs, *Treaties*, p. 785.

³⁷ Koo also notes the role of the treaties consolidating existing practices: Koo, *The Status of Aliens in China*, p. 63.

³⁸ Concurrently, legal adjustments were needed elsewhere in the semicolonial Empire, for example in the Ottoman Dominions. See: C. R. Pennel, 'The origins of the Foreign Jurisdiction Act and the extension of British sovereignty', *Historical Research*, 83, 221, (2010), pp. 465-85.

³⁹ BPP, HC: 1843, [534] *Foreign jurisdiction. A Bill to Remove Doubts as to the Exercise of Power and Jurisdiction by Her Majesty within Divers Countries and Places out of Her Majesty's Dominions, and to Render the Same more Effectual*, p. 1; Foreign Jurisdiction Act, 1843 Section I.; reaffirmed in: BPP, HC: 1865, [3497] *Order in Council for the Exercise of Jurisdiction in China and Japan*, 9th March 1865, p. 1.

and to render the same more effectual'.⁴⁰ The FJA established that it was lawful to hold power of jurisdiction through treaty, capitulation, grant, usage, sufferance or any other lawful means. As such the FJA allowed it to be:

lawful for Her Majesty to hold exercise and enjoy any power or jurisdiction which Her Majesty then hath, or at any time hereafter have within any country or place out of Her Majesty's dominions, in the same and as ample a manner as if Her Majesty had acquired such power or jurisdiction by the cession or conquest of territory.⁴¹

The FJA served three purposes. Firstly, it gave the seal of legitimacy to the acquisition of jurisdictional rights acquired through treaty. Secondly, it distinguished the legal basis of semicolonial extraterritorial jurisdiction whilst simultaneously putting it on the same footing as those of the colonial dominions. The FJA thus applied to all parts of semicolonial empire: the Turkish dominions and, later, Siam, parts of the west coast of Africa, parts of the western Pacific, Morocco, Madagascar, Zanzibar, Muscat and Egypt. Thirdly, the FJA re-confirmed the OIC1833 that already contained the body of British laws, regulations and legal administration applied in China. The OIC1833 (and subsequent OICs) contained with few exceptions the whole body of English statute law, which were to be exercised in China in conformity with English common law, rules of equity and other regulations concurrently in force in Britain. It is worth noting that Acts of Parliament were only applicable to Britons in China when they were sanctioned specifically in the OICs.⁴² In this sense, extraterritorial jurisdiction differed fundamentally from many colonial legal systems; the bilateral treaties were the sources of legitimacy, and the Emperor of China was the sovereign who conferred his legal powers upon the British sovereign. The FJA, in turn, further legitimised both the powers of exercising extraterritorial jurisdiction through treaty with China and the OIC1833 (and, in the same year an Order in Council relating to China of 1843) that contained the body of laws that applied. In contrast to neighbouring colonial Hong Kong,

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, Foreign Jurisdiction Act, Section I; reaffirmed in: BPP, HC: 1865, [3497] *Order in Council for the Exercise of Jurisdiction in China and Japan*, p. 2.

⁴² On the acts applicable to China, see for example: F. Piggott, *Exterritoriality: The Law Relating to Consular Jurisdiction and to Residence in Oriental Countries* (Hong Kong, 1907), pp. 83-107.

powers of jurisdiction were to be exercised over British subjects only.⁴³ The laws adopted most English criminal and civil law as a body for jurisdiction that was made through the Law Officers of the Crown in Britain. This metropolitan influence was accompanied by specific regulations and prohibitions shaped through operating in China. Such offences included smuggling on the China coast, levying war against China, offences against deriding religions as practiced in China, and specific aspects of seditious conduct – offences that could undermine Sino-British relations.⁴⁴ In this way, both metropolitan laws and the concerns of operating in the Chinese environment shaped the legal framework of extraterritorial jurisdiction.

Institutionalisation: the Hong Kong treaty port legal system 1842-1865

The OIC1843 and FJA together played a significant role in the institutionalisation of the early court system. It was the vehicle that fused together the legal institutions and influence of colonial Hong Kong and the extraterritorial system in China. The Sino-British treaties of 1842 made Hong Kong a crown colony, and thereafter the Criminal and Admiralty Court in Canton transferred to Hong Kong. The OIC1843 allowed the legal powers of the Superintendent of Trade, formerly at Canton, and now also Governor of Hong Kong, to inherit the legislative and judicial powers over the consular courts, and appointed consular officers for the courts.⁴⁵ As such, it created an integrated colonial-consular system, with the superintendent having legislative powers through consular ordinances.⁴⁶ Further, the Hong Kong Supreme Court was established in 1844, and through Consular Ordinance No.5 of 1847 became the appellate court for the China consular courts for civil appeals over \$500.⁴⁷ This system continued until 1865, although in practice, appeals to the Hong Kong

⁴³ Although in practice the understanding of ‘British’ was a complex legal issue, especially towards the end of the nineteenth century with the increase in Chinese-British marriages and joint stock businesses.

⁴⁴ Section VI, nos.81-83, and VII, nos.92-4 on rebellion and violation of the treaties; Section XI, no.11 on ‘Offences against Religion’ as observed in China and Japan. See: BPP, H.C: 1865, [3497] *Order in Council for the Exercise of Jurisdiction in China and Japan*, pp. 21-3 and p. 26.

⁴⁵ As an overview see: BPP, HC: 1852-3, [1666] *Order of Her Majesty in council for the government of Her Majesty’s subjects being within the dominions of the Emperor of China, or being within any ship or vessel at a distance of not more than one hundred miles from the coast of China*, pp. 2-3.

⁴⁶ *Ibid.*

⁴⁷ Norton-Kyshe, *The History of the Laws and Courts of Hongkong*, p. 301.

Supreme Court were limited over time owing to disputes between the China consuls, the Hong Kong Governor (also Superintendent of Trade) and the chief justices of the Hong Kong Supreme Court.⁴⁸

By 1853, the consular courts in China operated under a large body of consular ordinances enacted by the Governor of Hong Kong, making the extent of their jurisdiction unclear. As such, the Law Officers of the Crown passed OIC1853, abolishing all existing consular ordinances and replacing them with a legal code.⁴⁹ The OIC1853 incorporated a sizeable majority of the provisions of the previous ordinances but clarified and extended the consuls' jurisdictional and other legal powers while maintaining the power of the Superintendent of Trade and Governor of Hong Kong. Notable changes included the nomenclature 'Chief Superintendent'.⁵⁰ The omission of a reference to the Chief Superintendent as being also 'the Governor of Hong Kong' was made so that it paved the way for the transfer of powers to the ambassador at Beijing in 1860. Other significant alterations included vesting consuls with more extensive legal powers. Subject to the approval of the Chief Superintendent, they could make and enforce regulations for British subjects, and could award fines or imprisonment for any subject that breached these rules.⁵¹ Jurisdiction and punishment limits were also more clearly established for the consuls. Court cases could be heard either with or without assessors. For crimes and offences recognised as such by the laws of England, the consuls and Chief Superintendent could inflict a fine of \$1000 or twelve months imprisonment, or send the case for trial before the Supreme Court of Hong Kong. For breaches of rules and regulations created by the Chief Superintendent or Consuls, according to the degree of the offence, and if without assessors, the highest penalty was a \$200 fine or one month's imprisonment. If sitting with assessors, this could increase to \$500 or three months' imprisonment.⁵² For breaches of rules and regulations governed by the Sino-British treaties, cases could be heard summarily in court and could incur a

⁴⁸ Norton-Kyshe has described in greater detail the nuanced aspects of the modifications of the appeal process. See: Norton-Kyshe, *The History of the Laws and Courts of Hongkong*, pp. 301-18.

⁴⁹ BPP, HC: 1852-1853, [1666] *Order of Her Majesty in council for the government of Her Majesty's subjects*.

⁵⁰ *Ibid.* OIC1853 Section II.

⁵¹ Norton-Kyshe, *The History of the Laws and Courts of Hongkong*, p. 336.

⁵² *Ibid.*

maximum of \$300 fine or three months' imprisonment. In both types of cases, the Chief Superintendent held to right to hear an appeal from consular courts and the Chief Superintendent's power to hear appeals was extended again at the expense of the Supreme Court in civil suits of up to \$1000, whether between British subjects or between British and Chinese.⁵³ Finally, consuls had the power to deport 'refractory' subjects out of China.

The early legal system was not without significant problems, however, and differed from the metropolitan legal system in its inefficiency and legal incompetency. Long delays in communication existed to and from the consuls, Hong Kong and the Foreign Office in London, and in this early period there was no telegraph system, with communications made by letter. Direct contact between the consuls and the Foreign Office - even Canton as the chief consulate - was limited, because it was routed through the Chief Superintendent in Hong Kong.⁵⁴ Equally as challenging, and different to the legal system in England, was the issue of untrained consuls trying cases. Consuls had no legal training, and as such they often tried to apply the law in a way that, at best, ameliorated local tensions in Chinese-British cases and at worst did not adhere to strict legal principles. A notable incident was the *Compton* case in 1846, where Compton, a British subject, had been found guilty of kicking over a fruit stall and beating a Chinese officer with a cane.⁵⁵ The incident later led to local riots. In response to the Chinese rioting, the Canton consul punished Compton severely with a very heavy fine. On appeal to the Hong Kong Supreme Court, the decision was overturned, as there was little legal basis upon which the first judgment had been made. It caused difficulties between the consular authorities and Hong Kong Supreme Court as the consuls had little legal training but were basing their legal responses upon keeping order and peace. In practice therefore, the early consular system of rough justice had much in common with British justice elsewhere, such as that of early colonial west Africa, where, English law and principles were used but applied by individuals with no legal training, leading to practices that

⁵³ *Ibid.*

⁵⁴ P. D. Coates, *The China Consuls: British Consular Officers 1843-1943* (Oxford, 1988), pp. 101-8.

⁵⁵ Norton-Kyshe, *The History of the Laws and Courts of Hongkong Vol. 1*, pp. 115-6.

differed a great deal from those of the metropole.⁵⁶ The difference on the China coast was that the Hong Kong Supreme Court served to draw into sharper relief the legal deficiencies of the consuls, and in the process, prevented consuls from administering justice that sought to ameliorate Sino-British tensions caused by criminal incidents. At the same time, scandals and controversies also beset the Hong Kong legal system and legal personnel, tarnishing its own image as corrupt at the highest levels.⁵⁷

In sum, after 1842 the China consular and colonial Hong Kong system were linked in terms of legislature, appeals, and administration. The Superintendent of Trade, as a key figure in the arrangement worked both under the Foreign Office on behalf of the Chinese consular system until 1860 and as governor of Hong Kong under the Colonial Office. The institutional make-up of the legal system however, was significantly expanded during 1858-1865 in the last phase of the system's integration with the Hong Kong system, as explored next.

1858-1865: Territorial expansion

The year 1858 was an important for China and its relations with foreign powers. After the Qing authorities seized an opium-smuggling Chinese boat operating under a British flag, Britain used the incident as a *casus belli* with an eye on extracting a revision to the 1842-43 treaties and more open ports for trade. The Second Opium War thus ended with the Treaty of Tianjin (1858) and later the Convention of Beijing (1860). Within the treaty and convention new privileges included extended commercial and residential rights; the opening of new treaty ports for larger numbers of western traders and residents; legalization of the opium trade; control of China's tariff collections; the opening of the Yangzi river to foreign navigation; the granting of residence to western diplomats in Beijing; and expanded rights for the protection of missionaries.⁵⁸

The Treaty of Tianjin, however, made no advance on the principle of extraterritoriality, simply reiterating existing principles in Article XV and XVI.

⁵⁶ See for example: O. Adewoye, *The Judicial System of Southern Nigeria, 1854-1954* (London, 1977), pp. 30-5.

⁵⁷ C. Munn, *Anglo-China: Chinese People and British Rule in Hong Kong, 1841-1880* (Richmond, 2001), pp. 207-8.

⁵⁸ Treaty of Tianjin (1858): Customs, *Treaties*, pp. 404-22 .

However, in practice, Article IX expanded the scope of jurisdiction by allowing British subjects to travel and trade under a passport system in the interior (i.e. outside of the boundaries of the treaty ports).⁵⁹ This significantly relaxed restrictions on forays out of the settlements.⁶⁰ The relaxing of restrictions upon movement also applied to ships, with safe harbour granted for British vessels when stranded or wrecked anywhere within the dominions of China.⁶¹ Finally, Article XI underpinned the opening of more ports, which led to an increased number of consular officials with legal extraterritorial rights over British subjects. The latter were allowed to travel to the cities and ports of Niuzhuang, Dengzhou, Taiwan (Danshui), Shantou and Haikou (Hainan island). Disturbances delayed the opening of more ports, but in 1860 Tianjin was opened through the Convention of Beijing.⁶² Others emerged from 1860 to 1864: in Hankou, Jiujiang and Nanjing.⁶³ The stationing of a British ambassador in Beijing in 1860-61 led to the transfer of the office of Superintendent of Trade from Hong Kong to China.

It is important to note that this geographical expansion extended not only over new cities in China, but over others in Japan. This made the consular court system vast and transnational in structure. In a series of treaties from 1854, Japan conferred extraterritorial rights to American subjects, after US demands for free trade and open ports. Russia, France and Britain followed suit and demanded similar legal privileges. Subsequently, the 1858 Anglo-Japanese Treaty of Peace outlined British rights – open trading ports and extraterritorial rights over British nationals as defendants to any crime.⁶⁴ Following the treaty, British traders operated and resided in: Hakodate, Kanagawa, Nagasaki, Edo (Tokyo), Kobe, Yokohama and Niigata. Osaka and Tokyo opened as ports in 1868 and 1869. Niigata did not develop as a port, and no consular cases arose from there, whilst Osaka was primarily a missionary base and its consular business was handled in Kobe.⁶⁵ In legal records, therefore, Kobe and Osaka were amalgamated together

⁵⁹ See for example on the details of issuing passports: Cassel, *Grounds of Judgment*, p. 60.

⁶⁰ Treaty of Tianjin (1858) Section IX, Customs, *Treaties*, p. 407.

⁶¹ Treaty of Tianjin (1858) Section X, Customs, *Treaties*, p.408

⁶² The Taku vice-consulate was situated fifty miles downriver of Tianjin but closed in 1877.

⁶³ A consulate at Nanjing however was not established until 1900.

⁶⁴ For a more detailed background of the Japanese-foreign treaties see: Cassel, *Grounds of Judgment*, pp. 88-94.

⁶⁵ Roberts, 'British extra-territoriality in Japan', p. 14.

as 'Hiogo'. In the same manner as in China, an Order in Council of 1859 (OIC1859) outlined the laws and regulations to be applied in Japan, and made the Hong Kong Supreme Court the appellate court on the same footing as the consular courts in China. British consular jurisdiction was therefore transnational, linking Japan with China, Taiwan and Hong Kong – a huge geographical area within which there was a judicially transnational interlinked system. This institutional interconnection was reinforced through the insular nature of the staffing and appointments, with a merry-go-round of consuls and lawyers working in both China and Japan over the next several decades.⁶⁶ For example, Robert Mowat, Richard Rennie, Nicholas Hannen and Hiram Shaw Wilkinson all worked as senior judges in both China and Japan from 1870 to 1900.

On the eve of 1865, therefore, consular jurisdiction had grown into a geographically expansive legal system, based primarily on the east China coast, but also encompassing Japan, Hong Kong and Taiwan. Whereas treaties were instrumental in grounding and expanding rights, key aspects of jurisdiction and the basis of the legal system had in fact already been established by the OIC1833. The subsequent treaties provided overarching legal legitimacy and extraterritorial rights, and the various later OICs provided the body of laws for governing British subjects. The FJA served to legitimise both the treaties and the OIC1843, as well as providing for the amalgamation of the consular system with that of colonial Hong Kong. As such the British legal system was distinctly semicolonial but its institutional connection to Hong Kong gave it elements of colonial influence and governance. Although the bodies of law and the courts resembled those of the metropole, the application of law and justice were far from metropolitan standards. Indeed, the early system was hampered by a number of factors that made it inefficient and unprofessional, and significant reform of the legal system was necessary. The next section shows how 1865 was another watershed moment in the history of extraterritoriality in China, changing

⁶⁶ For the changes in consuls and HMSC judges and Crown Advocates from 1865-1899 see: Roberts, 'British extra-territoriality in Japan'; for details on lawyers see: T. Chen, *Jindai Shehui Bianjiang Zhong de Shanghai Lüshi [Lawyers in the Changing Modern Society of Shanghai]* (Shanghai, 2008), pp. 41-96.

the nature of the legal system and elements of jurisdiction that had been built on the Sino-British and Sino-foreign treaties.

2. 1865 Onwards – the Shanghai Centred Legal System

The year 1865 marked a new era for the British consular legal system. The Order In Council 1865 (OIC1865) created a new supreme court in Shanghai: Her Britannic Majesty's Supreme Court for China and Japan (HMSC). The court replaced the Hong Kong Supreme Court as the higher and appellate court, thereby severing the institutional link with Hong Kong.⁶⁷ New regulations provided for a more efficient and regulated mode of legal reporting and recording of judicial matters. The OIC1865 stated that change was necessary 'particularly for the more regular and efficient administration of justice among Her Majesty's subjects resident in, or resorting to the dominions of the Emperor of China or of the Tycoon of Japan'.⁶⁸

Legal commentators and historians give several different accounts as to why 1865 heralded a change. As highlighted in the first section of this chapter, a lack of legal training and regulation led to significant problems in the early system. Negative metropolitan press reports over various scandals, ineptitude of legal officials and suspects being acquitted on technicalities further damaged the reputation of consular jurisdiction.⁶⁹ Maladministration became more problematic with increasing numbers of British subjects sojourning in China.⁷⁰ Moreover, the number of new courts opened in the north of China and Japan during 1858-1860 exacerbated communication issues over long distances. An efficient, interlinked and more regulated court system was necessary to provide for the increasingly interconnected flows of people and goods between the ports.

⁶⁷ BPP, HC: 1865, [3497] *Order in Council for the Exercise of Jurisdiction in China and Japan*, p. 3.

⁶⁸ *Ibid.*, p. 2.

⁶⁹ See: Norton-Kyshe, *The History of the Laws and Courts of Hong Kong, Vol. 2* (London, 1902), pp. 56-7; Christopher Munn also highlights the corruption of the Hong Kong government and criminal justice system in early Hong Kong. See: Munn, *Anglo-China*.

⁷⁰ This issue of increasing numbers of British subjects is explored in chapter four.

A supreme court located in Shanghai was more practical than one in Hong Kong, as Shanghai was becoming a bigger trade hub and was closer to the newer ports.

Change was therefore instigated for both practical reasons and to rectify the bad image of the legal system. However, the 1860s was also a time during which - similar to the context for legislative changes in the 1840s - the metropolitan authorities were attempting to standardize British jurisdictional practices across the British Empire. The Foreign Office surveyed penal and legal practices in order to recommend a standardized form of practices that would be financially efficient. This included reforming the previously *ad hoc* manner of producing, recording and storing legal case records. The re-organisation of the Chinese consular legal system in 1865, including its new emphasis on the strict regulation of reporting cases and financial efficiency, therefore came as part of a wider metropolitan drive to reform legal practices across the Empire. The next sections will show in more detail what these changes in China were and why they were especially significant in the China context.

Main changes: analysing the Order in Council 1865

Firstly, the OIC1865 established HMSC in the International Settlement in Shanghai, making it the higher and appellate court of the British legal structure of treaty port China. The OIC1865 framed the administration of HMSC, giving the Foreign Office powers to appoint a judge (at times styled the Chief Judge or Chief Justice) to preside over the court. To ensure its professionalism, he was to be a barrister with at least seven years' legal experience.⁷¹ The Chief Judge could delegate judicial responsibilities and had the power to appoint legal personnel to work alongside him. Such personnel included an Assistant Judge, a Law Secretary, junior officers and clerks.⁷² In practice, the Chief Judge was often overburdened with appeals, high court cases and administrative duties, rendering the Assistant Judge and Law Secretary essential. They often stood in for the Chief Judge, hearing criminal and civil cases when the Chief Judge was busy or on leave.

⁷¹ BPP, HC: 1865, [3497] *Order in Council for the Exercise of Jurisdiction in China and Japan*, 9th March 1865 (Hereafter OIC1865) Section III, subsection I, no.9.

⁷² OIC1865 Section III, subsection I, nos.7-24.

The court had extensive powers of jurisdiction over all other summary courts; far more so than its predecessor, the Hong Kong Supreme Court. It had jurisdiction in all serious crimes, defined in criminal jurisdiction as charges that carried a potential sentence of over 12 months' imprisonment and a fine of over \$1000.⁷³ The court also acted as an appellate court for all other courts in civil cases that involved a dispute of \$250 or over.⁷⁴ The court ordinarily sat in Shanghai, but, the judge also went out on circuit, trying cases in the other treaty ports.⁷⁵ As such, Shanghai was placed at the centre of the new legal system, with all other British courts serving as summary courts.

The judicial functions of the court were relatively extensive, making HMSC an important institution. Aside from all high court and appeal hearings it also exercised its authority over a range of cases as a court with exclusive powers. For example, it was a court of Admiralty, initially acting with powers of a Vice-Admiralty court,⁷⁶ and after 1890 with more autonomous powers from the metropole as vested with jurisdiction of a Colonial Court of Admiralty.⁷⁷ The powers of Admiralty jurisdiction were first legitimised through the FJA1843 and thereafter through the OIC1865, which reinforced its jurisdiction over the waters within one hundred miles of the China coast. Admiralty cases involved matters relating to maritime activities, most usually shipwrecks, and disputes over a ship's assets.⁷⁸ Additionally, like other Vice-admiralty and Admiralty courts, the court had a separate set of rules of procedure for maritime affairs, which were distinct from regular high court cases. Any appeals went to the Court of Admiralty in England. HMSC was also a court of bankruptcy, and heard high profile cases.⁷⁹ Finally, HMSC alone had powers to exercise jurisdiction over

⁷³ OIC1865 Section V, subsection III, no.71.

⁷⁴ OIC1865 Section XVI, subsection I, no. 119. This did not apply to the Japanese provincial courts after 1878.

⁷⁵ OIC1865 Section V, subsection I, nos.37 -38.

⁷⁶ OIC1865 Section V, subsection II, no.54.

⁷⁷ The Colonial Courts of Admiralty Act 1890 and 1894 Order in Council respecting Vice-Admiralty Jurisdiction in China, changed the court from a vice-Admiralty court to a Colonial Court. This altered the rules and regulations relating to the court. The change affected all legal systems in semicolonial contexts across the British informal empire, and was a blurring between the colonial and semicolonial in nomenclature and jurisdiction.

⁷⁸ Piracy was not considered a maritime offence but a criminal offence, and could be heard in the lower courts as criminal cases, after notifying HMSC; OIC1865 Section X, no.99.

⁷⁹ OIC1865 Section V, subsection II, no.52.

several areas.⁸⁰ These included matrimonial cases, usually separation and divorce proceedings; lunacy, which involved legally deciding the sanity of an individual, and whether to incarcerate or deport them; and, in contentious cases of probate and administration, deciding on legal claims of inheritance.⁸¹ By exercising jurisdiction in these areas, the court had significant powers: the power to decide family matters, the power to free or to incarcerate those who were mentally ill, and the power to decide who inherited the possessions, money and estates of the deceased. In sum, significant powers over individuals and families, fortunes and lives were invested in one court in Shanghai.

The British legal system in China, however, was different to that of the metropole, Hong Kong and other colonies, for HMSC had what was known as ‘extraordinary’ powers that increased its jurisdictional reach over an interconnected legal system.⁸² It had powers to take cognizance over any court case in any British consular court anywhere in China. Biannually the lower courts were bound to send their case reports to HMSC for review.⁸³ This link provided for the transfer of legal knowledge of cases, criminals and suspects to and from Shanghai. The OIC1865 also allowed the Chief Judge to overturn any punishment of deportation from provincial courts.⁸⁴ At least under the first HMSC Chief Judge, Sir Edmund Hornby, there is evidence of many occasions when he used these powers to reverse and overturn sentences and punishments of consuls.⁸⁵ Hornby even claimed that he frequently accorded himself a ‘wide discretionary power’ including overturning jury verdicts when he thought it would otherwise result in a gross miscarriage of justice.⁸⁶ As such, certain aspects of the jurisdiction of HMSC made it significantly different from the Hong Kong Supreme Court and metropolitan High Courts. These aspects related to the increased powers of HMSC over various types of cases, and its oversight

⁸⁰ OIC1865 Section III, subsection II, nos.55-61.

⁸¹ OIC1865 Section V, subsection II, nos.55-57.

⁸² OIC1865 Section V, subsection I, nos.37- 38.

⁸³ OIC1865, Section V, subsection I, no.47; Edmund Hornby provided precise regulations to guide consuls on registering complaints and reporting of cases: E. Hornby, *Instructions to Her Majesty's Consular Officers in China and Japan, on the Mode of Conducting Judicial Business: with comments on the China and Japan Order in Council, 1865, and the rules of procedure framed under it* (1865), pp. 27-8.

⁸⁴ OIC1865 Section XIII, no.108.

⁸⁵ TNA: FO670/90 Edmund Hornby, HMSC to Whittock, Ningbo Consul, 9 Sept., 1865; Edmund Hornby, HMSC to Forrest, Acting Ningbo Consul, 25 Jun., 1866.

⁸⁶ E. Hornby, *An Autobiography* (London, 1928), p. 260.

over the summary courts. The latter was mainly because of the continuing issue that in practice consuls had little legal training.

The lower courts and naval courts

The OIC1865 also confirmed the existence of the lower courts in the treaty ports, now styled provincial courts. On the surface, the lower courts appeared to have similarities with metropolitan courts. By virtue of the OICs, the consular courts were Courts of Record; courts where proceedings were recorded and evidence was heard as was considered judicially legitimate in England. Lawyers had to be licensed legal practitioners and the courts had powers of fines and imprisonment. However, the consular courts were not mirror images of English Courts of Record. For example, common law made within the China consular courts did not apply to Britain, and judicial notice had to be taken of the laws of and legal changes in China, especially when considering the actions of Chinese plaintiffs and witnesses.⁸⁷ This is significant, because whilst the consular courts were modelled on metropolitan courts, they neither reflected nor straightforwardly extended the British legal system. They were, despite appearances, *foreign* British Courts; a product of the semicolonial reality of treaty port China, of metropolitan influences, local concerns, and wider imperial influences.

The OIC1865 issued a comprehensive set of regulations under which consuls conducted judicial duties from their consular courts and reported cases to HMSC. Jurisdiction of the consular courts in relation the HMSC was clearly defined. They heard all criminal cases that had a sentence up to a maximum 12 months' imprisonment with or without hard labour and with or without fine up to \$1000.⁸⁸ They had jurisdiction in minor bankruptcy cases and non-contentious administration and probate cases.⁸⁹ In civil cases of disputes up to \$250 any party aggrieved by the decision could apply for appeal to HMSC and in certain circumstances in criminal cases too.⁹⁰ The courts were also 'Courts of Law and Equity' meaning that they could hear cases according to legal procedure and resolve cases strictly according to laws, or they could use legal principles more

⁸⁷ F. Piggott, *Exterritoriality*, p. 51.

⁸⁸ OIC1865, Section V, subsection III, no.71.

⁸⁹ Hornby, *Instructions to Her Majesty's Consular Officers*, p. 31.

⁹⁰ OIC1865 Section XVI, nos.119-126.

loosely to help resolve civil disputes.⁹¹ The consul ordinarily sat alone, but consuls could request the aid of up to three assessors in more complex cases.

Naval Courts also heard cases *ad hoc* in treaty ports with a Naval Officer, a consular officer and master of a British vessel. They heard cases involving crimes on the high seas on board British vessels, including those of the army and navy, as well as matters relating to shipwrecks. These courts were more of an administrative tribunal reporting to the Board of Trade rather than judicial courts *per se*.⁹²

The OIC1865 also clearly defined jurisdictional powers between courts, with the courts being ‘auxiliary’ to each other, through ‘concurrent’ jurisdiction.⁹³ This meant that jurisdiction followed a defendant or suspect who left the district of, for example, court A, and went into the district of court B. As such, court B had the power to arrest, try and punish the suspect or defendant the same as if the crime had been committed in court B’s ‘district’ or territorial limits.⁹⁴ Warrants and summons could be made from one provincial court to another if a defendant or suspect moved, so although provincial courts might have their idiosyncrasies, they were part of a unified web of British jurisdiction. A person having committed a crime in Japan for example could be arrested, tried and imprisoned in Canton - over 1,000 miles away. This also meant that legal knowledge of suspects, crimes, cartels, and movements of individuals circulated within an interrelated system. Although some suspects may have escaped, the passing of legal knowledge and the powers of warrants and summons across jurisdictions were the tangible ways in which British consular courts were linked together over a vast distance. This aspect of concurrent jurisdiction was familiar within the metropolitan and colonial legal system but it was especially important for the consular court system of China, Taiwan, Hong Kong and Japan due to the vast distance between them and the transient nature of the British population as sailors and merchants moved frequently between and from ports.

⁹¹ Hornby, *Instructions to Her Majesty’s Consular Officers*, p. 8.

⁹² Roberts, ‘British extra-territoriality in Japan’, p. 163.

⁹³ OIC1865 Section V, subsection I, no.46.

⁹⁴ OIC1865 Section V, subsection III, no.64 and 65; R. Rennie (ed.), *Instructions to Her Majesty’s Consular Officers in China and Japan* (1881), pp. 6-7.

This is highly significant in the context of recent histories of ‘connected’ Empire. Thomas Metcalf has illustrated how Indian colonial law extended outwards across the Indian Ocean region to eastern Africa, and produced legal links between different constituent parts of the British Empire.⁹⁵ The types of concurrent jurisdiction found in the transnational extraterritorial system of China show the extent of such overlapping and concurrent jurisdictions across another interconnected circuit of British governance abroad. In this regard, it can be argued that the OIC1865 facilitated the networking of jurisdictional powers between the courts in China, Taiwan and Japan and constituted an important web of legal jurisdiction within a large, transnational extraterritorial system. Key aspects of these legislative links were executed by consuls on a highly mobile British population (principally missionaries, traders and sailors) and thus constituted an essential part of extraterritorial governance.⁹⁶

Plurality of laws, regulations and courts

The re-organisation of the consular court system in 1865 came alongside changes to the local legal environment in which it operated. Although the consular system remained separate from other legal systems, cases involving multiple parties of different nationals required the courts to pay attention to the complex legal environment in which it worked. One of the key courts in Shanghai was the Mixed Court. Local agreements between the Shanghai Chinese and foreign authorities established the court in 1864 as a summary court for Chinese defendants in the International Settlement of Shanghai. Although it was a Chinese court with a Chinese magistrate administering Chinese law, foreign ‘assessors’ – usually junior consuls - had some bearing on the court case. Certainly, given the large population of Chinese subjects within the foreign settlements, Mixed Courts, although not consular courts, were sites of contestation between foreign and Chinese authorities because of the great degree of power they held to punish minor criminals. The Shanghai Municipal Council (SMC), the foreign executive body of the International Settlement, had a vested

⁹⁵ T. Metcalf, *Imperial Connections: India in the Indian Ocean Area 1860-1920* (Berkeley, 2007), pp. 19-25.

⁹⁶ Types of concurrent jurisdiction and penal practices will be explored in more detail in section three of this chapter, and in chapter three on the case examples of Xinjiang and Yunnan with British colonial legal systems.

interest in the reduction of crime rates and enabling foreign plaintiffs and complainants to seek redress in such a court. The SMC also established its own court, the Court of Consuls, to hear the cases of anyone who wished to press legal charges against it or its employees when acting in their occupational capacity. The SMC as an administrative body produced bye-laws which were applicable to everyone within the settlement regardless of nationality. These were typically on minor matters, for instance traffic and licensing regulations. At the same time, a number of other foreign treaty power nations established consuls and courts for their subjects who had been accused of a crime. After 1865, then, the legal environment in Shanghai particularly was a complex overlaying of foreign and Chinese municipal laws, foreign extraterritorial laws, Chinese laws and a host of consular courts, Mixed Courts and Chinese courts; a plural legal environment.

Territoriality in extraterritorial jurisdiction

The OIC1865 also served to re-affirm territorial aspects of the consular courts in a number of ways. For example, it re-asserted that British jurisdiction in ‘China’ and ‘Japan’ specifically meant the dominions of the Emperor of China and dominions of the Tycoon of Japan.⁹⁷ It continued the principle that jurisdiction followed British subjects outside of the ports where consuls were not present. All the consular courts were now styled ‘provincial courts’ and their area of jurisdiction, although undefined, was referred to as their ‘consular district’.⁹⁸ This terminology suggests two things; that judicial authority now had a nomenclature that denoted its position in relation to an institutional system, and that the terms ‘provincial court’ and ‘consular district’ denoted territorial confines to extraterritorial jurisdiction that could simultaneously be extended should a British subject go beyond recognised settlement areas. Territorial aspects of extraterritorial jurisdiction continued in relation to jurisdiction over coastal waters. The OIC1865 expanded the hundred-mile jurisdiction to include not only any British subject on a British vessel, but also any British subject on a Chinese, Japanese or any vessel that did not claim protection of the flag of any

⁹⁷ OIC1865 Section I, no.2.

⁹⁸ OIC1865 Section III, subsection II, no.25.

state.⁹⁹ As such, ships were understood as extensions to the territorial land of the flag of the ship. As Japan and China had ceded extraterritoriality within their territorial dominions and conferred powers of jurisdiction to Britain, so their ships, and non-treaty power ships were likewise spaces of extraterritorial privilege for British subjects.¹⁰⁰

Hierarchical structure, powers of legislation and amendment

Following the promulgation of the OIC1865, sitting above the HMSC with various administrative and legal powers were three main bodies: the senior diplomatic representative of Britain (the ambassador at Beijing), the Foreign Office (alongside the Treasury and Law Officers) and the Privy Council. This means that the exercise of the legal system and its administration was layered with different bodies in both China and the metropole, which will be explored in the next to show how we can understand the extraterritorial system as incorporating both aspects that looked distinctly similar to colonial legal systems and the metropole, but also some unique features.

The ambassador at Beijing was a senior British official with various legal and penal powers over the consular courts. These included confirming or commuting capital sentences passed on British subjects, as well as taking on the role of informal advisor on various court cases and sentences that involved particular political sensitivities.¹⁰¹ In Shanghai, the consul-general also gave such advice. The ambassador also had legislative powers, issuing ‘Queen’s’ and ‘King’s Regulations’. These powers were intended to allow him to issue regulations on pressing issues, defined ambiguously as ‘fit for the peace, order and good government of British subjects.’¹⁰² These laws could be added to the OICs without the sanction of the Chief Judge, and British subjects could be tried under them in any consular court. Queen’s/King’s Regulations required the sanction of the Secretary of State to the Foreign Office, but his approval could be obtained in

⁹⁹ OIC1865 Section XII, no.101.

¹⁰⁰ HMSC was replaced by the Court for Japan in 1878 as a higher court but remained the appellate court until 1899 with the ending of extraterritoriality in Japan.

¹⁰¹ OIC1865 Section V, subsection III, no.69.

¹⁰² TNA: FO656/109 ‘King’s Regulations’ (1865).

retrospect if they were deemed to be required in an emergency. The ambassador could also approve or block legal appointments made by the Chief Judge.¹⁰³ His powers extended over penal practices, as he was the highest authority with the governance and superintendence of prisons in China. His role included mitigating or remitting prison sentences.¹⁰⁴ In many ways the British ambassador has administrative, executive and legislative powers akin to a governor of a colony, and was placed on the same footing, when his role was specified in various applied Acts.¹⁰⁵ However, his legislative, administrative and penal powers sprang from the authority of the British sovereign via the Sino-British treaties as conferred by the Chinese sovereign.¹⁰⁶

Unlike colonial legal systems, it was the Foreign Office rather than the Colonial Office through which the metropole oversaw various aspects of governance in China. It also had far greater administrative, legislative, and directive powers over the consular court system than it did in the formal colonies. The Foreign Office had the power to appoint and to remove consuls and Chief Justices, and Chief Justices were bound to send biannual returns of cases heard in HMSC for review.¹⁰⁷ In terms of legislation, the Law Officers of the Crown drafted the OICs with amendments suggested by the Chief Judge. Chief Judges could make Rules of Court, governing court procedure, fees and costs, but they required the Foreign Office and Treasury's sanction. When Chief Judges wanted to modify OICs, the Foreign Office's sanction was always needed, and so a justification of the reasons was always required.¹⁰⁸ Finally, the Treasury financed the consular legal system through the Foreign Office, despite dwindling financial resources by the end of the nineteenth century. In such a way, whereas the Hong Kong governor strongly shaped the consular legal system in his legislative and administrative capacities before 1865, after 1865, it was the HMSC, its Chief Judge and, moreover the metropolitan authorities rather than shaped the legislation and administration of the system.

¹⁰³ For example, the ambassador could refuse to sanction the Chief Judge's appointments of junior officials: TNA: FO656/109 Ambassador at Beijing to HMSC, 17 Apr., 1906.

¹⁰⁴ OIC1865, Section V, subsection III, nos.69 and 77.

¹⁰⁵ Piggott, *Extraterritoriality*, pp. 159-163.

¹⁰⁶ *Ibid.*, p. 159.

¹⁰⁷ OIC1865, Section V, subsection III, no. 80.

¹⁰⁸ TNA: FO656/63 HMSC to Earl Granville, Foreign Office, 18 Nov., 1880.

The influence of British authority extended to legal institutions, and the HMSC was not the apex of the legal system. In regards to appeals, the legal system continued to be connected to the metropole, alongside colonial legal systems, through the Judicial Committee of the Privy Council (JCPC). It heard civil appeals involving a dispute over \$2500 or more, cases where important legal issues had arisen, and naval court appeals.¹⁰⁹ This was the case until 1925 when direct appeals to the JCPC from HMSC were abolished. Thereafter, in the instance of an appeal in certain cases there was permission to form a full court with the magistrate of HMSC with the Chief Justice of the Hong Kong Supreme Court. Appeals could then follow from this hearing to the JCPC.¹¹⁰ Individuals could also make petitions to the Home Office; though there was just one recorded case of this.¹¹¹ Similar to all colonial legal systems, the British sovereign remained in theory at the head of the system and had the prerogative of pardon.¹¹² In practice, appeals to the JCPC were rare due to the length of the appeal process and cost involved. Appeals could take a year or longer, and the expense meant that the majority of appeals were related to shipping accidents involving big trading companies, who had the financial resources to pursue claims.¹¹³

In essence, while the JCPC was the *de jure* apex of the system, practicalities meant that the Supreme Court was more often than not the *de facto* apex of the system. Nonetheless, the JCPC connected the semicolonial treaty port system to the metropole, and in this respect China had a similar legal system to the formal colonies of the British Empire. As Bonny Ibhawoh has shown, the operational principle of judicial precedent (*stare decisis*) meant that JCPC decisions on appeals, regardless of whether the case originated in Africa, Australia, China or elsewhere, were directly binding on all courts in all colonial and extraterritorial parts of Empire.¹¹⁴ This ‘centripetal jurisprudence’, as Ibhawoh terms it,

¹⁰⁹ OIC1865, Section XVIII, nos.131-140; minor changes to the rules and regulations of general appeals were made in over time in various later OICs.

¹¹⁰ Direct appeal from HMSC to Privy Council was abolished by OIC1925 and a full court with the Chief Justice of Hong Kong established: OIC1925 nos. 22, 23 and 128.

¹¹¹ One petitioner named Catherine Hadley petitioned the Foreign Office for release from prison. Although it appears to have been the exception rather than the rule in appeals that usually were sent to the Ambassador at Beijing only. TNA: FO 371/23502/697.

¹¹² OIC1865 Section XIX, no. 141.

¹¹³ TNA: FO656/65.

¹¹⁴ Ibhawoh, *Imperial Justice*.

standardised legal interpretations on particular issues as well as larger values of justice.¹¹⁵ As such, this was another way in which the China extraterritorial system was connected to and could influence the wider Empire, for the JCPC and English law were a part of a connected global structure that transcended regional and national boundaries of colonial and semicolonial jurisdictions. This supranational and transnational aspect of appeals and common law was therefore somewhat contradictory. As explored above, the judges in the British consular courts in China could make law in their courts that was used as precedent for future cases, but they were not binding on any other court outside of China. At the same time, however, JCPC decisions were binding, making the legal system and law-making of the consular courts both a part of and distinct from broader colonial, metropolitan and other extraterritorial places.

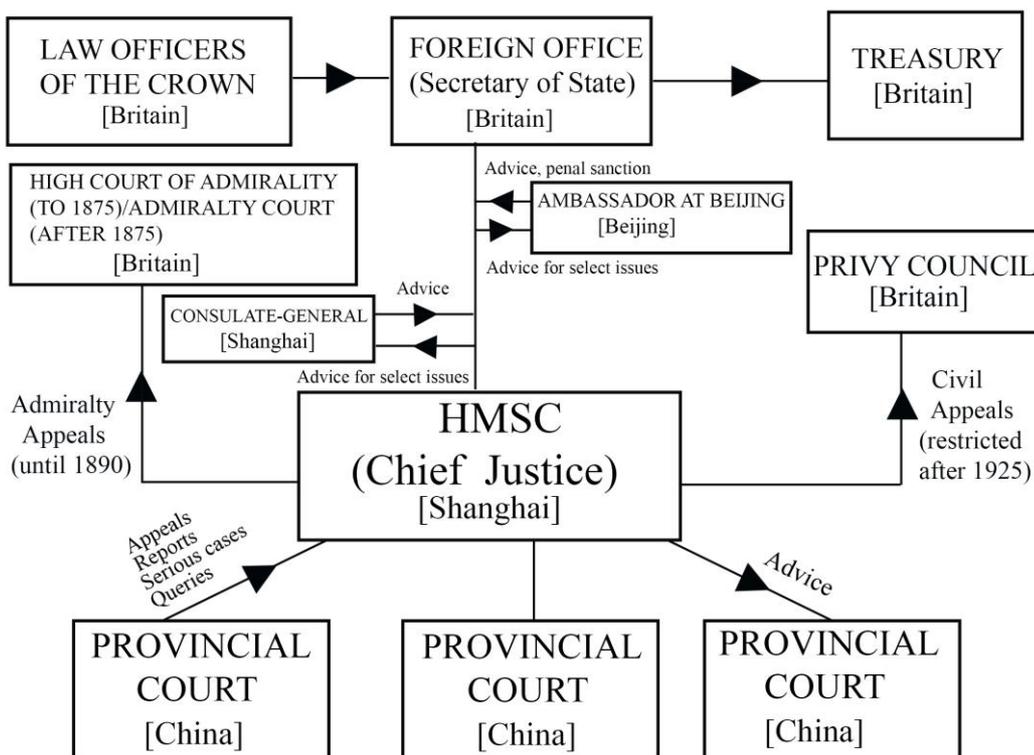
Although somewhat unique, the administrative hierarchy of the British consular system shared commonalities with other European legal systems in China. In the Italian, German and Danish legal system structure, appeals from the treaty ports went back to the metropolitan centres; Rome, Leipzig and Copenhagen. In other legal systems, metropolitan courts closer to China were appellate courts, such as Russian appeals to Vladivostok. Others send appeals and prisoners to their colonial territories, for example France sent its appeals to Pondicherry, then Saigon after 1869.¹¹⁶ Others included a mixture or changed over time: Spanish appeals lay to Manila until 1898 (until the US cession of the Philippines) then to Madrid and Dutch appeals lay to Batavia then to the Hague.¹¹⁷

¹¹⁵ *Ibid.*, p. 5.

¹¹⁶ G. Keeton, *The Development of Extraterritoriality in China* (London, 1928), p. 323.

¹¹⁷ *Ibid.*, pp. 323-4.

Figure 2.1: Hierarchy of British consular legal system, for administration, legal issues and appeals and finance.



Connections between the metropole and the consular court system in terms of legislature and administration were stronger than in China's colonial counterparts. The Law Officers of the Crown continued to provide HMSC and provincial courts with advice and directives on the nature of their jurisdiction, and drafted new legislation applicable to the consular system. Legal correspondence with the Foreign Office shows how often, in what ways and why the Foreign Office intervened in legal disputes and administration in China. It is clear that, first, the Foreign Office was always consulted when cases of a political nature arose or when a case and its outcome threatened Sino-British diplomatic relations. This was because the primary concern of metropolitan British interests in China was to maintain good trading relations, and from the late nineteenth century onwards, to secure political interests as inter-European rivalry intensified across Asia. China was an important battleground between the spheres of interest of Russia, Britain and France.

Second, the Foreign Office was also consulted regularly on questions of the application of extraterritorial law, the implementation of new metropolitan laws and nationality.¹¹⁸ The latter was the topic of a considerable volume in correspondence letters because of the very nature of extraterritoriality. Unlike colonial jurisdictions where native populations were subjects of Britain and where there was therefore less ambiguity over the exercise of jurisdiction, Chinese subjects were not amenable to British jurisdiction in China. However, both intimate relations and joint company partnerships with British subjects and businesses muddied the waters of who was British and hence under the purview of British jurisdiction. Therefore the Foreign Office and Law Officers remained important as advisors to British legal officials in China throughout the nineteenth and twentieth centuries.

Third, the Foreign Office remained important in British legal affairs and penal practices, because it financed an increasingly expensive system. Of particular concern was the costly practice of the deportation of convicts and vagrants, and the expense of maintaining prisons. Several cases from the late nineteenth and early twentieth centuries show how the Foreign Office attempted to limit convict deportation.¹¹⁹ Finally, as technology advanced, especially with the extension of the telegraph in the later nineteenth and especially in the early twentieth centuries, the Foreign Office and Treasury were able to keep better tabs on the practices and actions of the Supreme Court judges and prison management in the treaty ports. Thus although within the earlier system consuls had a large degree of autonomy, sometimes making decisions without regular directives, technological advancement was a critical factor tying the consular court system to the more rigorous oversight of the Foreign Office despite the increasing numbers of consulates.

¹¹⁸ For example, during the late nineteenth century there were questions about the naturalisation of 'illegitimate' mixed raced children and nationality status: TNA: FO656/83 (1892-1900) and FO656/93 (1899-1900).

¹¹⁹ For example the case of Ahmed 'Batchoo' and Henry William in 1880-1881: TNA: FO656/53, Foreign Office to HMSC, 14 Oct., 1880; the practice of deportation is explored in the next section.

3. China and Hong Kong: Continued Jurisdictional Links after 1865

Although the OIC1865 served to create a more integrated system, centred in Shanghai, legal jurisdiction retained distinct connections with other legal systems, most notably that of Hong Kong. This section argues that despite severing institutional ties with Hong Kong, links with China consular jurisdiction did not diminish but in fact remained, and in some senses, were strengthened. This occurred in two ways: through the creation of overlapping jurisdictional powers and through connections through penal practices. These powers came in the form of metropolitan acts that were applied to China as if it were a colony, and through OICs that were transnationally applied. Both types of legislation were driven by pragmatic concerns to deal with crimes and suspects who were mobile, and to render ambiguous legal spaces of border regions and seas more governable.

Extradition and concurrent jurisdiction

Although the FJA1843 (later amended in the FJA1890), differentiated consular legal systems from those of the metropole and colonies, extraterritorial systems were also able to connect their jurisdictional powers to those of other colonial legal systems.¹²⁰ In Section IV of the FJA1843 (repeated in Section VI of the FJA1890)¹²¹ power was given to the supreme court in each consular legal system to send any British subject, charged with an offence within their jurisdiction, to a British colony. This was amended in FJA1890 to any British colony specifically named in the OIC governing the jurisdictional powers of that system.¹²² As such, as directed in the OIC1865 (and all subsequent OICs), HMSC had the power to send suspects and defendants to Hong Kong for trial (with Mandalay added after 1905), when it was deemed expedient.¹²³ These jurisdictional powers were bolstered after the promulgation of the OIC1865. The OIC1865 allowed any writ, order or warrant issued by the Supreme Court of Hong Kong to be executed by

¹²⁰ The FJA1843 was amended in 1865 and 1866, and new FJAs promulgated in 1875, 1878 and 1890.

¹²¹ The Foreign Jurisdiction Act, 1890; for a detailed commentary of the FJA see: Piggott, *Exterritoriality*, pp. 47-56.

¹²² More on how this was amended and used in the western regions of Xinjiang and Yunnan will be explored in the next chapter.

¹²³ OIC1865, Section V, subsection III, no.67; Piggott, *Exterritoriality*, p. 56; the addition of Mandalay will be explored in chapter three.

any consular court in China or Japan. This gave them the power to detain suspects and to send them back to Hong Kong for trial.¹²⁴ The same principle applied in Hong Kong, and suspects accused of crimes in the district of a consular court could be sent from the colony to the consular court.¹²⁵ This power extended further afield to any authority in ‘Her Majesty’s dominions for the apprehension and delivering of anyone accused of committing a crime in such a place, currently residing in China or Japan’.¹²⁶ Removal of persons was not limited to criminal suspects, but also undesirables such as ‘lunatics’ could be deported to Hong Kong or the metropole through additional applied acts such as the Lunatics Removal (India) Act (1851) that applied to China.¹²⁷

However, locating, arresting and removing suspects were difficult in the ambiguous spaces of borderlands and the seas between China and Hong Kong. Several difficulties faced both authorities. The first was the proximity of colonial Hong Kong to treaty port China and the porous border. Problems of borders, law and order and mobile suspects, in and around the Canton coast predated 1865 in the early years of British colonial governance in Hong Kong.¹²⁸ This was especially the case in relation to catching suspected pirates who used Hong Kong as an ideal base for plundering European vessels. The rivers and seas helped such pirates to escape from justice. Whilst in China the apprehension and extradition of such subjects were expected of the Chinese authorities, in reality, the British were reliant on the good intentions of the Chinese government. Often, the Chinese authorities refused to surrender Chinese suspects wanted in Hong Kong.¹²⁹ However, the OIC1865 enabled the consul stationed at Canton to use his legal powers to make it easier to arrest and extradite British offenders. This was bolstered after 1865 by provisions for overlapping jurisdictions between the British consular system and Hong Kong. The OIC1877 also gave the Supreme Court of Hong Kong and the Canton consulate concurrent powers of jurisdiction (not just extradition) to within ten miles of the land boundary of the colony.¹³⁰

¹²⁴ OIC1865 Section V, subsection I, no.44.

¹²⁵ OIC1865 Section XX, no.158.

¹²⁶ OIC1865 Section V, subsection III, no.66.

¹²⁷ Piggott, *Exterritoriality*, p. 149.

¹²⁸ See, for a detailed analysis of crime, law and order in Hong Kong: C. Munn, *Anglo-China*.

¹²⁹ Munn, *Anglo-China*, p. 350.

¹³⁰ Tarring, *British Consular Jurisdiction in the East*, p. 19.

Other types of concurrent jurisdiction were applied to the seas. The seas were a particularly ambiguous legal space where there was no clear border, many inlets in which suspects could hide and a highway for traffic of people and goods moving from China and Hong Kong.¹³¹ In this respect, there was uncertainty in the understanding of the demarcation between semicolonial and colonial jurisdiction, with no obvious observable points where jurisdictions started and ended. As such, concurrent jurisdictions for the seas were an important feature of legislation. For example, in all matters relating to the Hong Kong China Company, either the courts of the consular legal system or Hong Kong could hear a case.¹³² It is important to appreciate here that it was not so much the seas as the ships themselves that were understood as territorial spaces where both consular and colonial jurisdiction were simultaneously constant. This type of concurrent jurisdiction appeared in other provisions. For example, provision 104 of the OIC1865 provided that any British subject in Hong Kong, previously having being on a Japanese, Chinese or British ship within one hundred miles of the Chinese coast, and suspected of a crime, was subject to the jurisdiction of Hong Kong Supreme Court, as if the crime had been committed in Hong Kong.¹³³ Significantly, the one hundred mile provision was not abrogated by the Foreign Jurisdiction Acts, but remained, showing the long-lasting effect of a principle apparently taken from East India Company practice in India and first introduced in the Chinese context in 1833.

Such connections were enhanced and reinforced after 1865 through metropolitan legislation; most especially the Fugitive Offenders Act 1881 (FOA1881).¹³⁴ This allowed for legal measures to be taken against ‘foreigners accused of having committed offences in one part of the dominions and escaping into another part.’¹³⁵ It was intended to regulate the increasing problem of cross-border crimes across the colonial world, but it also included semicolonial domains: Siam, the Ottoman Dominions, China, Japan, Korea, Zanzibar, the western Pacific and west Africa. In the case of China it was applied as if China were a

¹³¹ See on pirates on the south coast: D. Murray, *Pirates of the South China Coast, 1790-1810* (Stanford, 1987).

¹³² G. Keeton, *The Development of Extraterritoriality*, p. 124.

¹³³ OIC1865 Section XII, no. 104; Piggott, *Exterritoriality*, p. 138.

¹³⁴ For detailed commentary of the Act, see: Piggott, *Exterritoriality*, pp. 96-104.

¹³⁵ *Ibid.*

British possession and part of the dominions, forming ‘the Eastern group’ along with Korea, Japan, Weihaiwei and Hong Kong.¹³⁶ In such a way, although the extraterritorial system was different to that of the formal colonies, the FOA1881 classified British jurisdiction in China as having the same legal powers over fugitives as if was a colonial possession.

The content of the FOA1881 conferred powers of extraditing British fugitives and the inter-colonial backing of warrants and offences. This bolstered the powers of those already in place as stated in the OIC1865 and OIC1877. The FOA1881 allowed for the trial of offences committed on the boundary of two adjoining British possessions, giving either authority the power to serve and execute search warrants.¹³⁷ This included any navigable river, lake or canal.¹³⁸ In many senses, such extradition policies had precedent in other colonial domains in Asia. For example, the Dutch and British had mutual extradition laws on the frontier of boundaries in South East Asia (Indonesia).¹³⁹ The FOA1881 therefore filled a need within the wider understanding of inter-imperial governance for a type of concurrent jurisdiction and extradition practice that could be used in all jurisdictions of both formal and informal empire.

With metropolitan legislation in place, the question remains: was it frequently used and effective in treaty port China? Evidence from legal correspondence and documents suggests that fugitive offenders were common in Hong Kong, China and Japan, and that there were warrants for the arrest of many British subjects, including those from further afield. One example amongst many is a warrant issued at Pretoria for Walter Young Jardine on 12 November 1910 for embezzlement, which was circulated to China, alongside his photograph, and a sample of his handwriting.¹⁴⁰ However, it is uncertain if the FOA1881 was effective. For example, although foreign municipal police could arrest suspects in China, in Japan it was clear to the British authorities that the arrest and apprehension of subjects was dependent entirely on the goodwill of the Japanese

¹³⁶ *Ibid.*, p. 99.

¹³⁷ Foreign Offenders Act, 1881, see: Piggott, *Exterritoriality*, pp. 96-104.

¹³⁸ *Ibid.*, Foreign Offenders Act, 1881 Section XXI.

¹³⁹ E.Tagliacozzo, *Secret Trade, Porous Borders: Smuggling and States along a Southeast Asian Frontier, 1865-1915* (Durham, 2011), p. 53.

¹⁴⁰ TNA: FO562/3.

police, which could prove ‘difficult’ after 1899.¹⁴¹ Compounding the issue of extraditing British subjects in Japan was the absence of an Anglo-Japanese extradition treaty. In one particular case, the Japanese authorities stated that they would merely notify the British authorities when a certain suspect left the country.¹⁴² This aspect of the implementation of the Act is revealing; it shows that despite the intention of the legislation, and the many documents relating to the warrants, arrests, deportation and extradition of suspects and fugitives, the effectiveness of some of the powers of jurisdiction sometimes ran into practical difficulties, with many suspects possibly easily fleeing from justice. This is an important counterpoint when considering laws and jurisdiction – although they intended to make people and spaces more governable, in reality it may not have been as effective as it appears.

Despite this, the provisions were significant in three ways. Firstly, they underlined the need for transnational governance legislation and principles to deal with transnational crime. Secondly, it showed that despite institutional changes brought by the OIC1865 to separate the extraterritorial from the colonial legal system, these provisions provided for the overlapping of jurisdiction of the separate systems. Finally, much like the concurrent jurisdiction between consular courts these pieces of legislation gave types of concurrent jurisdiction between China and Hong Kong. Such provisions were important as trade, people and goods all moved across borders and over seas, and types of concurrent jurisdiction integrated the extraterritorial and colonial legal systems to attempt to make ambiguous spaces more governable.

Connections with penal practices

Connections within and between China, Hong Kong and other parts of the British Empire are also evident in penal practices. There is a rich literature on penal practices and the movement of convicts and indentured labourers between colonies.¹⁴³ Movement of prisoners however, was also evident within the

¹⁴¹ *Ibid.*

¹⁴² TNA: FO656/101 Claude Macdonald, Ambassador at Beijing to Havilland de Sausmarez, HMSC Chief Judge, 12 Jun., 1905.

¹⁴³ See, on the pan-European enterprise of convict transportation between colonies: C. Anderson and H. Maxwell-Stewart, ‘Convict labour and the western empires, 1415–1954’, in R. Aldrich and K. McKenzie (eds), *The Routledge History of Western Empires* (London, 2013), pp. 102-117;

extraterritorial system and from the extraterritorial system to other British penal system. Although not part of the formal British Empire, the FJAs and the OICs provided various provisions that enabled the British extraterritorial authorities in China to send convicted offenders to different jurisdictions to serve their sentence. For example, those sentenced to death could be sent to anywhere in the British dominions through the FJA1843, which was limited to Hong Kong and later Mandalay in the OICs.¹⁴⁴ By the FJA Amendment (1865) this included other places of extraterritorial jurisdiction including Siam, Muscat and Ottoman dominions. The OIC1865 also allowed HMSC to deport any convicted person to any part of the dominions they consented or without their consent to a term of imprisonment to Hong Kong.¹⁴⁵ This was confirmed and extended by the FJA1890 Act (Section VII) which allowed, where the OIC determined, their imprisonment in the British colonies. For the China OIC this was specified as provisions for trial, to Hong Kong and later, Mandalay. This practice was legitimized and extended through applied acts, such as the Colonial Prisoners Removal Act, 1884.¹⁴⁶

Deportation was a commonly used practice, as the subject of the overuse of deporting prisoners for minor crimes was a source of much correspondence between the British Chief Judge Hornby and consuls. For example a range of correspondence from Sir Edmund Hornby, the first Chief Judge of the Shanghai Supreme Court to the Ningpo Consul in 1865, shows this point where Hornby reviewed the sentencing of three sailors for theft: Rotherter, Williams and Smith.¹⁴⁷ Rotherter, as a principal to the crime was sentenced to deportation to Hong Kong. Hornby concurred with this decision, owing to the inadequate incarceration facilities at Ningbo. However, Hornby did not concur with the consul's decision to attach deportation for the abettors Williams's six weeks sentence, and Smith's fourteen days imprisonment claiming both were 'hardly

M. Kale, *Fragments of Empire: Capital, Slavery, and Indian Indentured Labor in the British Caribbean*. (Philadelphia, 1998).

¹⁴⁴ Tarring, *British Consular Jurisdiction in the East*, p. 17; Piggott, *Exterritoriality*, p. 57.

¹⁴⁵ OIC1865 Section V, subsection III, no.79; and Section XIII no.107.

¹⁴⁶ See: Piggott, *Exterritoriality*, pp. 106-10; the Colonial Prisoners Act, 1884 is still used today to remove certain prisoners from the remaining Overseas Territories to the UK, usually for their protection from retribution in the existing small communities.

¹⁴⁷ TNA: FO670/90 (1865) Edmund Hornby, HMSC to Ningbo consul Wittock, 9 Sept., 1865.

justifiable' and that deportation should only be used in severe cases.¹⁴⁸ Although he agreed with the principle of removing difficult offenders and prisoners, the use of deportation for petty offenders was not acceptable to him. Nevertheless consuls remained keen to rid of petty troublemakers in their consular districts to Hong Kong whenever possible, and indeed Hornby himself would later see the usefulness of ridding Shanghai of 'difficult' prisoners and repeat offenders by regularly sending them to Hong Kong.¹⁴⁹

Penal interconnections also existed within the consular China system: China, Japan, Taiwan (and later Korea) through the OIC1865. Section V, subsection III, no.78 allowed for HMSC, where expedient, to send anyone convicted of imprisonment before any consular court, to anywhere in Japan or China if it had been approved by the Foreign Office as a place of imprisonment. In practice, this was such a regularly used sanction that the Foreign Office often acknowledged the deportation of prisoners *ex post facto*. In particular, Judge Hornby and other HMSC judges claimed increasingly that the inadequacy of penal facilities meant moving prisoners was necessary for longer-term prisoners. All consulates had 'prisons' but the descriptions of some reveal that many outside of Shanghai were small buildings with limited space, designed for short-term detention than for long-term imprisonment.¹⁵⁰ In 1905, all consular gaols were deemed inadequate as places of execution, and a draft order was made to move death sentence prisoners to Shanghai.¹⁵¹

Aside from its use for repeat offenders and as a means of circumventing the problem of the lack of adequate prisons, deportation was also used for those who were part of the armed services, and 'criminal lunatics' – those judged to be insane during or after committing a crime. It was also extended to apply to any British subject who was thought likely to commit a breach of the peace, and unable to provide security for future good behaviour. In these cases, deportation could be made to Hong Kong or Britain.¹⁵² As well as Edmund Hornby, the

¹⁴⁸ *Ibid.*

¹⁴⁹ TNA: FO656/53 Foreign Office to Robert Mowat, HMSC Chief Judge, 14 Oct., 1880.

¹⁵⁰ TNA: ADM125/25 Captain to Admiral Robert Coole, 1 Mar., 1881.

¹⁵¹ TNA: FO656/106 HMSC to Ernest Satow, Ambassador at Beijing, 1 May, 1905; TNA: FO656/92 Ambassador at Beijing to Nicholas Hannen, HMSC Chief Justice, 10 Aug. 1898.

¹⁵² Piggott, *Exterritoriality*, p. 58.

Hong Kong legal authorities complained about having to receive increasing numbers of treaty port subjects, and the resulting change was the Order in Council 1904, (OIC1904) which stipulated that they and other governments had to consent to the receiving of prisoners. Hong Kong's enthusiasm for the legislation is highlighted in the case of Harry Haines, who was sentenced in Canton in 1905. Hong Kong exercised its new rights, and refused to receive him.¹⁵³ After 1908, the Hong Kong authorities also insisted that released prisoners release should be sent back to Shanghai.¹⁵⁴ Thus, there was a transnational link in terms of penal practices of sending prisoners to Hong Kong and then back again from the turn of the twentieth century.

The penal practices and regulations therefore appeared to make the extraterritorial system in China inherently connected to the wider formal empire, as well as being a transnational system itself between China, Japan, Taiwan and later Korea. Various provisions in particular connected Hong Kong to China, and this was particularly important due to porous and often ambiguous nature of land and sea borders. In practice, there were many instances where the metropolitan Acts and OIC regulations were used to track, arrest and deport offenders, although it is difficult to gauge their effectiveness. Nevertheless, jurisdictional practices underlined the need for transnational legal jurisdiction. Mobile goods and people, including fugitives, required types of transnational legal governance. The difficulties of ascertaining borders, and the crossing of them meant that the Hong Kong and British authorities created a blanket of joint jurisdiction. Finally, the movement of long-term prisoners from China to the metropole and Hong Kong (and later, India and Burma), forged penal connections between China, the metropole, and the wider British Empire in Asia.

Conclusion

This chapter has explored the key aspects of British extraterritorial legal system and jurisdiction. 1833 was a watershed moment for establishing a nascent

¹⁵³ TNA: FO656/106 HMSC to Ambassador at Beijing 27 Jun., 1905.

¹⁵⁴ TNA: FO656/101 Pelham Warren, Consulate General Shanghai to Assistant HMSC Judge Vincent, 3 Oct., 1908.

extraterritorial system and developing important elements of jurisdiction. The treaties with China during 1842-1843 were significant for expanding extraterritorial privileges. However, they were equally significant for consolidating and expanding *existing* jurisdictional powers. From 1842 to 1865, the consular court and Hong Kong system was institutionally integrated, with the governor of Hong Kong holding administrative and legislative powers that constituted the consular system. During this period the British extraterritorial system in China was both semicolonial as well as closely aligned to and shaped by the formal colony of Hong Kong. After 1865, with the creation of HMSC, the consular system changed in important ways. The OIC1865 attempted to professionalise and to regulate the consular system. It also severed the institutional link between China and Hong Kong and gave the Foreign Office and other metropolitan bodies a strong role in legislation and administration. However, although OIC1865 cut the institutional and administrative links with Hong Kong, metropolitan law and OIC regulations arguably increased its overlapping jurisdictional and penal practices with the extraterritorial system. In regards to law, this was due to the nature of transnational crime, notably the ambiguous spaces of the seas and frontiers between jurisdictions. In regards to penal practices, a lack of prison facilities, limited finances, and the question of what to do with 'difficult' prisoners made the deportation of prisoners an attractive option for the consular court authorities. Convicts were most commonly sent to Hong Kong and Britain. Both before and after 1865 both metropolitan legislation and the specific OICs served to connect the China consular legal system and jurisdiction as a transnational set of practices with Hong Kong and the extraterritorial jurisdiction in the region as well as the metropole.

Such colonial connections regarding jurisdiction and prisoners were not limited to Hong Kong. In the next chapter, a focus on China's western frontier regions of Xinjiang and Yunnan will show how overlapping legal jurisdictions between colonial legal systems in Burma and India were developed with the western regions.

Chapter 3

Xinjiang and Yunnan: Extraterritoriality in the Western Frontier Regions

Introduction

Although the last chapter explored the legal system and extraterritoriality as it was constituted on the east coast of China and intertwined with Hong Kong, this chapter examines the less familiar institutional and administrative developments of the extraterritorial legal system as it extended into the western Chinese interior. The chapter examines two case studies – Xinjiang and Yunnan – between c.1880-1920.¹ The cases have been chosen because of their connections with the legal systems in India and Burma, with the date reflecting the beginning of legal influence, and its consolidation in the early twentieth century. Although the foreign presence in China and extraterritoriality are often associated with the Chinese east coast and maritime connections of the treaty *port* world, this chapter shows how terrestrial and inland extraterritoriality operated.² By writing Xinjiang and Yunnan into the history of treaty port China, this chapter shows how extraterritoriality in the western regions constituted an important part of British legal (transnational) governance in the region. It reveals Xinjiang and Yunnan as examples of how extraterritorial jurisdiction was shaped by local circumstances, as well as regional social and political dynamics.

¹Although it was referred to as ‘Kashgar’ in contemporary nineteenth and early twentieth sources, British legal powers geographically covered the region roughly incorporating present day Xinjiang and north-western Mongolia.

² Kashgar in Xinjiang and the Yunnan consulates may not have been considered a ‘treaty port’ in the same sense as coastal treaty ports to the east. Nor was Kashgar opened by treaty – it was voluntary opened on the part of the Chinese authorities. However, British officials nevertheless exercised jurisdiction in these places by virtue of the Sino-British treaties and metropolitan legislation. Most studies have focused on Shanghai and the eastern treaty ports. For example, Scully on the American consular courts: E. Scully, *Bargaining with the State from Afar: American Citizenship in Treaty Port China, 1844-1942* (New York, 2001); P. D. Coates has explored the role of consuls, although he does not include Xinjiang and has a limited focus on the western regions. See: P. D. Coates, *The China Consuls: British Consular Officers 1843-1943* (Oxford, 1988); Skrine and Nightingale have provided the most comprehensive study on the role of the British officer and consul in Xinjiang, but their focus concerns the politics of the region rather than a legal analysis. See: C.P. Skrine and P. Nightingale, *Macartney at Kashgar: New Light on British, Chinese and Russian Activities in Sinkiang, 1890-1918* (Oxford, 1987).

Despite the fact that the western regions and their frontiers now receive greater attention within China historiography, none explore British extraterritoriality in these regions.³ This chapter makes a significant intervention, as it argues that extraterritoriality played three important roles in the western regions. Firstly, the British consuls and their extraterritorial powers in the frontier areas were important mediators between British colonial legal authorities and legal systems in India and Burma, local legal issues in the frontier, and the local and regional Chinese authorities. While the western frontiers have been richly explored as meeting points for Chinese, local and imperial actors, this chapter looks at this process from a new legal angle.⁴ In Xinjiang, the British official George Macartney embodied this process. First he acted as a legal negotiator on behalf of British subjects working (and sometimes struggling) with local Xinjiang legal authorities. Afterwards he was both part of the British Indian legal system and worked in a quasi-consular capacity with various legal powers invested upon him through extraterritorial powers as outlined in the China treaties. This formed a bridge between British extraterritorial and colonial jurisdiction. In Yunnan, consuls also worked as mediators between British colonial officials and on behalf of local British subjects to pressurise the Chinese authorities into investigating crimes. In the border regions the bridge between their legal powers and British Burmese legal powers jurisdictionally overlapped after 1914.

Secondly, extraterritoriality helped to reinforce territorial borders made by the British colonial authorities and redefine jurisdictional borders. This is most clearly seen in Yunnan. With the expanding British colonial presence in Burma, the ambiguous space of the frontier and local mobile populations that regularly crossed over borders, jurisdictional issues became a concern for the British authorities. As such, legal powers of arrest and deportation of British colonial officials were extended by virtue of extraterritoriality into China when a suspect drifted into assumed Chinese territory. In this way, the problem of jurisdiction

³ Edited volumes on frontier regions include: P. Crossley, H. Siu and D. Sutton (eds), *Empire at the Margins* (Berkeley, 2006); Lary (ed.), *Chinese State at the Borders* (Vancouver, 2008).

⁴ In China studies several works have underlined the importance of frontiers to understand the relationship between metropolitan center and borderland. See: Crossley (eds), *Empire at the Margins*; Lary (ed.), *Chinese State at the Borders*; this thesis does not attempt to downplay the role played by centres, but uncovers legal jurisdiction in the frontier as a meeting point between centres; China, colonial India and Burma and the treaty port consular system.

ending at territorial borders was overcome by attaching British jurisdiction to people, making the people themselves a jurisdictional border. This made for another, albeit different, way in which colonial and extraterritorial jurisdiction merged and overlapped in the frontier regions. This opens up a new perspective on the creation of jurisdictional borders in both legal studies and China studies. Most research in China studies focus upon Qing and Republican state building, cultural interaction and warfare in the region.⁵ In studies on legal jurisdiction in frontier regions, the role of extraterritoriality is rarely considered.⁶ The role of extraterritoriality can also add a new perspective on trans-frontier legal connections between colonial and consular jurisdiction, trans-frontier governance and how the local and regional were tied together through jurisdictional practices.

The chapter is split into three sections. The first section delineates the spread of the extraterritorial system to the hinterland and western region of China. Sections two and three thereafter examine Xinjiang and Yunnan as case studies in more detail. Legal consular correspondence records form the bulk of the sources and are used in conjunction with legislation to understand the framework of the legal system and the exercise of jurisdiction. The time frame 1880-1920 is selected as it incorporates the build-up to extraterritoriality in the regions and the main jurisdictional changes that occurred during the early twentieth century.

Finally, a note on terminology is important to frame key concepts in the chapter. 'Frontier' is the term used rather than 'borderland'. Although they are sometimes used interchangeably, 'frontier' is often used to designate a zone without clear boundaries where cultures overlapped and competed, or to express the outer

⁵ See amongst others: Crossley (eds), *Empire at the Margins*; P. Giersch, *Asian Borderlands: the Transformation of Qing China's Yunnan Frontier* (Cambridge, 2006); P. Perdue, *China Marches West: The Qing Conquest of Central Eurasia* (Cambridge, 2005); A. Rodriguez, 'Building the nation, serving the frontier: mobilizing and reconstructing China's borderlands during the War of Resistance (1937-1945)', *Modern Asian Studies*, 45, no.2, (2011), pp. 345-76.

⁶ Exceptions include: D. Margolies, *Spaces of Law in American Foreign Relations: Extradition and Extraterritoriality in the Borderlands and Beyond 1877-1898* (Athens, 2011); for research on borders in Asia and the role of non-state forces in shaping borders, see: E. Tagliacozzo, 'Ambiguous commodities, unstable frontiers: the case of Burma, Siam, and imperial Britain, 1800-1900', *Comparative Studies in Society and History*, 46, no.2, (2004), pp. 354-77.

reaches from the centre of a (European) settled area in foreign lands.⁷ The term *bianjiang* often denotes a relative periphery from a perceived centre. As Xinjiang and Yunnan were regions distanced from a number of different ‘centres’, including the Qing state, eastern treaty ports, and centralised authority in British India and Burma, frontier is the preferred term.

1. The Spread of Jurisdiction Westwards

In the first decades of the extraterritorial system following the Sino-British treaties (1842-1843), treaty ports opened for foreign trade and stationed British consuls reflected the importance of maritime commerce on the east coast. Starting from the south in Canton and developing north, by the early 1890s there were at least eighteen consulates. Consuls had both administrative duties and judicial powers over British subjects within their consular district.⁸ The varying numbers of British residents, trade, and receptivity of the local Chinese populace shaped each consulate. As such, some consuls were extremely busy with both administrative and judicial matters, depending on the popularity of the port as a trading centre. Meanwhile, other consulates saw very little foreign trade but were kept occupied dealing with wayward venturing Britons or missionaries when they stirred up trouble with the local populace further inland.

The latter scenario became the characteristic and unforeseen (yet important) role of the consulates established further inland by the close of the nineteenth century.⁹ The British authorities established inland and western consulates for economic reasons: in hopes of exploiting the potentially lucrative interior markets of China and linking inland consulates with those on the coast. This lucrative market never emerged due to the hostility of the local populace to a foreign presence, the control wielded over business networks by local merchants, and because British officials had grossly overestimated the potential of certain

⁷ Lary (ed.), *The Chinese State at the Borders*, p.5; M. Baud and W. van Schendel, ‘Toward a comparative history of borderlands,’ *Journal of World History*, 8, no.2, (1997), p. 213.

⁸ The territorial limits of a ‘consular district’ were not specifically defined in any of the OICs.

⁹ For an overview on the difficulties encountered by consuls and British communities in the central China consulates see: Coates, *The China Consuls*, pp. 255-90.

trades to be developed in the region.¹⁰ British traders did not flock to the new inland trading centres and the consulates remained somewhat lonely ‘outposts’ with a small handful of British subjects – usually missionaries – as the only residents and sojourners.¹¹ Such was the case for a number of consulates including Wuzhou in Guangxi, (200 miles upstream from Canton), Sanshui in Guangdong,¹² Changsha in Hunan province and Chengdu in Sichuan.¹³

The western region ‘outposts’ in Xinjiang and Yunnan resembled in many ways the other inland consulates after they were opened at the turn of the twentieth century.¹⁴ They disappointed British officials for their perceived lack of economic prospects. As a result the number of British ‘European’ residents and sojourners were few. However, the consuls and extraterritoriality operating in these western regions were in many ways unlike other inland consulates because of their frontiers and their proximity to rival empires. Both Xinjiang and Yunnan were frontier regions in relation to the Qing state, the British China Consular service primarily based on the east coast and the British Indian and Burmese colonial authorities. Negotiating the difficult local environment, the absence of clearly demarcated borders and hostile local populace was challenging for all three regimes in the frontier. Mountains in the north and south surrounded Xinjiang in China’s northwest region with a largely barren, arid desert landscape in between. Likewise, the Himalayan plateau to the north and rugged sub-tropical hills to the south surrounded Yunnan. The Qing Empire in both regions had consolidated its rule after local uprisings but still claimed only a tenuous hold on the western regions. As such, to the Qing, Xinjiang was considered a frontier

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² These rights were granted after the Sino-British Burma Convention (1886). See: G. Hertslet, *Treaties etc between Great Britain and China and between China and foreign powers and orders in council, rules, regulations, acts of parliament, decrees etc affecting British interests in China, vol. 1*, pp. 86-91.

¹³ However, Judith Wyman claims that there were approximately 100 foreigners living in Chongqing by 1906: J. Wyman, ‘Foreigners or outsiders? westerners and Chinese Christians in Chongqing 1870-1900’, in R. Bickers and C. Henriot (eds), *New Frontiers: Imperialism’s New Communities in East Asia, 1842-1953* (Manchester, 2000), pp. 75-87.

¹⁴ Extraterritoriality was also granted in the trade marts of Yadong (1894) and Gyantse and Gartok (1904) following the Appended Sikkim-Tibet Convention (1890). See: Hertslet, *Treaties*, pp. 92-4; the Tibetan trade marts had no consulate but a British Indian government political officer had jurisdictional powers over civil and criminal cases where the defendant was a British subject. The thesis does not have space for a thorough exploration of the dynamics of jurisdiction in Tibet.

region alongside Manchuria, Mongolia, and Tibet, as distinguished from ‘China proper’ in the form of ‘the eighteen provinces’.¹⁵ These frontier regions acknowledged Qing sovereignty through the tributary system whereby local leaders paid tribute to China as a recognition of the Qing’s *de jure* sovereign status over them. They, in turn, allowed them to exercise relative autonomy under local rulers. The local rulers often held *de facto* power and some of these regions were considered lawless, being beyond the nominal reach of Qing control.

Finally, in Xinjiang and Yunnan, inter-imperial rivalries played an important role in defining the political and economic powers in region. The empires of Britain, France, Russia and China often overlapped and part of the contestations were over territory and sovereignty. This included extraterritoriality and the exercise of legal powers in places like China. Although the exercise of legal rights was not the impetus behind the establishment of consulates and consuls in the western regions, exercising legal-judicial duties became an important aspect of British imperial power during the first and second decade of the twentieth century as the chapter will show below.

¹⁵ The Qianlong Emperor proclaimed in 1759 that the Xinjiang region was no longer a frontier region – *bianqu* - but part of the interior - *neidi*. However in administrative practice it remained very much a frontier region. See: J. Millward and L. J. Newby, ‘The Qing and Islam on the western frontier’, in Crossley (eds), *Empire at the Margins*, pp. 115-17; Yunnan was considered part of ‘China proper’ although the western parts were a largely autonomous frontier region.

Map 3.1 *Map of all consular establishments that existed during parts of the early twentieth century.*



Xinjiang is situated in the far northwest with a consulate at Kashgar. Yunnan is to the south-west with consulates at Tengyueh, Ssumao and Yunnan. Post-1943 consular establishments with no extraterritorial jurisdiction have been digitally edited out of this map. Source: credits to mapmaker Laura Vann, 2015. Original map: H. Lo and H. Bryant, *British Consular Establishments in China 1793-1949* (Taipei, 1988), p. viii.

2. Xinjiang

Background

Like other frontier regions, Xinjiang has a long history of competing empires and local factions vying for power. For many centuries political power oscillated between local *khanates* and between competing distant empires - Mongol, Russian and Chinese.¹⁶ It was a region lying culturally and geographically

¹⁶ A comprehensive background of Xinjiang as a frontier region and Qing conquest (especially pre-nineteenth century) is detailed in: Perdue, *China Marches West*.

between China proper to the east, Islamic Central Asia to the west, and Russia and Mongolia to the north and northeast. The populace was cosmopolitan, with increasing numbers of Chinese Muslims joining existing Turkic-speaking Muslims and nomadic peoples from the Mongolian Steppe in the north. Reflecting these ambiguities and political changes were the different appellations of the region in the English language in the nineteenth and early twentieth centuries: ‘Turkestan’, ‘Eastern Turkestan’, ‘Chinese Turkestan’, ‘Chinese Tartary’, and, later ‘Sinkiang’ (Xinjiang) after Chinese re-conquest in 1877.¹⁷ Nevertheless, it remained a ‘frontier’, despite technically coming under Chinese sovereignty. Located on the outer reaches of the Chinese Empire and its political power base in the east, Xinjiang was a largely autonomous region. It was governed through a mixture of local officials and military commanders. As overarching sovereign, China allowed local practices to continue without interference, as reflected in the application of law.¹⁸ While minor crimes were punishable by local Muslim law, the Great Qing legal code (*Da Qing lü li*) applied to all subjects in Xinjiang for more serious civil and criminal offences.¹⁹ In such a way, the Qing Empire retained its legal sovereignty over Xinjiang but allowed a certain degree of autonomy. Despite the re-conquest of Xinjiang, in many senses, the Qing Empire was in decline in the nineteenth century. As well as a series of socio-political difficulties within China proper, exhaustion of cultivable land in the frontier peripheries caused social unrest, left Qing control in the region precarious.²⁰ Internal instability and foreign engagement on its east coast continued until the collapse of the Qing in 1911.

These challenges facing the Qing Empire came with the contingent timing of expanding western imperialism in China and Asia as a region. By the nineteenth century both the British and Russian empires were edging their spheres of influence towards a common region near and around Xinjiang.²¹ A strong

¹⁷ A rebellion led by Yakub Beg, a Kokandi warlord established a brief independent state of ‘Turkestan’ from 1865-1877. The rebellion encompassed the Dungan revolt, where Muslim fighters in Shaanxi, Gansu, Xinjiang and Ningxia rebelled against Qing rule from 1862-1877.

¹⁸ Perdue, *China Marches West*.

¹⁹ J. Millward, *Beyond the Pass: Economy, Ethnicity and Empire in Qing Central Asia, 1759-1864* (Stanford, 1998), pp. 122-3.

²⁰ Perdue, *China Marches West*, pp. 551-2.

²¹ A comprehensive history of British and Russian advance in the region towards Xinjiang is detailed in G. J. Alder, *British India’s Northern Frontiers* (London, 1963).

Russian presence closed in to the north and east in Mongolia. By 1861 Russia established a consulate in Urga (present-day Ulaan Bator). Russia also secured special trading rights in both Mongolia and Xinjiang through the Treaty of St Petersburg (1881).²² The treaty was a trade-off for returning land to China following the Russian occupation of northern parts of Xinjiang during its brief independence under Yakub Begg (1865-1877). It allowed a Russian consul to be stationed in Kashgar. Alongside trading privileges for Russian subjects, this gave the Russian authorities and their subjects a great degree of influence over the Xinjiang export and import economy. Therefore, whilst Mongolia and its surrounding region were part of the Qing Empire, there was a certain overlapping of indirect power through Russian political and economic privileges.

Map 3.2 map of 'Sinkiang' (Xinjiang) in the late nineteenth century



Source: credits to mapmaker Laura Vann, 2015. Original map: H. Lo and H. Bryant, *British Consular Establishments in China 1793-1949* (Taipei, 1988), p. 567.

²² In 1899, after an Anglo-Russian exchange of correspondence, Britain recognised Mongolia as part of China and as a place where Russia could build railways free of competition from Britain. In essence, Britain recognised the Russian sphere of influence in Mongolia. See: A. Lamb, *McMahon Line: A Study in Relations between India, China and Tibet 1904-1914, Vol. 1* (London, 1966), p. 120.

The British Indian Government considered Xinjiang important for two key reasons. Firstly, there was a rising concern over growing Russian influence in central Asia: Xinjiang was part of the ‘Great Game’ of geo-political contest between Britain and Russia. Secondly, and partly to counteract the first reason, the British Indian authorities were keen to secure equal economic rights from the Qing similar to those conferred on the Russians in Xinjiang, in order to enhance British economic strength and minimize Russian trade.²³ In 1890, the Indian Government sent the Younghusband mission to Xinjiang accompanied by a translator; a mixed race China-born man named George Macartney. Macartney used his adept language skills, understanding and appreciation of Chinese culture, and diplomatic acumen with the Chinese authorities to stay on after the mission to become a successful sole diplomat, and later consul-general in charge of looking after British interests for 28 years until 1918.

Macartney as unofficial diplomat 1891-1908

The status of George Macartney from 1891-1908 was a peculiarity compared to the consular officers stationed in the treaty ports in China. For the first seventeen years Macartney was not a consular officer with training in the China service but a political officer working under the auspices of the Government of India. His status in the Indian Government was not particularly esteemed; his official title of ‘Special Assistant to the Resident in Kashmir for Chinese Affairs’ reinforced his status as an adjunct minor official. Both the Chinese and Russian authorities also refused to recognise his official position.²⁴ Neither the Russian nor Chinese authorities wanted Britain to expand its interests in a region that they considered their own spheres of influence. Given the sensitivity of the area as a space of contestation between the three powers, the Foreign Office and India Office delayed applying pressure on the Chinese authorities to officially recognise Macartney. The British authorities were cautious of antagonising relations with Russia, and the sensitive wider geostrategic and diplomatic engagement with Russia in the ‘Great Game’ politics in central Asia.

²³ For a detailed background on the political and economic aspirations of the British India government in the region, see: Skrine and Nightingale, *Macartney at Kashgar*, pp. 17-48.

²⁴ For a more in-depth examination of this, see Skrine and Nightingale, *Macartney at Kashgar*, pp. 88-149.

However, Macartney's role in Xinjiang can be seen as significant even at this early date. Aside from having an important duty as a listening post for British intelligence of Russia's designs in the region, Macartney used his position whenever possible to exercise judicial powers over British subjects and to negotiate legal privileges for British subjects.²⁵ In many senses, it was a type of customary extraterritoriality, where Macartney bargained for legal powers over particular cases. These rights became an increasingly significant part of British interests in Xinjiang, as the number of British subjects in Xinjiang grew. Most were Indian tradesmen, Sindhi Shikarpuri men, involved in moneylending business, living in the commercial centres of Kashgar and Yarkand.²⁶ Dealing with disputes of moneylending became a large part of the routine activities of Macartney and his assistants.²⁷

Despite this, one of Macartney's first major tasks after his appointment in 1891 was not mediating civil disputes but negotiating the release of British Indian slaves. Working alongside the local Xinjiang magistrate - the Chinese *Amban* - in 1894 Macartney succeeded in freeing at least 192 British Indian subjects kidnapped by Hunza tribesmen from over the mountain passes and sold into slavery in Xinjiang.²⁸ Although this involved negotiating with Chinese local authorities and judiciary on the use of Chinese criminal law, his role was more diplomatic than judicial. Nevertheless, part of his diplomatic dialogue with the local authorities concerned the legality of servitude in Chinese law and the application of certain types of servitude upon British subjects.²⁹ The episode outlined Macartney's desire to work on behalf of British subjects and his willingness to be involved in legal issues. It also demonstrated that he was negotiating - and succeeding - in making Chinese officials consider applying principles of extraterritoriality to British subjects. C. P. Skrine and Pamela Nightingale claim that slave owning was customary amongst Muslim tribes but

²⁵ *Ibid.*

²⁶ C. Markovits, *The Global World of Indian Merchants, 1750-1947: Traders of Sind from Bukhara to Panama* (Cambridge, 2000), p. 57 and p. 60.

²⁷ *Ibid.*, p. 95.

²⁸ Skrine and Nightingale, *Macartney at Kashgar*, pp. 52-64 and p. 78.

²⁹ *Ibid.*, p. 64.

illegal in Qing law, though the Qing overlooked the practice.³⁰ However slavery was not removed as a criminal offence within the Qing legal codes until later in 1909.³¹ This is significant as it suggests that Macartney did not, as Skrine and Nightingale assert, convince the Qing authorities to clamp down on practices that were illegal in Xinjiang. In fact, he was successful in asserting legal rights for British subjects despite the legality of slavery.

Macartney's involvement in diplomatic relations and legal issues continued to the end of the nineteenth century. However, his legal powers and success were constrained by his unofficial role, and dependent upon the goodwill of the Chinese authorities. One incident in particular highlighted this state of affairs. In 1896, two local Xinjiang soldiers and a Chinese soldier assaulted Macartney and a Hindu trader in an unprovoked attack.³² Macartney reported the affair to his administrative superiors in order to ensure that the local *Amban*, who had dismissed the incident, tried at least one of the accused. After failing initially to persuade the *Amban* to hear the case, Macartney reported the incident to the India Office, who corresponded with the Foreign Office. The Foreign Office then forwarded the issue to the British ambassador at Beijing, who in turn discussed actions with the Chinese authorities in the Chinese capital. The Chinese central authorities communicated to the Xinjiang provincial authority - the *Daotai* - to instruct the local magistrate in Kashgar - the *Amban* - to conduct a more thorough investigation and hearing of the assault case. The *Amban* tried the suspect and found him guilty and sentenced him to flogging. Although Macartney could pressurize the Chinese authorities to hear cases involving British subjects, success came after a lengthy series of letters. Hence, although Macartney eventually succeeded in forcing the local magistrate to hear the trial, his non-diplomatic status and absence of diplomatic recognition made communication and negotiation over Sino-British cases difficult.

In another case shortly afterwards, the conditional nature of Macartney's legal rights, and his success in securing more informal powers can be seen through a

³⁰ *Ibid.*

³¹ P. C. Huang, *Code, Custom and Legal Practice in China: The Qing and the Republic Compared* (Stanford, 2001), p. 17.

³² Skrine and Nightingale, *Macartney at Kashgar*, p. 89.

civil dispute.³³ Shortly before returning home, Macartney heard the case and pronounced a sentence. The local *Amban*, on hearing of Macartney's temporary leave, overturned his ruling in his absence, reinforcing Qing sovereignty over British subjects. When Macartney returned and learned of the actions of the *Amban*, through the same means of communication as the assault case in 1896, he launched a complaint. This time he expressed the view that he should be vested with legal powers over disputes involving British subjects. This request for non-treaty based extraterritoriality was akin to the customary practices conferred by the Qing to the British East India Company in Canton from 1759-1842. The British and Chinese authorities in Beijing decided that the local Chinese officials should allow Macartney to have some quasi-judicial powers.³⁴ This was a significant change in practice at a time when Sino-British court cases were becoming more frequent, owing to the increasing number of complaints made by Indian merchants. There were, according to the Joint Commissioner of Ladakh, a reported six hundred debt-related cases yet to be settled, discouraging prospective Hindu traders from going to Xinjiang.³⁵ This number increased after 1905 when the Chinese authorities agreed to give British nationals exemption from levies on trade, resulting in a larger population of British subjects flocking to Xinjiang and claiming British nationality for trading privileges.³⁶

The agreed upon judicial powers given to Macartney were in civil and criminal cases in which both the parties were British subjects, with Macartney or his agent able to hear the case in the presence of an agent appointed by the *Amban*.³⁷ In suits where one party was a British subject and another a subject of the *Amban*, cases were tried in the *Amban*'s court in the presence of a British representative. Appeals could be made to a higher official if the British representative felt there was a perceived injustice in the hearing or sentence. Criminal and civil cases where both subjects were foreigners – neither British nor a subject of the *Amban* – were tried in the *Amban*'s court in the presence of a British representative.³⁸

³³ *Ibid.*, pp. 96-100.

³⁴ *Ibid.*, pp. 105-39.

³⁵ *Ibid.*, pp. 104-5 and p. 139.

³⁶ *Ibid.*, p. 133.

³⁷ F. Piggott, *Exterritoriality: The Law Relating to Consular Jurisdiction and to Residence in Oriental Countries*, (Hong Kong, 1907), pp. 166-7.

³⁸ *Ibid.*

This legal arrangement was very similar to those in operation in British consular courts and Mixed Courts in China. The difference being that in the rest of China, British defendants were always tried in the consular courts. In Xinjiang, the agreed powers suggest British defendants could be tried in the *Amban's* court. The law used was not specified, but it was unlikely that British law or legal principles were applied in the *Amban's* court. However, Macartney may well have applied British Indian law in disputes between British subjects where it was more familiar to defendants than Chinese or local Xinjiang law. Despite these successes for Macartney, much like the customary extraterritorial privileges accorded to the East India Company from 1759-1842, there existed no written agreements or official recognition of Macartney's judicial status. As such, working with the local *Amban* depended on his goodwill. Nevertheless, the agreement suggests that Macartney played a legal role by working with the local *Amban* in British and Sino-British cases. Macartney therefore, as an unofficial British Indian political officer, was exercising a type of extraterritoriality within Chinese territory with near approximate consular rights as those in China 'proper'. However, these powers were dependent upon the local magistrate and Qing goodwill in conferring powers to work with local magistrates for the resolution of mixed cases and disputes between British subjects.

Macartney as Consul-General and consular extraterritorial jurisdiction, 1908-1920

In 1908 Macartney was finally appointed as consul-general in Kashgar. The change was the result of many years of India Office pressure upon the Foreign Office for his appointment as a recognised consul.³⁹ However, it was only through the Anglo-Russian convention in 1905, in which Russia dropped its opposition to his appointment, that the Foreign Office could declare him a consul-general with Chinese acquiescence.⁴⁰ His new status meant that he was officially recognised as having diplomatic and consular powers, working both for the Indian government and in the China consular system. He officially bridged both the colonial and consular systems in administrative terms, as the India Office continued to pay his salary and accommodation as an officer of the Indian

³⁹ Skrine and Nightingale, *Macartney at Kashgar*, pp. 149-57.

⁴⁰ *Ibid.*

Government.⁴¹ As regards the legal system, as consul and part of the China consular court system (1908-1920) McCartney's legal role was framed by the Orders in Council (hereafter OICs) that governed all the British consular courts in China.⁴² He applied extraterritorial British law and exercised his jurisdictional powers over both Xinjiang and Kobdo - a region to the northeast of Xinjiang in present-day western Mongolia. Like all other provincial courts, His Britannic Majesty's Supreme Court for China (hereafter HMSC), which also included 'Corea' at this point, was the high court and had appellate powers.

One might assume that similar to other interior and western 'outposts' this region could be described as a relatively sleepy consular district. However, legal correspondence reveals that Macartney's judicial role was of great importance due to the increasing numbers of British subjects registering at the consulate. In 1915, there were around 800 British subjects registered in Kashgar.⁴³ The majority of these were understood to be the heads of families and, in turn, they conferred British status to their wives and children. Macartney estimated that the average family size was five, equating to approximately 4,000 British subjects in Kashgar.⁴⁴ As Claude Markovits has also noted, unlike in other places in Central Asia, Indian Shikarpuri traders often took local wives in Xinjiang.⁴⁵ This made for a large number of British subjects, especially given the barely double figures comprising British subjects in most other interior ports. Another difference between Kashgar and other consular districts was the ethnic background of the British subjects. Of these 4,000 British subjects, only a few were 'European' or 'British-born'. The majority were of 'Asiatic' descent including Muslims or Hindus from the Punjab, Peshinis, Swatis, Bajouris, Kashmiris, Ladakhis, Gilgitis, Chitralis, Baltistanis, Nagaris, Kanjutis, and Afghans from Kabul, Badakshan and Wakhan. Most of them were born of emigrant parents in Xinjiang, and so were second-generation British subjects.⁴⁶ As such, the 'British' subjects under extraterritorial jurisdiction composed of a variety of people of

⁴¹ BPP, HC: 1914-16, [Cd.7749] *Royal Commission on the Civil Service, appendix to fifth report of the commissioners. minutes of evidence, dated Apr. 29, 1914- Jul. 16, 1914*, p. 302.

⁴² TNA: FO656/139 'Copy of Memorandum by Sir George Macartney', 14 Sept., 1915.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Markovits, *The Global World of Indian Merchants*, p. 98.

⁴⁶ TNA: FO656/139 'Copy of Memorandum by Sir George Macartney', 14 Sept., 1915.

local and regional heritage, rather than domiciled ‘European’ British subjects.⁴⁷ Macartney suggested that this population was expected to increase in the coming years with the registration of more second-generation immigrants.⁴⁸ Macartney’s role in resolving their issues continued unabated despite the 1911 Chinese revolution, which upturned the Qing, and the unrest of subsequent years, including in Urumqi.⁴⁹ Further, despite the outbreak of the Great War in 1914, consular reports show increases in trade, especially to and from British India, suggesting a corresponding increase in British subjects in the region.⁵⁰

Indeed, it was within the context of rising numbers of British subjects and the Great War that Macartney called upon the India Office and Foreign Office in 1915 for a change in the nature of his jurisdictional powers, with a separate OIC to govern his jurisdiction. The issue arose after a case of deportation of a prisoner, Akhtar Muhammed, raised issues of the legality of sending prisoners to India.⁵¹ Macartney’s reports reveal that the deportation of suspects and prisoners to India was a common practice.⁵² Sending prisoners and suspects was both practical and an efficient method of transnational British governance as there were few prison facilities in Xinjiang. Moreover, with the rise of anti-British Indian nationalism, political suspects could be easily sent back to India for detention and trial.⁵³ However, the deportation of suspects and removal of prisoners for imprisonment to India was constrained by the China OICs. As regards deportation, this could be made to Hong Kong, England or the place from where they were originally born or domiciled.⁵⁴ However, as chapter two explored, imprisonment to other parts of the British Empire was only specified to Hong Kong. Although the details of the Akhtar Muhammed case are missing, it is likely (given the resulting changes after the case) that he or someone on his

⁴⁷ The broad spectrum of people incorporated in court cases of the British consular system will be explored in more depth in chapter four.

⁴⁸ Skrine and Nightingale, *Macartney at Kashgar*, pp. 232-3.

⁴⁹ BPP, HC: 1914, [Cd.7356] *Further correspondence respecting the affairs of China*, Sir John Jordan to Sir Edmund Grey, 24 Jun, 1913, pp. 65-6.

⁵⁰ BPP, HC: 1924, [Cmd.2247] *Statistical abstract for British self-governing dominions, colonies, possessions, and protectorates in each year from 1903 to 1921*, pp. 242-3 and pp. 245-6.

⁵¹ TNA: FO656/139 Sir John Jordan, Ambassador at Beijing to Havilland de Sausmarrez, HMSC, 24 Feb., 1916.

⁵² *Ibid.*

⁵³ This will be explored in further detail in chapter five.

⁵⁴ Order in Council 1904, Section III, no.83, see: Hertslet *Treaties...vol. II*, pp. 864-5.

behalf may have questioned the legality of imprisoning him in India. Indeed, the importance of imprisoning prisoners in India was underlined by the Foreign Office Secretary of State, who, in reference to proposed legislative changes to allow imprisonment in India, said it ‘would settle the question of the practice to be followed in the removal of convicts from Kashgar to India.’⁵⁵ With the refusal of prisoners to be removed, the proposal was essentially about the major concern presented to both the Indian government and Macartney: the question of the deportation of convicts.

Macartney proposed to HMSC Chief Judge and the Foreign Office Secretary of State that his court should be brought within the Indian legal system, and British Indian law applied to all British subjects in the region.⁵⁶ In addition, he called for greater powers of deportation to the subcontinent.⁵⁷ Macartney cited several reasons for the proposed changes, including the large number of subjects, the common language of the majority of British subjects (Hindustani, Hindi and Persian), the region’s distance from HMSC.⁵⁸ These were plausible reasons for the court’s integration with the Indian system and use of British Indian law. His elevated status as a consul-general with powers of deportation, he suggested, would make the deportation of convicts easier, since the administrative system as framed by the OICs slowed down deportation.⁵⁹ After a lengthy period of correspondence the India Office, Foreign Office and British consular authorities agreed with the proposals. The ambassador at Beijing (the senior British representative in China) observed it was:

eminently practical in as much as they will relieve His Majesty’s Supreme Court for China of duties and responsibilities in respect to the application of British law to British Indian subjects and British protected persons in a remote and inaccessible part of China where conditions are entirely different from those obtaining in the interior of China Proper and in the treaty ports.⁶⁰

⁵⁵ TNA: FO656/139 Foreign Office to Ambassador at Beijing, 3 Jan., 1916.

⁵⁶ TNA: FO656/139 ‘Copy of Memorandum by Sir George Macartney’, 14 Sept., 1915.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ TNA: FO656/139 Sir John Jordan, Ambassador at Beijing to Havilland de Sausmarez, HMSC, 24 Feb., 1916.

With an agreement in place, the amendment was made five years later as the China (Kashgar) Order in Council, 1920 (hereafter OIC1920).⁶¹ The content of the OIC1920 reflected Macartney's proposals; the Kashgar court was made part of the British Indian system, and considered 'a district of the Punjab'.⁶² The law applied to the criminal and civil codes of India and any of its future laws.⁶³ The High Court for appeals was the High Court in the Punjab, and the consul-general was bound to send reports to the governor-general of India.⁶⁴ The OIC1920 gave the Kashgar consul-general extensive powers for sentencing and punishment, including deportation. He could send the accused to trial to Lahore or for a sentence of imprisonment.⁶⁵ He could also send prisoners and deportees to the Punjab or anywhere else in the dominions with the consent of the Punjab government.⁶⁶ However, the OIC1920 empowered the consul-general further, stating that 'in addition to any punishment every conviction under the provision of this Article shall of itself and without further proceedings, make the person convicted liable to deportation from Kashgar'.⁶⁷ Finally the consul-general, like the ambassador at Beijing, accorded legislative powers in the OIC1920 in the form of King's Regulations. The consul general could had legislative powers both with the sanction of a higher authority, such as the Foreign Office or the Indian governor-general, and emergency legislative powers that could be made and executed without prior sanction.⁶⁸ These powers aimed to tie the Xinjiang legal system to British India's and also made Xinjiang an autonomous region through the Consul-General's special legislative powers. These legal changes consolidated deportation practices without consent, linking Xinjiang and the Indian legal system. Moreover the Xinjiang system was now more than simply connected to the Indian legal system: it was part of it.

⁶¹ The China (Kashgar) Order in Council, 1920; published in: *The London Gazette*, 12 Mar., 1920, pp. 3153-63.

⁶² The China (Kashgar) Order in Council, 1920, Section III, no.11.

⁶³ The China (Kashgar) Order in Council, 1920, Section II, no.8 (1).

⁶⁴ The China (Kashgar) Order in Council, 1920, Section III, no.11; no.18 (3).

⁶⁵ The China (Kashgar) Order in Council, 1920, Section III, no.12 (1).

⁶⁶ The China (Kashgar) Order in Council, 1920, Section III, no. 14; and Section III, no.18 (1); this provision existed in the concurrent China Orders in Council, although the specificity of the Punjab was unique to the Kashgar Order.

⁶⁷ *Ibid.*

⁶⁸ The China (Kashgar) Order in Council, 1920 Section VII, no.61.

However, whilst OIC1920 brought the Xinjiang legal system under the administration of India, it was not entirely independent of British extraterritorial jurisdiction in China or Chinese administration. Since Xinjiang was still the legal territory of China with British extraterritoriality, agreements made between diplomatic and consular authorities in conjunction with the Chinese authorities regarding, ‘Sanitary, Police or Game [gambling] regulations’ also applied to British subjects in Xinjiang.⁶⁹ Therefore, in cases involving British subjects in Xinjiang the consul-general had to take into consideration the plural legal environment: Chinese municipal laws, British extraterritorial laws and regulations, and colonial Indian laws. This is important to underline as extraterritoriality was the basis of which vested British Indian legal powers of Macartney were implemented. The underlying role of extraterritoriality and its relationship with Chinese sovereignty is underscored by the eventual termination of British legal powers in Xinjiang in 1943. In the Sino-British Treaty for the Relinquishment of Extra-territorial Rights, British extraterritoriality was abolished in China. Section I subsection I extended this to include Kashgar (Xinjiang).⁷⁰ Therefore British jurisdiction within Xinjiang (though amalgamated into the Indian legal system through the application of British Indian law from 1920-1943), was still extraterritorial jurisdiction, albeit exercised in conformity with Chinese and British municipal legislation and agreements, and exercised with British Indian law. This Xinjiang British system from 1920-1943 was therefore an administrative and legal bridge between both the colonial and semicolonial world and shaped by the events of Chinese sovereignty in relation to British extraterritoriality.

In sum, the case of Xinjiang shows the ways in which prior to 1908 Macartney exercised his legal powers through an informal practice based on extraterritorial privileges similar to that conferred on the East India Company prior to 1842. Macartney had a key role as a legal and diplomatic mediator and held quasi-legal powers. Between 1908 and 1920, Macartney exercised extraterritorial rights by virtue of the Sino-British treaties, and under the China OICs. However, the practices surrounding the deportation of suspects and convicts connected

⁶⁹ The China (Kashgar) Order in Council, 1920 Section III, no.23, (1).

⁷⁰ *The London Gazette*, 25 May 1943, p. 2331.

Xinjiang to British India. This was a necessity due to the political and social concerns of the British Indian government during the Great War. After 1920, owing to the practical limitations of exercising legal rights in Xinjiang and the need of the British Indian authorities to control and punish British subjects committing political crimes beyond the borders of India, the OIC1920 integrated the Xinjiang legal system with that of British India and gave the Xinjiang consul significant powers to send away prisoners and others for trial. However, legal jurisdiction was by virtue of extraterritoriality, and extraterritorial regulations as well as Chinese municipal laws, still applied to British subjects in Xinjiang. As such, Xinjiang presents the ways in which the British extraterritorial and colonial powers overlapped in a frontier region. In the next section, Yunnan will be explored, to show the ways in which extraterritoriality merged with British colonial law and legal system in another frontier region, that of the southwest. It will show the similarities and differences compared with Xinjiang.

3. Yunnan

Background

The area of Yunnan and its western frontier at the turn of the twentieth century was, compared to the east coast of China, far less familiar to the British colonial and China consular authorities. Even to the Qing, the western regions of Yunnan were places of tenuous authority upon local life.⁷¹ The provincial capital, Kunming (known to the British as Yunnan-fu) to the east, however, was a rapidly growing commercial centre, linking trade between the east coast of China, the inland provinces and the frontier regions. The region therefore attracted great interest from both the British colonial and consular authorities concerning the possibility of developing the tea trade, interlinking British India to China overland. However, as the ill-fated Margary mission in 1877 had shown, there were many dangers to foreigners in Yunnan. When British envoy Augustus Margary died, the British claimed Chinese officials assassinated him and the

⁷¹ Several British travellers published their travels in Yunnan in the late nineteenth century, notably: J. Anderson, *Mandalay to Momein: A Narrative of the two Expeditions to Western China of 1868 and 1875 under Colonel Edward B. Sladen and Colonel Horace Browne* (London, 1876).

Chinese claimed local tribesman had killed him. Either way, a foreign presence in Yunnan was not welcome. Qing authority was concurrently also contested in the area, with local ethnic groups in the hill regions that straddled western China and Burma open hostile to it despite the peace. The destruction caused by the Panthay Rebellion of 1858-1873 was still in recent memory where local Hui Muslim and other local ethnic groups violently asserted their autonomy before being tenuously re-conquered by the Qing.⁷² As James C. Scott has argued, the hilly regions covering the western area of Yunnan, Burma, India, Laos and Thailand were, despite empire and state-building enterprises, very much one of local resistance and autonomy.⁷³

Circumstances by the turn of the century necessitated a British presence for political and economic reasons that were similar to those for Xinjiang. The era was characterized by an intense rivalry between European powers for Chinese territory, clamour for mineral resources and railway construction. French advances in southwest Asia and China were of particular geostrategic concern for the British authorities. After the conclusion of the Sino-French war (1884-5), France consolidated its rule in present day Vietnam; Cochin China to the south became a French colony, with Annam and Tonkin in the north bordering Yunnan as French protectorates.⁷⁴ A French presence also extended in China, via the southwest province of Guangxi. The French established a consulate in Longzhou in 1889, and drew up plans for a railway line into the region from Tonkin. The frontier station in Longzhou, although later to be seen as insignificant for the French, demonstrated that, like Britain, France tried to use consulates in China as a way of mediating between its colonial possessions and China. This was especially important because the border itself was not clearly demarcated.⁷⁵ Longzhou lost its appeal in French interests after France constructed a railway line from its colonial possessions to China via a railway

⁷² See: D. Atwill, *The Chinese Sultanate: Islam, Ethnicity, and the Panthay Rebellion in Southwest China, 1856-1873* (Stanford, 2005).

⁷³ J. C. Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* (New Haven, 2009).

⁷⁴ For background on France in Indochina see: N. Cooper, *France in Indochina: Colonial Encounters* (Oxford, 2001).

⁷⁵ D. Lary, 'A zone of nebulous menace: the Guangxi/Indochina border in the republican period', in Lary (ed.), *The Chinese State at the borders*, pp. 180-5.

line linking Hanoi to Kunming, the capital of Yunnan, in 1910. Territory was also acquired on the south coast of Guangdong, in the Franco-Chinese agreement in 1892 (enforced from 1898), which regulated the leasing of the territory of Guangzhouwan (Kwangchowwan).

The British authorities therefore had reason to feel it was necessary to contain French spheres of interest in southwest China and, more broadly, French interests in the region of Asia. Britain advanced its colonial interests around China's southwest before turning towards Yunnan. As well as the extension to British India's northern and east frontier around Tibet, the annexation of Burma to Yunnan's southwest in 1885 was a significant development. As a tributary state of China, the Sino-British treaty in 1886 established British *de facto* control over Upper Burma (the northern regions of Burma). Areas near the frontier with China, especially the Shan and Kachin states were populated with local hill tribes that lay between Burma and China and had few demarcated borders. Unsurprisingly, the 1886 treaty included a British demand for a committee - the Burma-China Frontier Delimitation Commission - to establish a border between China and Burma. Later, a provision for the opening of consulates in Yunnan was added to the treaty.⁷⁶ Consulates in Yunnan owed their existence to the bilateral Sino-British treaty, forged from the wider regional developments of inter-imperial rivalry between Britain and France. Sensing the decline of the Qing power over its tributary state of Burma, the British authorities aimed to extend consular authority in Yunnan by virtue of the 1842 treaties to bolster their interests of trade and political sphere of influence. Following from the 1886 convention, consulates were later opened in Simao (Ssumao), Kunming (Yunnan-fu) and Tengyue (Tengyueh).⁷⁷

⁷⁶These rights were granted after the Sino-British Burma Convention (1886), see: Hertslet, *Treaties...Volume I.*, pp. 86-91. Amendments to the treaty in 1897 allowed British consuls at 'Tengyueh' and 'szumao' (Art XIII) and 'Yuannanfu' (Kunming).

⁷⁷Mengzi ('Mengtze' or 'Mengtsz') was opened to foreign trade in May 1889, but it did not appear to have a consulate.

Map 3.3 Map showing the proximity of British Burma and French Indochina from Tengyueh, Ssumao, Mengtsu and Yunnan-fu (Kunming).



Source: Laura Vann, 2015; Original map: H. Lo and H. Bryant, *British Consular Establishments in China 1793-1949* (Taipei, 1988), p. 398.

The disappointment of the Yunnan consulates

The primary reasons for opening the Yunnan consulates were trade and the desire to gather political intelligence on French activities. All of the consulates immediately disappointed the British authorities. Apart from Kunming, they were located in inaccessible hilly environments with poor transport connections for anything more than the local trans-frontier mule trade. Trade did flourish in the frontier regions; raw cotton imported from the Burmese Shan states was distributed to southern part of Yunnan province, with tea and metals exported back across the Burmese border.⁷⁸ However, trade was not lucrative enough for the British; nor was it possible for them to monopolise trade given the reliance on local networks and hostility to the foreign presence. In 1900, Consul Jamieson, found to his great displeasure that even the local *pu'er* tea, was discovered to be ‘not suited to foreign palates’.⁷⁹ With little French presence in

⁷⁸ BPP, HC: 1899, [C.9045-1] *Diplomatic and Consular Reports: China. Report on a Journey from Hong Kong to Ssemao*, p. 9; BPP, HC: 1911, *Diplomatic and Consular reports: On the Trade of Mengtzu and Ssumao*, p. 18.

⁷⁹ BPP, HC: 1902, [Cd.786-45] *Diplomatic and Consular reports. China. Report for the Year 1900 on the Trade of Ssumao and Mengtse*, p. 4.

the region, and the distance from other consulates and British Burma, Jamieson and other consuls lamented their time spent in a region with little potential for foreign trade. For example the 1911 report noted that there were no resident foreign merchants in Simao, and the only export of any importance – *pu'er* tea - remained solely in the hands of Chinese merchants.⁸⁰ Opium and tin were being produced and distributed from Mengzi, although there is little indication from consular reports on whether they were part of the trade.⁸¹ In economic terms, therefore, the Yunnan consulates were nothing short of a great disappointment. Unlike the French Indochina-Yunnan railway, a proposed railway from Mandalay to Yunnan was considered and surveyed, but was eventually deemed financially unviable. The eventual dropping of the initiative appeared to reflect the general failure of British economic and political aspirations of the whole region. It is worth asking then why consuls remained in the two consulates – Tengyue and Kunming - for over forty years (c.1900-1943).

Kunming and Tengyue: the importance of jurisdiction

In 1903 the Kunming consulate opened and subsequently made regular reports to the ambassador at Beijing and HMSC. Although trade in the capital of the province was more significant than in the outer stations, few cases were heard from 1903 through to the early 1940s. It was not uncommon for the consul to report 'nil' returns for criminal and civil cases in his district.⁸² However, there is evidence that the legal role of the consul and regional jurisdiction were more important than the court case statistics suggest. First, the consul played an important part as a mediator and facilitator of negotiation to resolve Sino-foreign cases. Second, issues of transnational governance between British interests in Yunnan, Burma and India coalesced to form overlapping legal practices and jurisdiction.

In the first respect, Kunming was not an anomaly in terms of the informal legal role of the consul. Like all interior stations and east coast consulates, the consul's legal role involved more than hearing formal court cases. His role, as noted in

⁸⁰ BPP, HC: 1911, [Cd.5465-146] *Diplomatic and Consular reports: On the Trade of Mengtsz and Ssumao*, p. 7.

⁸¹ *Ibid.*, p. 16.

⁸² TNA: FO656/149.

chapter two, was principally to resolve local issues, and to try to prevent incidents escalating into formal case hearings that had the potential to inflame local tensions. Such tensions were of greater concern in the interior consulates than the eastern ones. The interior cities and towns were not cosmopolitan urban areas, so many of the local populace remained suspicious of the foreign presence. Foreigners in these outlying regions were also easy targets for kidnappers. One of the most prominent incidents to occur in Kunming for the consul was the suspected kidnapping and murder of D. F. Pike in 1929.⁸³ Pike was a member of the China Inland Mission and resident in southwest Guizhou province bordering Yunnan in 1929. He was presumed kidnapped, and later killed as there was no group calling for his ransom. The Kunming consul worked to follow the case, pressurising both the Yunnan Chinese legal officials and the Guizhou legal officials for investigation into the case. The case suggests that the role of the consul in legal issues was broader and involved more than consular court cases, as they appealed to the Chinese authorities to investigate Pike's disappearance and to trace suspects both in Guizhou and Yunnan. In Simao in 1924, another case of murder was the most prominent incident in the consular reports. It was especially noteworthy as the victim was A. H. H. Abel, acting commissioner of the Simao customs.⁸⁴ It was claimed that he had had a heated argument with his Chinese chef, and was later found lying on the dining room floor of his home with a knife lodged in his left shoulder. Both cases suggest that although the consulates were far less busy than in the eastern ports, criminal incidents involving British subjects did occur, and the consul had to use his authority to encourage the resolution and investigation into Sino-British cases, especially when the victim was British. This included pressurising the Chinese authorities into investigating criminal issues that involved British subjects. In such a way even when consular cases were few, the consul's full legal role is not reflected in the return case statistics; one of his most important roles in regard to law was his informal role that did not involve hearing court cases.

⁸³ TNA: FO656/149 Consulate-general of Yunnan (Kunming) to HMSC, 21, Feb., 1930.

⁸⁴ TNA: FO656/149 H. E. Sly, Custom House Simao, to Kunming consul, 28 Jan., 1924.

Legal and penal practices and the connection with British Burma

The absence of reported court cases in the Kunming consular court also masks the busy role the consul had over dealing with British subjects in the region. Shortly after the opening of the consulate, Consul Litton raised concerns over the jurisdiction of British Indians and British Burmese in Yunnan and the neighbouring Chinese province of Guizhou. In July 1903, Litton forwarded a proposal to the ambassador at Beijing who in turn forwarded the proposal to the Foreign Office.⁸⁵ Litton's proposal put forward suggestions for amendments to the drafting of a new China OIC. His principal suggestion was that special legal provisions should be made to apply to British Indian and Burmese subjects in Yunnan. In particular, he suggested that they should be sent to Burma for trial, imprisonment, as a place for deportation and for appeals. The existing state of affairs was that cases were sent to HMSC in Shanghai, a process that could take up to four months. The Ambassador at Beijing favoured making the Yunnan consulates integrated with the British (Indian) Burma legal system. The reasons for change were similar to those proposed in Xinjiang a decade later: concern over the practicality of operating in a frontier region so far from the east China coast and the potential difficulty of a rising British Indian (and Burmese) population in China. HMSC judge Bourne agreed with some of the proposals.⁸⁶ Although he rejected the proposal to turn the court at Mandalay into an appellate court or a place for trial for British subjects suspected of offences in Yunnan, he did agree that British Indians who were tried in Yunnan could be sent for imprisonment in Burma or deported there.

The result of the correspondence was evident in the OIC1904; deportation could be made to any place in the dominions of which the person belonged, and Mandalay was later added as a place of deportation.⁸⁷ It is suggestive that consuls and legal issues in the smaller ports – such as in Kunming – could shape China OICs that covered jurisdiction in the whole of China. There were local influences on legislation encompassing the consular region. However the

⁸⁵ TNA: FO656/92 John Jordan, Ambassador at Beijing to Foreign Office, 21 Jul., 1903.

⁸⁶ TNA: FO656/92 Frederick Bourne, HMSC to John Jordan, Ambassador at Beijing, 27 May, 1903.

⁸⁷ Order in Council 1904, Section III, no.83 (4), see: Hertslet *Treaties... Vol.II*, pp. 864-5.

Yunnan courts remained under the China system with HMSC as the higher and appellate court. Clearly, both the Kunming consul, the British authorities in China and the Foreign Office recognized the importance, as in Xinjiang, of giving Yunnan consuls powers to deport problematic individuals. This was both for the legal governance of British subjects in China and for the British Burmese government which was in regular communication with the Yunnan consul and Chinese authorities over frontier cases. However, more legal changes were to come in the next decade, albeit localised to the Yunnan/Burma frontier. The consuls there were also important in their roles mediating between the British colonial authorities and British suspects in China, particularly in Tengyue.

Tengyue: legal mediators

Although the Yunnan consulates were far less busy than the eastern consulates, Tengyue (Tengchong county, Baoshan prefecture) was far more busy in terms of its legal role than other Yunnan consulates. It was also particularly shaped by local circumstances and the movements of people in the frontier region.⁸⁸ Opened in 1899, it operated until the Japanese army invaded the area in 1942. Like other consulates the accessibility of the town, especially given its proximity to Burma and the city of Bhamo, promised opportunities for trans-border trade between British interests in China and Burma. Trade, however, disappointed and the various consuls in Tengyue were quick to air their concerns about having a consular presence. There was no significant trade and nothing to be gleaned from French intelligence, and reports of which were more significant on Simao, Mengzi and Kunming.

However, the Tengyue consulate showed its importance in other, if less rewarding, ways, both for the British colonial and consular authorities. The consulate became a mediator between British colonial authorities and the Chinese authorities in legal cases, following arrests of suspects, especially in the difficult frontier area. The importance of the consulate was underlined as in British India, for example Kashgar, which partly financed the running of the

⁸⁸ The town was also known by its anglicised Burmese name as ‘Momein’ testament to its historical and concurrent links with Burma.

consulate.⁸⁹ Clearly, from an early date, the colonial authorities recognized the importance of having extraterritorial British influence within their region - an area that was at times difficult to traverse, and in a territory where colonial jurisdiction ceased. Unlike Kashgar, however, the consuls at Tengyue were not staffed from the government of India, but from the China consular service.⁹⁰ This had undoubted benefits for legal mediation between the colonial authorities and Chinese authorities; the China consuls often had many years of experience, understood the decorum and custom necessary for successful engagement with the local Chinese authorities, were accustomed to their cultural sensibilities and knew how the Chinese political and legal system operated.

This is illustrated in the way that the first Tengyue consul, Jamieson, (as P.D. Coates has suggests), played a vital mediator role between British Burmese officials and the Yunnan viceroy, concerning 'Burma cases'.⁹¹ The difficulty lay in the territorial jurisdiction of British Burma, which had an unrecognized border, and local ethnic colonial subjects drifting into Chinese territory. The British consular authorities had to rely upon the cooperation of the Chinese authorities for the apprehension of suspects and, if it was a mixed case involving a Chinese suspect and British Burmese complainant, to apply pressure on the Chinese authorities to investigate the case and hold a trial. As consul Jamieson found out, initial attempts at communication between British Burma officials and the Chinese authorities in the provincial capital of Kunming in the first years of the consulate were doomed to fail; the colonial authorities sent letters in English, but they were written in such a way as to cause insult to the Chinese authorities.⁹² He therefore became the mediator of all future communication, which was sent via his Tengyue consulate for editing before being sent on to Yunnan.⁹³ The Tengyue consul was therefore important as a communicator between the British Burmese colonial and Chinese authorities, and this would continue into the later years when the issue of borders was still in places unresolved.

⁸⁹ BPP, HC: 1901-1902 [46] *Estimates for civil services, for the year ending 31 march 1902*, p. 443.

⁹⁰ W. Palace, *The British Empire and Tibet 1900-1922* (London, 2005), p. 56.

⁹¹ Coates, *The China Consuls*, pp. 316-7.

⁹² *Ibid.*, p. 315.

⁹³ *Ibid.*

Frontiers and borders: legal issues and colonial-consular jurisdiction

For the Tengyue consulate, the legal workload was heavier than at Kunming due to the problem of the proximity of British Burma and border issues. Borders between Burma and the Qing had changed over several centuries as the Qing Empire's power (and campaigns in the region) waxed and waned. It remained ambiguous by the turn of the twentieth century with no clear boundary.⁹⁴ Local tribal chieftains in the frontier region regularly moved across the hills without concern for imperial jurisdiction. It was partly for this reason the British Burmese colonial authorities saw it as imperative to designate a border. Border-making initiatives were shared by other colonial nations; a lack of a precise border proved difficult for France in demarcating the line between French Indochina and Guangxi, an area that had never needed a border before.⁹⁵ The British authorities likewise resolved to establish a Border Commission to demarcate a border between Burma and Yunnan. This was important for two reasons. Firstly, territory and border demarcation were important for taxation on agricultural production. This became a more pressing concern as the revenue of the Indian colonial state turned away from the declining maritime trade in the nineteenth century. Secondly, territory and demarcation was an important part of mapping and designating a clear understanding of where and, *who* was part of the British Empire.

This 'where' and 'who' of Empire was particularly problematic in the frontier region of Yunnan. As well as the hilly terrain, and relative autonomy of various groups in the region, territorialising British Burma was inherently difficult. In particular, whilst the creation of borders was imperative for state building initiatives, paradoxically the very creation of a border created a limit to the reach of colonial jurisdiction over local highly mobile colonial subjects, notably in

⁹⁴ See for example: Y. Dai, 'A disguised defeat: the Myanmar campaign of the Qing dynasty', *Modern Asian Studies*, 38, no.1, (2004), pp. 145-89.

⁹⁵ The border was an artificial design, with commercial interaction between China and its southern neighbours largely maritime-based. Borders became more important once France entered Guangxi in 1885 for the Qing. see: D. Lary, 'A zone of nebulous menace' in: Lary (ed.), *The Chinese State at the borders*, pp. 180-5.

Yunnan-Burma in what were described at the time as ‘transfrontier cases’.⁹⁶ Indeed, with no geo-political boundary in place, as the Tengyue consul noted, the Burma-China border was entirely ‘arbitrary’.⁹⁷ It did not recognise ethnographical groupings, and because the border cut through Shan, Kachin, Lisu and other tribal regions,

at some parts of the frontier a man walking along paddy-bunds might cross from China to Burma and from Burma to China a dozen times without being aware ... that there had been any frontier to cross.⁹⁸

The importance of jurisdiction in the frontier region of Burma-Yunnan is shown through a selection of correspondence from 1910-1917.⁹⁹ The question arose in 1910-11, between Deputy Commissioner of Bhamo Cabell, and Tengyue consul Rose, upon the matter of trying British subjects resident in Burma who were accused of committing offences in Chinese frontier territories. Under the existing system, British subjects straying into China and suspected of committing crimes were under the jurisdiction of the consul. Under the OICs, as noted above, consuls in Yunnan could send British subjects for imprisonment in Burma or other places. Though this proved helpful for Kunming, this was not practical in the frontier region, because Mandalay was just as far away as Shanghai. In this context, Deputy Commissioner Cabell suggested two alternatives: either the Burma frontier courts should have powers of jurisdiction where British subjects committed crimes in Chinese territory, or British Tengyue consuls should have full powers of criminal extraterritorial jurisdiction (including for capital crimes) similar to those held by the deputy commissioners in the Kachin hills. Clearly, what was at issue were not petty cases or civil disputes but crimes of a serious nature: murder, sedition, grievous bodily harm or large-scale robbery. Consul Rose thus petitioned the Ambassador at Beijing and Foreign Office for investing him with supreme court powers. Whereas the Ambassador at Beijing was sympathetic, the Foreign Office considered that conferring such powers on a

⁹⁶ TNA: FO656/139 John Jordan, Ambassador at Beijing to Havilland de Sausmarez, HMSC, 24 Feb., 1916.

⁹⁷ TNA: FO656/139 C.D. Smith, Acting consul, to John Jordan, Ambassador at Beijing, 6 Oct., 1914.

⁹⁸ *Ibid.*

⁹⁹ TNA: FO656/139 C. D. Smith, Acting consul, Tengyue consulate to John Jordan, Ambassador at Beijing, 6 Oct, 1914.

consul lacking in judicial training contravened the principles of the OIC. Thus a judge from Shanghai should be sent to try serious criminal cases.¹⁰⁰

The new Tengyue consul, C. D. Smith, did not pursue the issue until a few years later when the impracticality of the arrangement became apparent to him. The issue of the change of Xinjiang jurisdictional powers as proposed by Macartney helped persuade the Foreign Office to consider the Burma frontier issue once more.¹⁰¹ Smith pressed for the adoption of the first proposal outlined by Cabell, namely that the Burma frontier courts should have powers of jurisdiction where British subjects committed crimes in Chinese territory. However, Cabell argued that instead of jurisdiction over British subjects resident in Burma (in the northern Shan states, and Bhamo and Nyitkyina districts) that the Burma frontier officers should have overarching powers of jurisdiction over British subjects in Chinese territory.¹⁰² His report to the Foreign Office was extremely insightful in acknowledging the challenges of extraterritorial jurisdiction, colonial jurisdiction, local tribal groups and borders, and merits further discussion here.

There were two particular reasons for his proposal. One was pragmatic and the other dependent upon a cultural-racial understanding of the use of extraterritoriality. Smith outlined the ways in which current jurisdictional practices were impractical:

Having neither constable nor jail, nor consulate guard, nor any means of effecting an arrest at a distance, detaining prisoner in safe custody, or conveying him from place to place, he [the consul] is entirely dependent upon the good-will of the Chinese in all these respects. Even supposing the accused person [British suspect] to have been successfully arrested, brought to Tengyueh and kept safe (inevitably in the Chinese jail), it is still necessary to bring in the complainant and the witnesses on both sides, and further, since the complainant, accused and witnesses between them might easily speak three or four distinct languages, the requisite number of interpreters must also be found.¹⁰³

¹⁰⁰ TNA: FO656/139 Foreign Office to Consul Rose, Tengyue consulate, 10 Jun., 1911.

¹⁰¹ TNA: FO656/139 John Jordan, Ambassador at Beijing to Havilland de Sausmarez, HMSC judge, 24 Feb., 1916.

¹⁰² China had attempted to do the same over its claimed subjects in Burma, but the colonial authorities in British Burma never agreed to Chinese claims of jurisdiction in its territory.

¹⁰³ TNA: FO656/139 C. D. Smith, Acting consul, Tengyue consulate to John Jordan, Ambassador at Beijing, 6 Oct, 1914.

Indeed, the issue extended further in the consideration of trials, which were deemed of a more serious nature, which required the case to be heard in Shanghai:

either the parties, witnesses and interpreters must be sent to Shanghai, or a Judge of the Supreme Court must come to Tengyueh on circuit. Either course inevitably involves great inconvenience and expense, and the latter involves the absence of one of the judges from Shanghai for more than two months unless a judge is specially appointed *ad hoc*. Supposing the parties to be sent to Shanghai there might be much difficulty in securing the attendance there of the witnesses or even the complainant. ... In any case the cost of the proceedings would be excessive. ... Yet another objection to this procedure in murder cases is that the Order in Council provides that such cases must be tried with a jury, and there are never sufficient persons here liable to jury duty.¹⁰⁴

In sum, delay, inconvenience and expense made current practices extremely impractical. Burma had the necessary machinery of police, jails, and interpreters; Yunnan did not. It was not satisfactory to give the Tengyue consuls jurisdiction over British subjects and be dependent upon the good will of the Chinese authorities for arrest, investigation and detention. Added to these issues around trials and sentencing were that the OICs required all British subjects to register at the nearest consulate and carry a passport when moving between territories.¹⁰⁵ This was particularly difficult to do when families and clans were spread over both sides of the borders.

In his second line of argument, Smith claimed that:

The primary object of the institution of extraterritoriality was to exclude British subjects of European origin from the operation of laws, founded on a system of jurisprudence distinct from that to which they are accustomed, and applied in a manner largely arbitrary and wholly alien to British custom. ... This is not an argument for the abandonment of extraterritoriality ... [but] ... a departure from the principle of extraterritoriality in some degree... [for the application of jurisdiction over non-European subjects in the territory of China].¹⁰⁶

Smith also suggested that Burma officers were more familiar with frontier languages and tribes, and so could weigh the evidence and assign penalties at

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

‘frontier meetings’ rather than in court. The Foreign Office and Ambassador at Beijing both agreed with the idea.¹⁰⁷ The Ambassador at Beijing believed that this would not antagonize Sino-British relations, pointing to a similar practice exercised by the Russian authorities on the Sino-Russian border, which allowed the extension of jurisdiction over local Russian subjects in the same manner.¹⁰⁸ The extension of powers proposed by Smith thus came into effect after 1916.¹⁰⁹

In essence, the changes allowed for the extension of British colonial jurisdiction over the border into China by virtue of the operation of extraterritoriality in Chinese territory. With the creation of a border in the region, this extension was therefore important. In effect, the British colonial authorities instituted a type of personal jurisdiction on the mobile local population whilst simultaneously keeping borders for the territorialising of the colonial state with requisite financial and political interests. These changes were both practical and testament to the importance of local criminal jurisdiction. The adaptation of both extraterritoriality and colonial jurisdiction suited the purposes of both colonial and consular jurisdiction over British subjects. This arrangement benefited both the colonial and Tengyue consular authorities. The Tengyue consulate was not only a medium for Sino-British disputes but, by helping to remove troublesome subjects from a frontier region, it allowed both the Chinese authorities and consular authorities (who had little administrative institutions and financial support) to be relieved of the costly processes of sentencing and punishment.¹¹⁰ For the British colonial authorities the need to control ‘troublesome’ and ‘criminal’ ethnic groups was a practice with a familiar history in its legal governance closely tied to fears of anti-British rebellion.¹¹¹

In sum, although the case reports of the Yunnan consulates suggest that extraterritorial jurisdiction in Kunming and Tengyue was not an important

¹⁰⁷ *Ibid.*

¹⁰⁸ TNA: FO656/139 John Jordan, Ambassador at Beijing to Foreign Office, 30 Nov., 1914.

¹⁰⁹ Colonial Burma also had the necessary practical and economic support for trials and a penal system capable of taking large amounts of prisoners, as well as staff for linguistic purposes, such as interpreters: TNA: FO656/139 India Office to Foreign Office, 26 Jan., 1916.

¹¹⁰ TNA: FO656/139 Acting consul C. D. Smith Tengyue consulate to John Jordan, Ambassador at Beijing, 6 Oct., 1914.

¹¹¹ M. van Woerkens, *The Strangled Traveler: Colonial Imaginings and the Thugs of India* (Chicago, 2002).

element of British governance, the power to try or to refer criminal cases was an increasingly significant issue for Yunnan consuls in the early twentieth century. The consulates played a vital role in connecting colonial systems and mediating between the colonial authorities, consular authorities and the Chinese authorities especially in mixed cases. The legal changes in jurisdiction show how local issues, which included jurisdiction over British Indians, the frontier and a creation of a border made alterations to jurisdictional practices necessary. In turn these amendments were added to the OICs that covered the whole of China. The power to deport subjects to the place they were originally domiciled was important for both the Yunnan and Xinjiang consulates. This removed ‘problematic’ individuals and was effectively a form of legal expulsion of emigrants back to the Indian subcontinent. The dynamics of the local environment and people in the Burma-Yunnan frontier also shaped British jurisdiction there. Amendments of legislation allowed British colonial jurisdiction to be applied in China by virtue of extraterritoriality. Through doing so, it evaded the difficulties attached to territoriality by attaching a type of mobile British jurisdiction over Burmese subjects wherever they moved. Far from the assumption that British extraterritoriality was of little use in the western regions of China, they were actually important to a trans-frontier British legal justice as British populations were – whether borderland people or migrants to the Yunnan cities – increasingly mobile.

Conclusion

This chapter has explored the extraterritorial legal development of the western consular stations. In doing so, it has used Xinjiang and Yunnan as case studies to provide an analysis of how the consuls and extraterritoriality became an important part of governance, and increasingly, trans-frontier governance. In the late nineteenth century, British interests in Xinjiang and Yunnan were mainly economic and political. However, Macartney in Xinjiang had increasingly important informal powers of legal jurisdiction over British subjects albeit sometimes in conflict with local Xinjiang officials in the exercise of his powers. As the majority of the cases were those involving trade, powers of jurisdiction

were important for economic aspirations. In Yunnan, the early years of the consulates disappointed for economic and political reasons, but jurisdictional powers became more important. Consuls became legal mediators between the British Burmese colonial authorities and worked on behalf of British subjects to pressurise the Chinese authorities to resolve Sino-British cases.

In the twentieth century, in both Xinjiang and Yunnan there were jurisdictional powers that overlapped with that of British India and Burma. From 1908-1920 Macartney was a British Indian official working with extraterritorial powers. This connection was reinforced by his illegal practice of deporting and imprisoning British subjects sentenced in Xinjiang to India. By 1920, new powers were given to him, allowing him to send British subjects with much more ease to India. His legal powers were also amalgamated with the Indian legal system, although his powers stemmed from extraterritoriality, and the Orders in Council and aspects of extraterritoriality in municipal regulations applied in Xinjiang. The operation of colonial law and jurisdiction by virtue of extraterritoriality also found form in Yunnan. In Tengyue, highly mobile local populations and the difficulty of a border, meant that jurisdictional powers of British Burmese authorities were extended into Chinese territory by virtue of extraterritoriality. This meant that the jurisdictional border of British Burma moved wherever the British subject went.

Finally, the local difficulties of dealing with mobile Burmese and Indian subjects in the local context of the frontiers in Xinjiang and Yunnan ultimately facilitated changes in the China OICs that applied to China as a whole. In this regard, local circumstances helped add provisions to legislation that covered a region. The laws were made in conjunction with local consular officials, British officials in Shanghai, and colonial legal authorities in Burma, India and the metropole. Law was mediated in the local, regional and transnational in its making and its application.

As will be shown in the next part of the thesis that explores court cases, the local, regional and global overlapped via the people who entered the consular courts and gaols in Shanghai. The next chapter will explore how law and order issues

were constituted in the nineteenth century, principally from 1865 to 1899 in Shanghai.

Chapter 4

Crime and Criminal Cases in Shanghai, 1842-1899

Introduction

Building on the first part of this thesis exploring law and the legal system, the second part of the thesis examines the exercise of jurisdiction through criminal court cases. This chapter analyses cases heard in the Shanghai summary court and Her Britannic Majesty's Supreme Court for China (HMSC) in the International Settlement of Shanghai, 1865-1899. The analysis begins with an elaboration of the years 1842-1865 sketching the opening of the treaty port with focus upon demographics, trade and crime, and then discusses cases after 1865, when systematic judges' notebook records began. It focuses on criminal cases, demonstrating how criminal hearings for petty crime – often neglected in broader legal historiography - were an integral part of everyday life and legal governance and draws parallels to colonial legal governance, especially in India. Several questions are raised: who were the typical defendants and plaintiffs in court? What were the most commonly heard cases? What can court cases tell us about the function of the criminal courts and legal governance in Shanghai during this era? The analysis of cases for this chapter stops at 1900, when demographic, political and social changes altered the dynamics of consular jurisdiction. These changing dynamics are explored in chapters five and six.

Through doing so, the chapter explores the 'who' of criminal court cases. It shows that, crime scenes, courtrooms and gaols were places of contact between a variety of people. 'British' subjects included large numbers of merchant crews, some of whom had different racial, ethnic, linguistic, cultural and even national backgrounds. Court cases included defendants, plaintiffs, witnesses who were British and Chinese, as well as other foreign nationals. Many were considered from the lower-class echelons of society: hawkers, rickshaw divers, policemen, sailors and the unemployed. Although studies upon various cultural and social aspects of Shanghai have proliferated in recent years, this chapter will focus on

how ‘British’ subjects and those under the jurisdiction of British legal authority encompassed a wide array of people.¹ Cases demonstrate everyday episodes of interaction between people that were local residents, regional migrants, and some who were connected to the broader British Empire.

Secondly, the chapter explores the function of the courts in its capacity of criminal jurisdiction. Although foreign and British perpetrated crime was far less prevalent than Chinese perpetrated crimes, they nonetheless constituted a sizeable portion of crime in the International Settlement of Shanghai. This suggests British criminal jurisdictional authority was an important part of governance to both the British authorities and foreign authorities more broadly in the International Settlement. Similar to the US consular courts and other port cities in the British Empire, the functions of the British consular courts were to punish petty crimes, such as intoxication and violence, as well as to augment and reinforce maritime labour discipline on vessels and in port.² The chapter examines how and why the courts punished – or overlooked – these offences. In particular, it assesses racial assaults perpetrated by British subjects upon Chinese, showing how quotidian racial violence was a prominent aspect of everyday life. This echoes Elizabeth Kolsky in her assertion that petty physical violence was a ‘constant and constituent element of British dominance’ in India

¹ There are a number of studies on subaltern Chinese subjects in treaty port Shanghai. See for example, on Chinese beggars: H. Lu, ‘Becoming urban: mendicancy and vagrants in modern Shanghai’, *Journal of Social History*, 33, no.1, (1999), pp. 7-36; and on prostitutes, see: C. Henriot, *Prostitution and Sexuality in Shanghai: A Social History, 1849-1949* (Cambridge, 2001); networks and cosmopolitanism between Chinese and foreigners in the treaty ports have tended to focus on elite connections. See for example: J. Wasserstrom, ‘Cosmopolitan connections and transnational networks’ in: N. Dillon and J. Oi (eds), *At the Crossroads of Empires: Middlemen, Social Networks and State Building in Republic Shanghai* (Stanford, 2008), pp. 206-23; studies on marginal and lower-class Europeans in China include the many works of Robert Bickers. See, amongst others: R. Bickers, *Empire Made Me: An Englishman Adrift in Shanghai* (London, 2003); R. Bickers, ‘Shanghaiers: the formation and identity of the British settler community in Shanghai 1843-1937’, *Past and Present*, 159, no.1, (1998), pp. 161-221; Eileen Scully has explored American prostitutes although it is doubtful whether she regards them as ‘subaltern’. See: E. Scully, ‘Prostitution as privilege: the “American Girl” of treaty-port Shanghai, 1860-1937’, *The International History Review*, 20, no.4, (1998), pp. 855-83.

² E. Scully, *Bargaining with the State from Afar: American Citizenship in Treaty Port China, 1844-1942* (New York, 2001), pp. 49-80; H. Fischer-Tiné, ‘Flotsam and jetsam of the Empire? European seamen and spaces of disease and disorder in mid-nineteenth century Calcutta’, in A. Tambe and H. Fischer-Tiné (eds), *The Limits of British Colonial Control in South Asia: Spaces of Disorder in the Indian Ocean Region* (London: 2009), pp. 116-49.

and the colonial experience; something that is widely acknowledged in colonial studies, yet rarely explored in depth.³

By emphasising quotidian acts of violence the chapter shows a different way in which foreign aggression – more commonly documented in larger events such as the Opium Wars (1839-42; 1856-60), and May Thirtieth Incident (1925) – was directed against Chinese subjects.⁴ The role of British juries and judges overwhelmingly reinforced everyday racial petty violence through overlooking assaults or passing lenient verdicts and sentences on white perpetrators, similar to other colonial contexts.⁵ The chapter therefore serves as a counterpoint to the research on the interrelated British consular jurisdiction in Japan, where it is claimed that there were few instances of racial injustices in British consular jurisdiction.⁶ Violence was not merely a physical act, and the chapter also explores some of the ‘mentalities’ of violence - the attitudes towards violence both within and outside of the courtroom in relation to crime - to explain why it occurred and why it was often overlooked.⁷ It suggests that the act of racial violence was often embedded with social meaning, making physical assault a symbolic act of communication reinforcing racial hierarchy and privilege.

Finally, the chapter draws attention to the role of race, class and gender, highlighting the poor men in the courts. British imperial and colonial governance was often hinged upon discourses of dichotomies, especially concerning race,

³ E. Kolsky, *Colonial Justice in British India: White Violence and the Rule of Law* (Cambridge, 2010), p. 1; Robert Bickers has also highlighted aspects of everyday interracial physical violence and racism in treaty port China throughout his works. See, for example: Bickers, *Empire Made Me*; in the broader colonial studies field, examples include: C. Elkins, *Britain's Gulag: The Brutal End of Empire in Kenya* (London, 2005); J. McCulloch, *Black Peril, White Virtue: Sexual Crime in Southern Rhodesia 1902-1935* (Indianapolis, 2000).

⁴ Aspects of everyday foreign governance and life of British and Sino-British interaction have also been explored in the treaty port China, see for example: Bickers, *Empire Made Me*; I. Jackson, ‘Managing Shanghai: the International Settlement administration and the development of the city, 1900-1943’, Ph.D. thesis, (University of Bristol, 2012).

⁵ Martin Wiener has explored in a global comparative context the race prejudices of white juries in interracial violence trials, see: M. Wiener, *An Empire on Trial: Race, Murder and Justice under British Rules, 1870-1935* (London, 2004).

⁶ R. Chang, *The Justice of the Western Consular Courts in Nineteenth-Century Japan*, (London, 1984); C. Roberts, ‘British extra-territoriality in Japan 1859-1899’, Ph.D. thesis, (School of Oriental and African Studies, 2010).

⁷ ‘Mentalities of violence’ is a term used by Carter Wood expressing the cultural underpinning of knowledge underlying attitudes towards violence See: C. Wood, *Violence and Crime in Nineteenth Century England: the Shadow of our Refinement* (London, 2004), p. 5 and pp. 8-26.

class and gender, but in practice these categories were blurred and challenged.⁸ This chapter uncovers how and why vagrants could be a source of disorder.⁹ Although there were many vagrants, such people in the courts appear to be charged for more specific reasons, relating to repeat offenders, begging and public displays of poverty. These offences undermined ideas of white racial prestige and middle-class values of respectability in the ports. This has parallels to legal practices and campaigns in colonial India over poor white men, often classified as ‘loafers’ as well as sharing similarities with the US consular authorities in the same period in Shanghai.¹⁰ In this respect, the chapter serves to show that the courts in its criminal jurisdiction capacity - its legal responses, its challenges to law and order through demographics and issues of class, race, gender and governmentality - shared much in common with other port-cities. Parallels with British India suggest that regardless of its status as a non-colonial context, Shanghai as port city and similar social constructions of ‘criminality’ intersecting ideas of race, class and gender shaped legal governance.

Chapter structure and sources

The chapter is divided into six sections: background 1842-1865; crimes tried by the British consular courts; race, gender and status; seamen and ship discipline; race and violence; and poor Britons. The archives have comprehensive sets of records of summary court and HMSC cases, and the chapter uses case data for its central analysis in sections two and three. From the summary court judges’ notebooks there are on average several hundred cases per year. This makes for an

⁸ F. Cooper and A.L. Stoler (eds), *Tensions of Empire: Colonial Cultures in a Bourgeois World* (Berkeley, 1997).

⁹ As Kolsky has claimed, the Briton himself was a source of lawlessness and disorder: Kolsky, *Colonial Justice*, p. 4; Bickers has also highlighted races discourses and the lives of lower class men and the SMP: Bickers, *Britain in China* (Manchester, 1999); Bickers, *Empire Made Me*.

¹⁰ On lower class men and law and order see: C. Anderson, *Subaltern Lives: Biographies of Colonialism in Indian Ocean World* (Cambridge, 2012), pp. 157-86; D. Arnold, ‘European orphans and vagrants in India in the nineteenth century’, *Journal of Imperial and Commonwealth History*, 7, no.1, (1979), pp. 104-27; H. Fischer-Tiné, ‘Flotsam and jetsam of the Empire?’; H. Fischer-Tiné, ‘“The drinking habits of our countrymen”: European alcohol consumption and colonial power in British India’, *Journal of Imperial and Commonwealth History*, 40, no. 3, (2012), pp. 383-408; S. Mizutani, ‘“Degenerate whites” and their spaces of disorder: disciplining racial and class ambiguities in Colonial Calcutta (c.1880-1930)’, in Tambe and Fischer-Tiné (eds), *The Limits of British Colonial Control* (London, 2009), pp. 155-92; on the blurred lines between ‘colonizer’ and colonized; On the ambiguities of the status of ‘colonizer’ and ‘colonized’, see: A. L. Stoler, ‘Rethinking colonial categories: European communities and the boundaries of rule’, *Comparative Studies in Society and History*, 31, no.1, (1989), pp. 134-61.

extraordinarily rich source base to explore everyday instances of social interaction and legal governance. However, it also means that sampling of cases has been necessary. As mentioned above, I start in 1865 when the records begin. I then analyse 1865-1872, followed by 1890-99. This provides an opportunity to compare aspects highlighted at the start and end of this period, and to note changes in practice or procedure. The chapter primarily uses judges' notebooks for both summary and HMSC court cases (with additional case reports from various other sources) for qualitative and quantitative analysis. Additional reports are used from the *North China Herald (NCH)*, former HMSC judge Edmund Hornby's autobiography and Reports of the Shanghai Municipal Council (SMC).

There are several caveats attached to examining court cases. Firstly, cases neither reflect all the interactions between British subjects and others, nor all the crimes committed by British subjects. Many crimes were prevented from reaching the courtroom because of lack of evidence (including dismissing evidence from 'unreliable' witnesses), police authorities' wilful blindness to certain offences, or the protection of perpetrators of a high social status. This 'dark figure' overshadowing statistical analysis of crimes is one acknowledged by other scholars working with similar data.¹¹ Nevertheless, court cases are still an extremely valuable resource, especially for showing glimpses of everyday social interactions and legal responses. Moreover, court archives are extraordinarily rich, and there is a comparative absence of records of summary court cases for other colonial and imperial contexts.¹² This means that summary court records from China are valuable for imperial legal studies more broadly.

Court cases are examined in several ways. Firstly, sets of cases are used to give an overall picture of criminal cases in the mid to late nineteenth century. The chapter uses HMSC and summary judges' notebooks from 1865-72 and 1891-1899. The cases examined are all complete cases available for the given years.

¹¹ J. A. Sharpe, *Crime in Early Modern England, 1550-1750* (London, 1999), p. 61.

¹² For colonial India, Kolsky states there was no official centralised system of law reporting until 1875, and there afterwards only the High Courts. As such, many colonial studies on law cases tend to focus on high profile civil and criminal cases, such as murder cases. E. Kolsky, 'A note on the study of Indian legal history', *Law and History Review*, 23, no.3, (2005), p. 706.

Secondly, using a quantitative analysis of court cases, the number of defendants is recorded, but for statistical analysis charges as opposed to sentences are counted. Similar offences are grouped into several clear categories: death related cases; non-fatal bodily harm cases; robbery and theft cases (with or without violence); and manipulation of goods offences (such as forgery); and sexual offences. Thirdly, taking a qualitative analysis approach, case studies are used to provide a more nuanced understanding of the larger context. In some instances, the chapter draws upon additional cases outside of the selected groups, to reinforce and illustrate a particular issue. In each instance, the methodology is noted before analysis.

Note also that, as mentioned earlier, this chapter will focus primarily on Shanghai. This is for three reasons. Firstly, after 1860 the number of consular courts in China proliferated. This makes pulling together data across all consulates unwieldy, making a singular place study more suitable. Secondly, the Shanghai court records of the Shanghai Law Secretariat for summary cases and HMSC are the only series that contain the full records of court case proceedings. Although it was suggested how ‘British’ subjects incorporated a range of people, in chapter three on the western regions, the court data from Shanghai gives a more in depth view from court cases on the types of people on the eastern coast. Together with use of relevant newspaper reports and other consular correspondences and statistics, this study has a rich array of source data to triangulate information. Finally, as a port-city the chapter shows how British legal governance was similar to other port cities in the exercise of its jurisdiction and some of the ‘challenges’ to law and order it faced. In doing so, however, the chapter does not claim that Shanghai was necessarily representative of all other consular courts and treaty ports in China, but where possible the chapter also draws examples from other treaty ports to show similarities with Shanghai.

1. Background: ‘Sin City’, Foreign Crime and ‘Anarchical Scoundrelism’, 1840-1865

Treaty port Shanghai is often associated with the rampant crime of the 1930s Republican era. The shady underworld of Chinese gangsters and bandits,

prostitution and opium dens helped Shanghai earn its epithet of ‘sin city’.¹³ Whilst one may question the exceptionality of Shanghai’s high crime rates compared to other cities, it is also pertinent to ask whether the perceived features of ‘sin city’ predated the Republican period and, furthermore, whether foreign perpetrated crime was of significance to foreign and British legal governance in Shanghai in the nineteenth century?

Foreigners first came in numbers to Shanghai after it was opened for foreign trade and residence in 1842 following the First Opium War (1839-42) and the Treaty of Nanjing (1842). Aside from the Chinese ‘city’, there were three foreign settlements: the French Concession, the American Settlement and the English Settlement.¹⁴ The settlements were populated with thousands of Chinese subjects accompanied by a comparatively small number of foreigners. In 1847, for example, there were just 108 foreign residents in Shanghai, with 87 ‘English’ subjects.¹⁵ However, whilst the total foreign resident population remained a small percentage compared to Chinese inhabitants throughout the lifetime of the foreign settlements in Shanghai, census records often excluded foreigners of the non-resident population: notably naval and merchant shipping crews. As a rapidly commercialising port, Shanghai attracted increasing numbers of the transient population. In 1848, foreign residents numbered approximately 200, but there were 2,000 sailors manning the merchant ships that year in the harbour.¹⁶ Whereas the resident community slowly grew, numbers of sailors rapidly increased over the next few years; in 1849 there were 133 ships entering the port of Shanghai, 94 of which were British.¹⁷ By 1852, foreign ships numbered 182, with 103 being British, and by 1855 there were 437 ships, with 249 British ships.¹⁸ In six years therefore, the number of British ships had more than doubled.

¹³ See, for example Frederic Wakeman on aspects of Chinese law, police and crime during 1927-37: F. Wakeman, *Policing Shanghai: 1927-1937* (Berkeley, 1995).

¹⁴ The latter two were amalgamated together as ‘International Settlement’ in 1863.

¹⁵ H. B. Morse, *The International Relations of the Chinese Empire, vol. I* (London, 1910), p. 355.

¹⁶ G. Lanning and S. Couling, *A History of Shanghai* (Shanghai, 1921), p. 364.

¹⁷ Morse, *International Relations, vol. I* (London, 1910), p. 357.

¹⁸ *Ibid.*, p. 357.

The numbers of those under the jurisdiction of the British authorities in Shanghai was thus considerably larger and more cosmopolitan than one may first assume. 'British' subjects included all those working on British vessels, regardless of nationality, if the crime in question was one of ship indiscipline.¹⁹ This included intoxication, when crews came onshore. As British ships formed the majority of foreign vessels, 'British' subjects there comprised a large majority of the foreign population. As technology and transportation improved, more ships and seamen followed; clipper ships (speedy long distance commerce vessels) were joined by bigger and faster steam-powered ships after the opening of the Suez Canal in 1869. The actual numbers of British subjects was therefore far higher than censuses indicate. This suggests that British consular legal governance also carried more significance given the larger numbers.

Although the foreign authorities were more outspoken over the rise of the Chinese population and Chinese criminality, foreign perpetrated crime including British perpetrated crime menaced the settlements from the opening of Shanghai as a treaty port in 1843.²⁰ It was not just the number of offences but the social characteristics and perceived behaviour ascribed to the British seamen and the temptations offered by the ports that drew particular concern from the British consular authorities. As sailors came onshore, Shanghai would most likely appear to be both an alien city yet familiar to other colonial port-cities, offering tempting vices such as alcohol shops, prostitution and gambling dens.²¹ In 1864, for example, there were at least 270 brothels, 200 opium shops, and 73 gambling houses in Shanghai.²² Drinking and violence converged to concern to the British consular authorities. In 1855, Shanghai vice-consul Robertson stated that it was

¹⁹ As will be shown in more detail below; the British authorities regularly claimed jurisdiction over all sailors upon British vessels accused of minor crimes such as drunkenness on shore, as well as jurisdiction over British sailors on board non-British ships accused of more serious offences including violent crimes and murder.

²⁰ See for example, Kotenev on the issue of law and order in the International Settlement and Chinese crime: A. Kotenev, *Shanghai: Mixed Court and Council: Material relating to the History of the Shanghai Mixed Court and the History, Practice and Statistics of the International Mixed Court* (Shanghai, 1925).

²¹ Networks and cultural familiarity of port towns are the subject of recent researchers and research groups. See for example the Brad Beaven's 'Port Towns and Urban Cultures' project on the cultural construction of sailortowns and ports: B. Beaven, K. Bell and R. James (eds), *Port Towns and Urban Cultures* (Forthcoming).

²² R. Bickers, *The Scramble for China: Foreign Devils in the Qing Empire, 1832-1914*, p. 223, original citation: *Minutes of the Shanghai Municipal Council*, 27 Jul., 1864.

‘sometimes dangerous to Europeans, and generally dangerous for Chinese to walk down Shanghai’s streets at night owing to drunken and insubordinate seamen.’²³ This violence and criminality was closely associated to social class and race. Shanghai Consul Rutherford Alcock stated disdainfully that incoming British vessels in Shanghai were manned by ‘the lowest class of London and Liverpool seafaring men or by Lascars and Manilamen, whose knives were always ready for service’.²⁴ The sentiment was shared by colonial authorities in other parts of the British Empire, such as in Calcutta, where, as Harold Fisher-Tine has shown, sailors were notorious for their ‘unruly’ conduct, unrestrained violence towards the local populace and inclined (or predisposed) towards the vices of drink and prostitution.²⁵ Assumed characteristics linking their social class and criminality were compounded by ideas of race; white men were supposed to be a model of refined behaviours reflecting a supposedly superior civilization; but their behaviours served to discredit these discourses that supported colonial governance. The ‘sailor problem’ remained problematic precisely because ‘Jack Tar’, manning merchant vessels and naval ships, was an important part of the trade and military force of the British imperial and colonial enterprise.²⁶

The changing social and political circumstances in China provided additional problems for law and order in the early period. The internal disruption of the Taiping rebellion (1850-64) offered an environment of social upheaval, political fragmentation, and disbanded Chinese and foreign naval and military men. In Shanghai, the Small Swords rebels took over the walled Chinese city in 1853, with Chinese refugees pouring into the foreign settlements. The defence of the foreign settlements led to a local agreement between the foreign and Chinese authorities in 1854: the Land Regulations. This gave the foreign authorities the power to tax and police their own settlement. The Land Regulations had also given the British consul some jurisdictional rights alongside local Chinese authorities over Chinese subjects (for a short period of time), and in 1855, there

²³ P. D. Coates, *The China Consuls: British Consular Officers in China, 1843-1943* (Oxford, 1988), p. 48.

²⁴ Coates, *The China Consuls*, p. 47.

²⁵ Fischer-Tiné, ‘Flotsam and jetsam of the Empire?’, p.121; S. Mizutani, “‘Degenerate whites’”, pp. 155-92.

²⁶ *Ibid.*, p. 122.

were reportedly at least 500 cases heard by the consul of Chinese subjects.²⁷ Whilst at first remaining neutral, by 1855 the British authorities joined the support of the Qing to quash the rebels. However, Chinese and foreign sailors deserted in droves joining mercenary bands, and many took advantage of the opportunities for plunder, which was helped by the social chaos and inadequate policing.²⁸ In the American Settlement at Hongkew, there were gangs that roamed largely unchecked, robbing and looting.²⁹ Although there may have been great differences in the demographic, social and political context of the 1850s and 1860s, the concern towards foreign perpetrated crime of the 1850s was reflected in the 1860s by the Shanghai Municipal Council Report for 1863. It noted the increase in foreign population of the ‘lower orders’ who, were ‘without any honest means of obtaining a living’, and coincided with a recent spate of robberies in the Settlement.³⁰ The crisis facilitated a response by the foreign authorities and local Chinese authorities. After a continued influx of Chinese subjects and Chinese perpetrated crime in the foreign settlements, the local foreign and Chinese authorities established the Mixed Court in 1864 for Chinese defendants accused of petty crime. Foreign perpetrated crime, however, regardless of Chinese crime, was still a prominent issue. Lanning, in his *History of Shanghai* (1921), stated that the period was one of foreign ‘anarchical scoundrelism’.³¹ Foreign perpetrated crime was certainly considered a visible part of life even in the early period.

Indeed, the presence of a large population of sailors who were destitute and a potential source of danger to law and order is notable in the number of charitable organisations created during this period. One of the first institutions established was the Shanghai Sick and Destitute Foreigner Fund in June 1855.³² A year later in 1856, the Seaman’s Mission Shanghai branch opened; an Anglican missionary

²⁷ Kotenev, *Mixed Court and Council*, p. 45; F. Dikötter, *Crime, Punishment and the Prison in Modern China* (New York, 2002), p. 307.

²⁸ Bickers, *Scramble for China*, p. 180.

²⁹ *Ibid.*

³⁰ *North China Herald* (hereafter *NCH*) 11 Apr., 1863, ‘Shanghai Municipal Council Report (1862)’, p. 58.

³¹ Lanning and Couling, *A History of Shanghai*, p. 364.

³² N. Djordjevic, *Old Shanghai Clubs and Associations: A Directory of the Rich Life of Foreigners in Shanghai from the 1840s to the 1950s*. (Hong Kong, 2009), p. 20 and p. 233.

society that worked for the practical and spiritual welfare of sailors.³³ In 1858, the Seaman's Home gave additional relief for sailors who needed residence and sustenance in Shanghai.³⁴ Such maritime institutions were not unfamiliar in port-cities in Britain and across the British Empire. Branches in India and Singapore, and more elsewhere in the British Empire were established from the 1830s and especially after a metropolitan drive in the 1850s.³⁵ The Shanghai institutions formed part of a worldwide network of British charitable welfare provisions for displaced and poor sailors in the interconnected trade routes of ports.³⁶ Some institutions provided religious teaching, whilst others provided accommodation.³⁷ Alston Kennerley suggests that there were several reasons for the growth of such organisations. They included the problem of some crews being discharged once in port, shipmasters delaying payment of sailors, and the prevailing ideas surrounding sailors, social class, poverty in material wealth and 'spiritual' wealth. In particular, discourses surrounding cleanliness, sobriety and respectability alongside the inability of the sailor to help himself drove the establishment and growth of charitable organisations.³⁸ Finally it may also be considered that the growth in these institutions was also borne of necessity; although the Merchant Shipping Act (1854) allowed for the deportation of distressed sailors in parts of the British Empire (which also applied to consular jurisdiction in China) in practice deportation was often too expensive as a suitable method for dealing with large numbers of sailors.³⁹

By 1865, therefore, increasing numbers of British subjects (most prominently sailors and disbanded military men) sojourned in Shanghai. However, their numbers and discourses surrounding race and class of the transient population compounded by the social and political upheaval of China, provided a context

³³ *Ibid.*, p. 202.

³⁴ *Ibid.*

³⁵ A. Kennerley, 'Joseph Conrad at the London sailors' home', *The Conradian*, 33, no. 1 (2008), p. 75.

³⁶ Kennerley, 'Joseph Conrad', p. 77.

³⁷ A. Kennerley, 'Seamen's missions and sailors' homes: spiritual and social welfare provision for seafarers in British ports in the nineteenth century, with some reference to the south west', in: S. Fisher (ed.), *Studies in British Privateering, Trading Enterprise and Seamen's Welfare, 1775-1900* (Exeter, 1987), pp. 121-51.

³⁸ Kennerley, 'Seamen's missions', p. 124; on the discourses of intoxication, disease and disorder of sailors see: Fischer-Tiné, 'Flotsam and jetsam of the Empire?', pp. 129-31.

³⁹ Fischer-Tiné, 'Flotsam and jetsam of the Empire?', p. 128.

wherein perceptions of foreign crime became increasingly noticeable. With the formation of the new consular legal system with the HMSC in Shanghai, the courts became a vital part of British consular governance. The next section, will explore how and why using consular court records and statistics.

2. Crimes Tried by the British Consular Courts

Prominence of criminal cases

Whilst at least perceptions of foreign and British perpetrated crime were high during the first two decades of the opening of Shanghai, the earliest (and only) comprehensive statistics of court cases for all the treaty ports (1866-8) demonstrate that this was likely because the increasing number of criminal court cases. This may have been because of the creation of HMSC in 1865, the rising population of sailors, or, as Edmund Hornby suggests, because police numbers and efficiency increased, resulting in more arrests and court hearings.⁴⁰ As a creation of the Foreign Office that was financed by the Treasury, the metropolitan authorities were keen to assess the financial upkeep of the consular legal system. Consuls thus produced regular reports on the numbers of plaintiffs and convicts in British consular gaols of the twelve consulates and two vice consulates in China. They show that there was a sizeable number of Britons tried and convicted of petty crime. Table 4.1 gives the reported plaintiff statistics for Shanghai, and all other consulates (see appendix, pp. 223-4).

The statistics provide a snapshot of population census records compared with the numbers of civil and criminal plaintiffs. Several interesting aspects about the function of the courts can be inferred from the table. Firstly, in many instances there are fewer registered Britons compared to the numbers of both civil and criminal cases heard in a given port. This suggests that many involved in court cases were not registered residents but those of the transient British population. Secondly, except for Hankou, over the three years of 1866-1868, in all ports the numbers of criminal plaintiffs are higher than civil plaintiffs; sometimes to the extent

⁴⁰ Hornby, *An Autobiography*, p. 255.

of up to double or triple the number.⁴¹ This suggests that criminal incidents and cases took up a significant portion of the consul's time as a legal official, and points to the prevalence of petty crime - or at least its trial. Thirdly, the total number of cases for each port shows that the courts were extremely important even in the earliest decades of the British presence in the treaty ports. In Shanghai, the number of complaints averaged over a staggering 1,000 each year. The statistics therefore suggest that legal governance in the ports, although important for the resolution of civil suits, was vitally important for dealing with criminal cases and petty crime too.

Court statistics

Records of judge's notebooks for Shanghai provide a more detailed insight into types of criminal cases and the response of British legal officials to certain offences. Examining summary court statistics from the Shanghai summary court, the charges against the 18 defendants in 1871-1872 there were: drunkenness (16), drunken assault (six), assault (six), absent without leave (three) and a handful of other offences including larceny and one for vagrancy. A picture of these two years shows that insobriety and physical violence were the most common charges. Some of these offences were committed on board ship, but most were committed onshore. These types of cases are similar to those in treaty port Japan.⁴² The types of cases also broadly correlate to those of colonial Calcutta for a slightly earlier period, where in 1855, alongside the prominence of shipboard offences of indiscipline and desertion, nearly half of all cases involved sailors committing offences of violence.⁴³ Summary judges' notebooks on intoxication offences reveal little if any information about the nature of the crime, usually just stating the charge and conviction, typically a fine between \$1 and \$3, with two types of offences: 'drunk and disorderly' or 'drunk and incapable'. The latter was distinguished from the former when the individual could not stand, and needed to be wheeled in a rickshaw to the station. Little

⁴¹ Hankou was a growing successful commercial port lying further upstream of the Yangzi River. Although the Royal Navy's China Station patrolled the river up to Hankou, there may have been fewer visiting merchant and naval ships, or ships that docked for a shorter time than the coastal ports. This may be a reason for fewer criminal cases.

⁴² C. Roberts, 'British extra-territoriality in Japan', p. 99.

⁴³ Fischer-Tiné, 'Flotsam and jetsam of the Empire?', p. 132.

detail in the records about intoxication, however, means that although inebriation offences were an important part of the court records, there are few details with which to analyse the offence in detail in this chapter.

The case statistics also broadly reflect arrest statistics of ‘foreign’ perpetrator-crimes (see Table 4.2, below). Municipal Council annual reports for the Shanghai Municipal Police (SMP) arrests of foreigners in 1863-4 show that drunkenness was by far the most common offence, followed by assault, desertion, and drunken assault.⁴⁴ The reasons why British and foreign crimes appear similar may have two interrelated explanations. The first is that intoxication, assault, and desertion were common ‘crimes’ perpetrated by sailors, regardless of their nationality. The second explanation is that ‘British’ sailors consisted of the majority of the foreign (sailor) population, thus making the statistics appear similar because they were the same.

Table 4.2 Foreign and Chinese arrests by the SMP 1863-4

1863-4 arrests by the SMP		1863-4 arrests by the SMP	
Foreigners		Chinese	
Drunkenness	1,370	‘Idle Chinese’	3, 113
Assault	92	Theft	885
Desertion	57	Assault	156
Drunken assault	37	Drunkenness	104
Total	1,777	Total	4,750

Source: Shanghai Municipal Archives (hereafter SMA) U1-2-16. ‘Foreign prisoners arrested by the Shanghai Municipal Police 1863-4.’

The foreign arrest statistics are also of interest compared to SMP arrests of Chinese subjects in the International Settlement. For 1863-4, there were 4,750 arrests with most being for the charge of ‘idle Chinese’ followed by theft, assault, and drunkenness.⁴⁵ Given that the Chinese population dwarfed the foreign population even in these early years, the total foreign arrests constituting around 25 per cent of total arrests attests points to the disproportionately high

⁴⁴ Shanghai Municipal Archives (hereafter SMA) U1-2-16 ‘Foreign prisoners arrested by the Shanghai Municipal Police 1863-4.’

⁴⁵ *Ibid.*

levels of foreign crime.⁴⁶ It also highlights the problem of inebriation, whereas Chinese arrests were predominately for expelling subjects from the Settlement.⁴⁷ This reflects similar statistics for British India, where police reports for 1867 in Bombay showed that of 3,869 persons arrested for being drunk and incapable, more than a quarter were Europeans or Eurasians, even though these communities made up less than five per cent of the total population.⁴⁸ Thus Shanghai's foreign crime was very similar to other colonial port cities.

Alongside summary court records, criminal cases from HMSC reveal the nature of high court crimes in the settlement during the early era. The first judges' notebook (1865-1870) contains a total of 30 cases with 40 defendants.⁴⁹ Charges were in order of commonality: murder and death related offences, serious assault offences, robbery, larceny, piracy, money-related crimes such as embezzlement, false pretences, libel, a rehearing of a case of refusal of duty, and a case of aiding an escaped prisoner (see Table 4.3, below). The vast majority (35) were found guilty of at least one offence. Two were acquitted for money-related crimes, two for murder and one for helping a prisoner escapee. Another case was adjourned without statement of a reserved judgement, suggesting acquittal of the defendant. The statistics show that the majority of cases involved violence in some measure (death, violence with theft or grievous bodily harm). Reflecting the summary courts, it was violence rather than crimes relating to theft or any other offence that predominated in HMSC hearings.

Table 4.3 HMSC charges 1865-1870

HMSC charges 1865-1870	
Murder and manslaughter	11
Grievous bodily harm	6
Robbery, larceny, piracy	6
Fraud, embezzlement	5

⁴⁶ Robert Bickers has also highlighted this aspect of arrest records: Foreign arrest numbers in 1865, recorded the equivalent of 68 per cent of the foreign population (2,300), 60 per cent of arrests were from drunk and riotous, drunk and incapable, and desertion by visiting seamen. R. Bickers, 'Ordering Shanghai: policing a treaty port, 1854-1900', in D. Killingray, M. Lincoln and N. Rigby (eds), *Maritime Empires: British Imperial Trade in the Nineteenth Century* (Aldershot, 2004), p.188.

⁴⁷ Robert Bickers has also used SMP arrests, and states the low levels of Chinese violent crime for this era: R. Bickers, 'Ordering Shanghai', p. 188.

⁴⁸ Fischer-Tiné, 'Britain's other civilising mission', pp. 311-12.

⁴⁹ TNA: FO1092/338.

Libel	2
Refusal of duty (appeal)	1
Aiding prison escape	1
Total	32

Source: TNA: FO 1092/338

A sample of summary court cases from 1898-1899 provides a familiar picture to the earlier decades, albeit with a certain noticeable changes.⁵⁰ In a selection of 50 cases, the crimes were: absent without leave, drunkenness, assault, theft and assault, drunken and exposure, attempted indecent assault, nuisance, false pretences and unlawful selling (see Table 4.4, below).

Table 4.4 Summary Court Charges from 1898-1899

Summary Court Charges from 1898-1899	
Absent without leave	23
Drunkenness	22
Assault	12
Theft and assault	1
Drunk and exposure	1
Indecent assault	1
Nuisance	1
False pretences and unlawful Selling	1
Total	62

Source: TNA: FO 1092/192.

The statistics from table 4.3 and 4.4 reveals two things. Firstly, the most frequent offences in the summary court were intoxication, violence and absence without leave. It suggests a continued problem with sailors, their behaviours and encounters and the unwillingness of some to re-board ships after coming to shore. Secondly violence-related offences were also the majority of charges in the high court. Money related offences comparatively fewer, suggesting that the courts either reflected the commonality violence in everyday life, and/or functioned primarily to discipline those charged with violence, either because it was an explicit intention of the courts to do so or because and it reflected the comparative ease of arresting and charging those of offences that could be proved with evidence of bodily harm. In order to understand these aspects of

⁵⁰ TNA: FO1092/192.

crime further, it is necessary to ask who exactly were these perpetrators and others involved in these cases?

3. Race, Crime and the Courts

Race and categorisation

The consul reports and plaint statistics indicate that a transient population constituted the bulk of the defendants in criminal cases. However, who exactly were these people? An examination of prison statistics following conviction reveals the racial background of those sentenced to imprisonment through the courts (see Table 4.5, below).

Table 4.5: Return of prisoners confined in consulate goals during the year 1868

Consulate	No. of Europeans	No. of Asiatics	Total days Europeans	Total days Asiatics	Average No. of days Europeans	Average No. of days Asiatics
Canton	13	24	190	35	15	1½
Whampoa	15	---	111	---	7½	---
Swatow	36	8	663	71	19	9
Amoy	26	14	No Return	No Return	70	30
Taiwan	---	---	---	---	---	---
Tamsuy	---	---	---	---	---	---
Foo-chow	29	---	No Return	---	20	---
Ningpo	8	---	115	---	14	---
Shanghai	266	55	No Return	No Return	40	21
Kiu-kiang	---	---	---	---	---	---
Hankow	1	---	10	---	10	---
Chefoo	38	7	No Return	No Return	11	11
Tianjin	6	4	144	94	24	24
Taku	---	---	---	---	---	---
New-chwang	2	---	4	---	2	---

Source: B..P.P., HC: 1870, [C.44] *Reports on Consular Establishments in China: 1869*. (Statistics from individual consulates from this source have been amalgamated into this table).

Table 4.5 shows an interesting snapshot of prisoners and sentences. Considering the number of court cases in each consulate as seen in Table 4.1, for most ports

there were a sizeable number of prisoners, meaning a high plaint-conviction ratio. Shanghai dwarfs the other ports for prisoners even in this early period, with roughly a third of plaints as indicated in Table 4.1 commuted into prison sentences in Table 4.5. Shanghai had a combined 321 prisoners in 1868, with an average of between twenty-one and forty days sentence of imprisonment, meaning that the Shanghai consular gaol was consistently busy. Whilst the first gaol in the Shanghai foreign settlement had been built in 1856 as a holding cell for those on trial and for those convicted of crimes at the British consulate, by 1868 a new British gaol was erected on Amoy Road to accommodate increasing numbers of prisoners sentenced by the summary court and HMSC.⁵¹

Table 4.5 is also revealing for understanding the numbers and ethnic backgrounds of prisoners recorded in a binary category: 'European' and 'Asiatic'. 'European' subjects predominate in Shanghai and most other treaty ports. As the Xiamen (Amoy) consul added to his individual report, the 'Europeans' or as he specifically termed them, 'white men', were 'principally English, Scottish, or Irish, with a few foreigners on the muster rolls of British vessels.'⁵² At Yantai (Chefoo), the forty-five prisoners included thirty-two 'Englishmen', three Germans, two Americans and an Italian.⁵³ The appearance of other European nationalities in British gaols is not surprising. As stated above, crews of British ships charged with minor offences came under the jurisdiction of the British authorities. In addition, as Britain was the only foreign nation to have gaols, other foreigners were also imprisoned there. The prisoners were also predominately sailors. As the Fuzhou consul stated in 1869, all the Europeans imprisoned at the Fuzhou consular gaol were seamen, and the average length of imprisonment was between fifteen days to one month, suggesting the gaols were being primarily used to hold those convicted of petty offences.⁵⁴ Indeed, the average length of imprisonment for all the ports including Shanghai, suggest that

⁵¹ Comprehensive comparative gaol statics for the end of the nineteenth century, unfortunately, do not exist.

⁵² British Parliamentary Papers, House of Commons (hereafter BPP, HC:) 1870, [C.44] *Reports on consular establishments in China: 1869*, p. 49.

⁵³ *Ibid.*, p. 100.

⁵⁴ Statistics include Pagoda Island vice consulate; *Ibid.*, p. 66.

the consulate prisons were being used for short-term imprisonment.⁵⁵ This reinforces the analysis of chapter two, which highlighted the penal connection between the British consular system in China and that of Hong Kong relating to long term prisoners and deportation. The statistics also show that European crime was of relative significance despite it being less prevalent than Chinese crime. According to the Municipal Council report for 1864-65, the number of foreigners apprehended by the Municipal Police constituted 1,564, and the number of Chinese 3,447. The foreign individuals arrested for intoxication accounted for 1,098 of the total 1,564.⁵⁶ Foreign crime totalled over a third of the overall total with intoxication charges forming the bulk of arrests. Considering the relative small population of foreign and British subjects these were indeed high figures.

Whilst ‘Europeans’ formed the majority of defendants and prisoners, there was also a sizeable proportion of ‘Asiatic’ subjects imprisoned within a number of the consular prisons. So who were these ‘Asiatic’ people? As the Tianjin consul stated in returning his predecessor’s 1868 statistics, the four Asiatic prisoners consisted of two ‘Malays’ and two ‘Mahomedan [Muslim] inhabitants of British India’.⁵⁷ Likewise, in 1870 the Xiamen consul stated that the ‘Asiatic’ prisoners were ‘nearly all Malays and Lascars, with a very small proportion of Manilamen serving on board British vessels’.⁵⁸ As Iona Man-Cheong has shown, the abandonment of the Navigation Acts (1651) after the Napoleonic Wars (1803-15) paved the way for mass recruitment of foreign sailors, chiefly indigenous sailors of the Indian Ocean region.⁵⁹ That numbers of ‘Asiatic’ sailors came to the treaty ports after 1865 is shown in the statistics; in Shanghai, of 321 prisoners in gaol, 55 were ‘Asiatic’ (just over 17 per cent of the total in prison).⁶⁰ Increasing numbers of ‘Asiatic’ seamen presented linguistic issues for the consular authorities. In Xiamen, consul Layton relied on a British merchant who

⁵⁵ As explored in chapter two, this was because prisoners convicted for long-term imprisonment were removed to Hong Kong for incarceration.

⁵⁶ *Shanghai Municipal Council Report for the Year Ending March 1865* (Shanghai, 1865).

⁵⁷ BPP, HC: 1870, [C.44] *Reports on consular establishments in China: 1869*, p. 41.

⁵⁸ *Ibid.*, p.49.

⁵⁹ The Navigation Acts stipulated that at least three-quarters of the crew of British ships be British sailors, hence British colonial subjects were used in contrast to non-British foreigners. See: Iona Man-Cheong, “‘Asiatic’ sailors and the East India Company: radicalisation and labour practices, 1803-15”, *Journal of Maritime Research*, 16, no.2, (2014), pp. 167-81.

⁶⁰ BPP, HC: 1870, [C.44] *Reports on consular establishments in China: 1869*, p. 15.

spoke Bengali as an interpreter in court cases.⁶¹ Meanwhile, consul Sullivan (who claimed that at times there were up to 700 seamen in the port) requested a constable speaking Malay, Bengali and Portuguese.⁶² This certainly suggests that many sailors had connections to India, Southeast Asia and the Portuguese possessions of Goa and Macau and other trading ports. Within the vast literature on the European empires and imperialism in East Asia, it is often forgotten that ‘Asian’ sailors were integral to imperial trade and presence, and in this regard in treaty port China as well.⁶³

Chinese subjects were also part of foreigners’ everyday life. Consular gaols held not just sailors from different parts of the British Empire, but also local Chinese subjects, temporarily held in British custody awaiting trial in Chinese court.⁶⁴ As the Yantai consul noted, all seven of his ‘Asiatic’ prisoners were of Chinese nationality.⁶⁵ It is uncertain whether prisoners were racially segregated in prison, but the categories of ‘Asian’ and ‘European’ prisoners suggests that the demarcation of the race of prisoners was significant, possibly indicating separate confinement, as they were in Hong Kong.⁶⁶

Indeed, race formed an important part of the understanding of legal governance. The labelling of men as ‘European’ or ‘Asiatic’ in the consular records is important as it shows how the consular authorities reduced their understanding of a vast array of people into binary terms: European and non-European. This intentionally attempted to overlook the heterogeneous nature of crews of race, ethnicity, religion and language into categories that the British authorities preferred to understand and demarcate people by; race and religion - white and Christian versus ‘other’ as primary markers in the social categorisation of subjects.

⁶¹ Coates, *The China Consuls*, p. 49.

⁶² *Ibid.*

⁶³ A select few studies have explored this lacuna but they have focused on the ships themselves as sites of research: See for example the special journal addition of ‘Asian sailors’: J. Ransley, ‘Introduction: Asian sailors in the age of empire’, *Journal for Maritime Research*, 1, no.16, (2014), pp. 117-23.

⁶⁴ BPP, HC: 1870, [C.44] *Reports on consular establishments in China: 1869*, p. 49.

⁶⁵ *Ibid.*, p.100.

⁶⁶ F. Dikötter, “‘A paradise for rascals’: colonialism, punishment and the prison in Hong Kong (1841-1898)”, *Crime, History and Societies*, 8, no.1, (2004), p. 52; Unfortunately there are no comprehensive comparable gaol statistics for the end of the nineteenth century.

Cases

Crime scenes, the courts and prisons were therefore site of interaction between a variety of people. What can court case statistics reveal about who was coming before the courts? Of the HMSC cases 1865-70, the majority of defendants had names suggesting a European heritage (37), with a minority denoting an 'Asian' heritage (3).⁶⁷ The vast majority were sailors, with most offences committed in port.⁶⁸ Examining summary court statistics from the Shanghai summary court (the Law Secretariat), and a selection of cases from 1871-72, exemplifies the trend of European sailors as defendants for minor criminal offences.⁶⁹ By a perusal of names, of a selection of 18 defendants, 16 have names suggesting being of 'European' parentage. One was directly identified as Chinese-British and another was a man with naturalised British citizenship from Australia, but Polish by birth. Of these 18 defendants, where the occupation can be discerned, ten were sailors and there was one policeman. The first judges' notebook (1865-70) contains a total of 30 cases with 40 defendants.⁷⁰ Of the defendants the majority had names suggesting a European heritage (37), with a minority denoting an 'Asian' heritage (three). This broadly correlates with Scully's assertion that during this era upwards of 75 per cent of cases were between foreigners rather than involving Chinese subjects.⁷¹ However, Chinese subjects occasionally appeared as plaintiffs, and, more prominently, many cases involved Chinese witnesses, especially shopkeepers, and 'coolies' where the crime had taken place onshore.

'British' subjects, as suggested in section one of this chapter, however, incorporated a range of people, some with names suggesting a European but non-English heritage, including those suggesting Scandinavian descent, for example 'Olsen', 'Schmersen', 'Stronsen' and 'Ommundsen'. Edmund Hornby, the Chief

⁶⁷ Whilst understanding race from names can potentially be misleading, names are still a relative indication of likely race and ethnicity, especially in regards to non-European names. As will be shown later, the surname 'Singh' was a relative marker of Sikhism, and South East Asian race, and those of Chinese origin we often reported as Chinese-British. Although it is noted that it is possible that some of non-European origin might have assumed English names.

⁶⁸ As chapter two has explored, crimes on board ship were amenable to the jurisdiction of the consular courts were only those committed within 100 miles of the China coast.

⁶⁹ TNA: FO1092/168; The 18 cases selected were the first that appeared in the notebook.

⁷⁰ TNA: FO1092/338.

⁷¹ Scully, *Bargaining*, p. 8.

Justice of HSMC, indicated that the practice of the British courts after 1865 as well as before was to assume jurisdiction over an array of different nationals:

As a matter of practice it has, so far as my experience extends, been always usual for the Consul of the nationality of the vessel to assume and exercise a jurisdiction over all members of the ship's crew, even in the case of an offence committed on shore. This Court [the Shanghai summary consular court] constantly exercises such a jurisdiction and no foreign consul has hitherto made any objection, but the cases in which the point might have been raised have been usually of trifling importance, and it may be that on this account it has not been worth while to question the right or the practice.⁷²

This appears to suggest that the British consular courts were regularly exercising jurisdiction by charging, sentencing and gaoling foreign nationals, as well as British nationals. Furthermore, the high percentage of sailors in the courts continued throughout the nineteenth century. A sample of summary court cases from 1898-1899 provides a familiar picture to the earlier decades, albeit with a certain noticeable changes.⁷³ In a selection of 50 cases, assuming names as an indication of race, there were 68 defendants, of with those denoting European heritage: (55) and those of Asian or Indian heritage: (13). Where employment status was revealed, there were sailors (34), unemployed (10), watchmen (nine), and a policeman (one). Of the complainants, aside from the Crown and police (29) there were shipmasters (12), Chinese subjects (four), Asian or Indian subjects (three), and those with European names (three). The noticeable difference in this latter set of court case statistics is a rise in those with the surname of 'Singh' and described as watchmen and policemen. This suggests the growing number of British Indian men brought to the treaty ports for work as watchmen and police constables. Unlike many sailors, British Indians tended not to be transient, but more long-term residents in Shanghai.⁷⁴ Notable too, is the increase in those stated as unemployed. This indicates a demographic shift in the British population from the late nineteenth century onwards. The statistics also suggest that aside from the Crown and shipmasters, there were roughly equal numbers of people with names indicating possible European, Chinese and Indian heritage, suggesting that there was a rising number of non-European people in

⁷² TNA: FO881/2631 Edmund Hornby to Consul Wittock, 28 Jun., 1869.

⁷³ TNA: FO1092/192.

⁷⁴ British Indian subjects in the courts will be explored more thoroughly in chapter five.

the courts.

As the majority of defendants, regardless of race, were sailors, the next section will explore one of the key functions of the court in specific relation to seafaring; ship discipline.

4. Seamen and Ship Discipline

During 1865-1899 sailors were overwhelmingly the main defendants in the courts. China was increasingly interconnected with British maritime trade networks and other imperial ports, as discussed above with the increase of British ships in the 1850s. This continued in the 1860s, and for 1868 (a few years before the summary court statistics above) there were 7,165 British vessels that entered Chinese waters, of which 1,827 came into Shanghai.⁷⁵ This demographic of British subjects in the ports meant that British sailors were integral to the imperial enterprise, yet also required an efficient and professional legal authority to deal with inevitable large numbers of misdemeanours. Intoxication and assault aside, the summary court had a duty to deal with those charged with offences of ‘absent without leave’ and ‘desertion’. In the main, the role of the court was primarily to enforce sailors to re-board their ships whenever possible. This was important for two reasons. Firstly, it was imperative that there was an effective legal system that could both enforce force sailors onto their ships, and appear to be enforcing law and order to the Chinese authorities and public. Secondly, there are many indications that desertion was because of the difficulties of working on a ship and the judge served to resolve that issue through the case so that they could re-board the ship. However, this was not always possible as many sailors stated that they refused to go back on board. This was either because of serious claims of abuse or more minor disputes over incompetence with shipmasters; in the case of *R. vs. Moor and Johnson*, the defendants claimed that they wanted to leave the ship as the captain was in the habit of ‘growling at their steering’. This was because the compass, they complained, was simply too high for them.⁷⁶

Regardless of the nature of the dispute, serious or seemingly more trivial, the role

⁷⁵ BPP, HC: 1870, [C.44] *Reports on consular establishments in China: 1869*, pp. 9-10.

⁷⁶ *NCH*, 1 June 1872, ‘W. Moore and J. Johnson of the Black Adder: Refusal of Duty’.

of the courts of enforcing those back on board wherever possible meant that the courts in many senses, ‘shanghaied’ them back on board and out of the settlement. The term meant to coerce, drug or otherwise force men to work on ships bound for the East Asia. While the court cases do not reveal that sailors had been coerced onto the ship from their point of joining the ship, by forcing sailors back onto vessels the British consular courts were complicit in ‘Shanghaiing’ them back out of treaty port China. In this way, the function of the court showed similarities with what would become more pronounced in the later decades; one of the key functions of the court was to facilitate and order the forced movement of problematic subjects, principally those out of work and repeat offenders, out of the port. Whilst deporting was expensive, enforcing sailors back onto ships cost the British authorities nothing. If this could not be done, as in the Moore and Johnson case, a severe sentence of imprisonment and hard labour could be levied.⁷⁷ Cases from 1898-1899 show that the legal authorities were similarly inclined to punish severely sailors charged with refusal of duty. In two cases of refusal of duty against four sailors on the 23 and 24 February 1898, both sets of sailors were sentenced to four weeks imprisonment with hard labour and to board the ship if it left within the four weeks.⁷⁸ As will be revealed in more detail below, most convicted in the summary court for offences such as violence and repeat offences received sentences that were much more lenient than that for refusal of duty. This suggests the importance of augmenting shipboard discipline and priority of the legal authorities to have dissenting sailors re-board their ships.

However, it is worth highlighting that although the courts functioned to enforce ship discipline and breaches of maritime contract between shipmasters and their crew, occasionally the courts could protect sailors from the abuses of the punitive excesses of shipmasters. For example, on the 26 August 1872, a seaman, of the ‘Belted Will’, launched a complaint against his shipmaster.⁷⁹ He stated that the shipmaster had beaten him severely on several occasions with a knotted rope three inches thick. The beating was given for the sailor’s alleged incompetency whilst undertaking one of his tasks. After the assaults were proved in court, the

⁷⁷ *Ibid.*,

⁷⁸ TNA: FO1092/192 *R. vs. Charles Stanby, William Clarke, Anderson, A. Tikka, J. Hakensen*, 23 Feb., 1898; *R. vs. Alfred Potter, Charles Stetson, William Fisher, John Francis Horntherns*, 24 Feb., 1898.

⁷⁹ *The Nautical Magazine (1872) Part 2*, ‘Flogging on Shipboard’, pp. 1054-5.

judge observed that shipmasters were not justified in flogging their crew for any offences except those that directly affected the maintenance of order and discipline on board. This therefore excluded those for incompetency or inability to perform the work, for which the only punishment was the reduction of their wages. The shipmaster was fined twenty-five dollars, and the prosecutor's maintenance in the Sailors' Home. In another case, recalled by Edmund Hornby around the same era, Hornby gave an English captain and the mate three months and six weeks imprisonment respectively for thrashing their Chinese 'coolies' without good cause.⁸⁰ Although Hornby's defence of Chinese against racial violence on the whole is still circumspect (as will be explored below) both cases demonstrated that the courts were not merely punitive, but could sometimes be a check upon shipmasters' excessive abuse of workers, whether 'European' seamen or Chinese. In the next section however, a look at racial violence cases will show how legal responses were more uniform in their understanding of the justification for violence.

5. Race and Violence

Racial violence and judicial sentencing, 1865-1872

Violence was a common feature of treaty port life. Most cases of violence were between 'European' subjects, but racial violence played an important role in everyday life. Although Pär Cassel cites *R. vs. George* (1869) – a case where a white British man was found guilty of murdering a Chinese man – the case appears to be the exception rather than the rule; the vast majority of interracial murder cases involving white men accused of killing a Chinese or other non-white subject ended either in an acquittal or a manslaughter charge.⁸¹

Manslaughter verdicts were far more common, with either accidental death or 'provocation' the mitigating factor. Within the set of cases examined, there are instances of white perpetrators receiving manslaughter verdicts on questionable

⁸⁰ Hornby, *An Autobiography*, pp. 152-3.

⁸¹ P. Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (New York, 2012), pp. 73-4.

grounds for the death of Chinese subjects. One such case was the trial of in *R. vs. John Hart*, heard on the 17 August 1868.⁸² Hart was charged with murdering a Chinese subject on board a vessel. A jury found him guilty of manslaughter only, and thereafter sentenced him to only one-year imprisonment with hard labour. The *NCH* in its annual review noted it as a murderous act of violence that received a mitigated punishment, owing to ‘great provocation’ offered to Hart.⁸³ ‘Provocation’ in this instance was interpreted very liberally. Nor were manslaughter cases uncommon outside of Shanghai. In another case as related by Edmund Hornby on ‘circuit’, a British subject was charged with shooting and killing a Chinese man by the ‘Shantung lighthouse’.⁸⁴ In a scuffle, the accused’s revolver had ‘accidentally’ gone off, and the jury decided that the suspect had not deliberately shot at a Chinese man. The accused was judged to have used appropriate ‘self-defence’, but in the process of doing so had caused the gun to fire and accidentally resulted in death.⁸⁵ At Niuzhuang on the same circuit, a jury passed another manslaughter verdict upon an Englishman who, according to Hornby, ‘under the influence of fear’ and ‘from misunderstanding the language and habits of the people’ had killed a Chinese man.⁸⁶

Although it may appear unsurprising that juries and judges held prejudices based on race, studies on the British consular courts in Japan have argued that there was very little or no such injustices based on race in Japanese-British cases.⁸⁷ Christopher Roberts’ argues that a string of criminal cases demonstrate that the British legal authorities bowed to Japanese pressure to charge Britons of manslaughter for Japanese deaths under questionable evidence. If we are to see cases such as *R vs. Hart* as merely suggestive of the idea that the race of the perpetrator and victim influenced court decisions, then more explicit admissions of racial prejudice are more forthcoming in the form of private letters between legal officials.

⁸² TNA: FO1092/338.

⁸³ *NCH*, 11 Sept., 1868 ‘The Supreme Court’.

⁸⁴ Hornby, *An autobiography*, pp. 240-4.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, pp. 248-9.

⁸⁷ Chang, *The Justice of the Western Consular Courts*; Roberts, ‘British extra-territoriality in Japan’.

In an extract from a private letter from Edmund Hornby to Yokohama consul Hannen in an undated letter (c. 1871-77) Hornby replied to an earlier correspondence on a murder case.⁸⁸ Although the details are missing, it appears that a man named Blackburn - a British subject - had killed a Japanese man. Subtitled a 'punishment for a common assault', Hornby provided his advice on how consul Hannen should proceed with the trial. In particular, he stated that manslaughter of a Japanese subject should be viewed more leniently; as common assault. Referring to the defence plea of the Blackburn, he stated that there was a:

good deal in what [the defendant] had to say about the native authorities not doing their duty ... [so] that foreigners are frequently obliged to take the law into their own hands to get redress.⁸⁹

Moreover, Blackburn's actions were excusable, despite the result in death because of the inaction of the Japanese authorities was considered a 'provoking' issue:

I do not approve it, but at the same time I cannot help seeing that the local authorities are the provoking cause I see no earthly pretence on going on with the charge of manslaughter, and have therefore ordered it to be put on one side – for assault and taking law into own hands, the justice of the case will be quite right by fines.⁹⁰

The letter reveals quite explicitly the factors that shaped the processes of judicial decision-making; they were infused with political and cultural assumptions about the nature of justice, 'provocation' and the rights of white men to be excused of full responsibility for violent acts towards Japanese subjects. That such measures were applied in China under Hornby's direction is almost certain. Hornby, as HMSC Chief Judge for both Japan and China, often complained of the similar problems he deemed as inherent flaws of the Chinese administration of justice. These included assumptions of corruption, and the authorities doing little to address the complaints of foreign subjects (both in civil and criminal cases) especially in regards to the Shanghai Mixed Court.⁹¹ On the other hand, pseudo-

⁸⁸ TNA: FO656/235 Edmund Hornby, HMSC to Hannen, Yokohama 'Punishment for a common assault'.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ See for example, his autobiography: Hornby, *An Autobiography*, p. 239; On the Mixed Court and its perceived shortcoming under Chinese governance See: A. Kotenev, *Shanghai: Its Mixed*

medical ideas based on race also absolved white perpetrators of murder verdicts and sentences. Hornby himself claimed that ‘Chinamen have very thin skins, and what an English sailor would hardly feel cuts into their flesh’.⁹² As such, a slight blow could kill a Chinese person whereas the same blow might not even hurt a European. These were ideas commonly held by British legal officials likewise in Hong Kong.⁹³

Continued racial violence: 1890-1899

In contrast to the earlier period, everyday forms of petty violence are much more revealing from summary court records in this period than in high profile cases. A good example is *R. vs. Hugh Robertson* heard on 22 August 1898.⁹⁴ Robertson, a sailor of S.S. Heathfield, was charged with ‘being drunk and disorderly and also assaulting constable Leighton in Broadway at 10.40pm’. Constable Leighton witnessed Robertson assaulting a Chinese ‘coolie’, and ordered him to desist but Robertson refused. Leighton stated that he was prepared to ‘let him off’ if he would go quietly, however Robertson proceeded to assault a Chinese policeman, and thereafter kicked Leighton several times. The judge found Robertson guilty of assaulting constable Leighton and being drunk and disorderly, and sentenced him to one week’s imprisonment with hard labour. Despite Leighton’s statement, what is notably absent is a charge and conviction of the assault upon the Chinese constable and coolie. Further, Leighton openly stated that he was prepared to overlook Robertson’s assault upon the coolie. It is revealing that both the European policeman and the British law court were uninterested in pressing charges for the assaults upon both Chinese subjects, especially upon those of low social status, such as rickshaw pullers.

Through examining thousands of consular court cases, convictions of interracial assault usually came in three forms. Firstly, those involving a more serious incident of assault, especially on Chinese police officers. Secondly, charges and conviction usually came when there were multiple charges filed, such as assault

Court and Council: Material relating to the History of the Shanghai Mixed Court and the History, Practice and Statistics of the International Mixed Court (Shanghai, 1925).

⁹² Hornby, *An Autobiography*, pp. 252-3.

⁹³ Dikötter, “‘A paradise for rascals’”, p. 58.

⁹⁴ TNA: FO1092/192 *R. vs. Hugh Robertson (S.S Heathfield)* 22 Aug., 1898.

and damages, assault and intoxication. Thirdly, convictions for assaults sometimes were made when there was no evidence of provocation. Typical examples of the former two are evident in the case of *R. vs. Charles Reid*, 29 August 1898.⁹⁵ Reid was charged with assaulting a Chinese police constable by ‘striking him on the head and other parts of the body, causing bodily harm in the Kiangse Road at 4.15am and causing loss of his uniform (\$3).’ Through a witness statement it was further revealed that he struck a rickshaw coolie and a Chinese police constable on the arms and face with a stick. A hospital report confirmed bruising on the head of the police constable. Reid was found guilty and fined \$3 for damages to the uniform with one weeks’ imprisonment and hard labour. Again, notable is the dismissed charge of assault upon the rickshaw coolie. However, not all charges of assault resulted in convictions where other charges were made. In another case, *R. vs. Nabot Singh*, Singh was charged with being ‘drunk and creating a disturbance in Scott Road and damaging property (\$3)’.⁹⁶ Singh admitted to being intoxicated, and through witness statements it was found he hit a Chinese woman, as well as damaging a lamp. He was found guilty of intoxication and damages to the lamp, being fined \$5. Notably absent from the charge and conviction however, is the assault on the Chinese woman. One wonders whether Singh was visiting a prostitute - the Chinese woman – and this may have worked against her claim of violence, or perhaps discouraged her from making a claim of assault herself.

Convictions for assaults and severity in sentence could also depend on the consideration of ‘provocation’ in interracial violence cases. In *R (Police) vs. John Hanson*, a sailor from S.S. Delcannie, Hanson was charged with being ‘drunk on the garden bridge and assaulting a Chinese policeman at 3pm.’⁹⁷ Hanson was found guilty of assault, by ‘hitting the Chinese policeman with fist in face and chest without provocation’. He was sentenced to two weeks imprisonment with hard labour. Compared to the previous cases it appears that a more severe sentence was handed down to Hanson as there was no provocation.

⁹⁵ TNA: FO1092/192 *R. vs. Charles Reid* 29 Aug., 1898.

⁹⁶ TNA: FO1092/192 *R. vs. Nabot Singh* 13 Sept., 1898.

⁹⁷ TNA: FO1092/192 *R. vs. John Hanson* (‘S.S.Dalcannie’) 14 Mar., 1898.

The race of the victim and perpetrator in interracial violence cases indeed, mattered. In *R. (Police) vs. William Curran*, a sailor from the British ship “Brynhilda”, Curran was charged with being ‘drunk and disorderly in Broadway [and] also making use of threatening language to P. C. Dahl’ (a European policeman).⁹⁸ In a witness statement, Constable Dahl stated that Curran ‘used very obscene language’. He was found guilty and sentenced to two weeks’ hard labour. Using obscene language to a European police officer received the exact severity of punishment for Curran as for Hanson who had physically attacked a Chinese policeman in the face and chest without provocation. In another, *R. vs. Thomas Ryan*, a sailor from S.S. *Marathon*, Ryan was charged with being ‘drunk and indecently exposing his person on the public footpath in Broadway ... also assaulting inspector Reed ... at 3pm’. Ryan admitted being drunk but claimed he remembered nothing, while the policeman confirmed the assault and added that Ryan was ‘exposing himself in a most disgraceful manner’. His conviction however was three months imprisonment and hard labour, for assaulting police.⁹⁹ Contrast this sentence with Hanson’s two-week imprisonment for assaulting a Chinese policeman, and it suggests how the race of the victim and perpetrator could matter in court sentencing; the British courts reinforced and reemphasised racial discrimination including physical violence towards Chinese. This was done in the summary courts in this era by either overlooking assaults, or punishing it lightly in comparison to cases of assaults on Europeans.

Explaining racial violence

In the selection of court cases, it appears that defendants to charges of petty violence towards Chinese subjects (and the majority of all other criminal case charges) were committed by lower-class men (sailors, watchmen, sometimes even policemen) but that the British authorities in many instances overlooked some aspects of violence. Several questions remain: why were the defendants overwhelmingly lower class men? Why was racial violence so common in Shanghai? What factors converged to see some convicted of assault and others not?

⁹⁸ TNA: FO1092/192 *R. vs. William Curran* (‘S.S. *Brynhilda*’), 11 Feb., 1898.

⁹⁹ TNA: FO1092/192 *R. vs. Thomas Ryan* (‘S.S. *Marathon*’), 9 Feb., 1898.

Firstly, it is important to consider the relationship between cultures of violence, class and law in nineteenth-century Britain. As Carter Wood has argued, the nineteenth century saw the ascendancy of one mentality towards violence over another; the culture of middle and upper-class ‘refinement’ emphasising self-restraint, poised against a ‘customary’ mentality that legitimised direct confrontation and associated with lower-class status.¹⁰⁰ A culture of violence used for communication, to assert boundaries, resolve disputes and for leisure was a common part of everyday life for many Britons, especially amongst the lower social classes.¹⁰¹ A link between social class, violence and criminality was perpetuated in the nineteenth century through popular crime fiction and newspaper reports.¹⁰² In law, this was reflected in attempts to punish violence through legislation: the Offences Against the Person Act in 1828 and 1861.¹⁰³ Both Acts defined more clearly physical violence in its more serious ‘grievous’ and milder ‘actual’ forms. Together they were used to punish more stringently acts of violence, and it is unsurprising that those charged of violence were typically lower-class men.

In colonial contexts however, issues of race often mediated or overrode those of social class and violence. This was particularly apparent in the ideas surrounding ‘chastisement’. As Kolsky, Hay and Craven illustrate, chastisement of servants and labourers was more acceptable in the colonies because of race.¹⁰⁴ Whereas in metropolitan legislation protection for labourers was being developed, reasonable chastisement of male indigenous servants was not uncommon. In China, like elsewhere, it was common for Chinese to serve and be in subordinate positions to Europeans either domestically or in service positions in the cities. In treaty port China, as Robert Bickers has shown, popular contemporary British attitudes tended to relegate Chinese social, cultural and racial attributes as distantly inferior.¹⁰⁵ In the SMP, Chinese were understood as servants, insubordinates, and

¹⁰⁰ Wood, *Violence and Crime*, pp. 3-4.

¹⁰¹ *Ibid.*, pp. 8-26; p. 111; pp. 96-118.

¹⁰² *Ibid.*, p. 5

¹⁰³ *Ibid.*, p. 5 and p. 29.

¹⁰⁴ Kolsky, *Colonial Justice*, p. 22; D. Hay and P. Craven (eds), *Masters, Servants and Magistrates in Britain and the Empire, 1562-1955* (Chapel Hill, 2004).

¹⁰⁵ Bickers, *Britain in China*; Munn, *Anglo-China*.

the criminal classes were understood as mainly Chinese.¹⁰⁶ At the same time, in colonial contexts there were discourses that linked lower-class men to violence¹⁰⁷ and in China it was suggested that lower class white men had higher levels of aggression towards Chinese because of their class status; violence towards Chinese made themselves feel better in a British social world that ordinarily looked down upon them.¹⁰⁸

Corporal punishment and race provides another factor. As Frank Dikötter has explored, during the nineteenth century public whippings of Chinese subjects in Hong Kong were common.¹⁰⁹ However, when physical punishment was applied to European subjects in Hong Kong it caused public uproar in the European community.¹¹⁰ Physical violence as punishment towards Chinese was acceptable, but for white men was not.

Another factor is the proximity of Chinese men and women with lower class British men. Perhaps because of their low status many lower class men broke social norms emphasising physical and social distancing of British and Europeans from non-Europeans, contact and interaction.¹¹¹ In some cases this was unavoidable; the court records from Shanghai reflect interaction on the streets with policemen and rickshaw drivers. Contact between foreigners and Chinese rickshaw drivers in particular was an important part of everyday life.¹¹² Rickshaws were the prime mode of urban transport, providing cheap transportation around the settlement, bringing foreigners to and from places in the settlement, especially places of entertainment and drink. However, disputes could frequently arise between the rickshaw pullers and intoxicated foreigners over the price of the fare. Many rickshaw pullers were migrants, and did not

¹⁰⁶ Bickers, *Empire Made Me*, p. 72.

¹⁰⁷ K. Ballhatchet, *Race, Sex and Class under the Raj: Imperial Attitudes and Policies and Their Critics* (London, 1980).

¹⁰⁸ Bickers, *Britain in China*, p. 97.

¹⁰⁹ Dikötter, ““A paradise for rascals””, pp. 54-5.

¹¹⁰ *Ibid.*

¹¹¹ Bickers, *Britain in China*; A. L. Stoler, *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule* (Berkeley, 2002).

¹¹² For more on rickshaw pullers and their role in transport in everyday life (especially in the twentieth century) see: H. Lu, *Beyond the Neon Lights: Everyday Shanghai in the Early Twentieth Century* (Berkeley, 2004); D. Strand, *Rickshaw Beijing: City People and Politics in the 1920s* (Berkeley, 1989).

know the city well, or speak pidgin English – a compromised form of English that was used by most foreigners to speak to Chinese.¹¹³ As Robert Bickers has highlighted, the colloquial Shanghai Chinese slang, eating *waiguo huotui* ‘foreign ham’ referred to the common assault on rickshaw coolies receiving kicks from foreign passengers.¹¹⁴ Hitting rickshaw coolies after pay disputes or alcohol-fuelled unprovoked attacks appear frequently in the courts, but assault charges were usually not formally brought against British defendants, although they appear in witness statements. Nor was racial violence uncommon in the SMP, where there were many instances of disciplinary charges against European constables for striking Chinese constables.¹¹⁵ This suggests that interracial violence was likely more prevalent than the case statistics suggest; the ‘dark figure’ of physical violence cannot be fully counted, but there are indications that it was present.¹¹⁶ This reveals the cultural assumptions that may have resulted in racial violence, but how was violence understood or justified in the courtroom, and why were lower class men seen in the court?

Finally, the issue of violence and legal interpretation of ‘provocation’ helped white subjects evade convictions. Within the courtroom when violence was charged, ‘provocation’ appeared to be interpreted loosely in interracial violence cases. As the earlier cases of *George* and, more explicitly, *Blackburn* showed, violence was not merely a form of protection but could be deemed reasonable if an antagonising factor, such as the denial of justice from native authorities, could be used to explain violence. The interpretation of *reasonable* therefore was taken within a social-cultural context with ideas of justice and the rights of white men as an excusable and justified response to the unreasonable tardiness, or inefficiency of Chinese subjects and policing. The conclusions of racial violence and legal injustice therefore resonate with scholars that have demonstrated how the courts upheld racial inequalities through showing how white perpetrators often got away with serious offences. Although British justice rested upon ideas of impartiality, the disparity between principles of legal universalism and unequal governance based on race in consular criminal court cases of racial

¹¹³ Bickers, ‘Ordering Shanghai’, p. 190.

¹¹⁴ Bickers, *Britain in China*, p. 81.

¹¹⁵ Bickers, *Empire Made Me*, p. 84.

¹¹⁶ Sharpe, *Crime in Early Modern England*, p. 61.

violence can also be understood as another form of the ‘rule of colonial difference.’¹¹⁷ Violence towards Chinese subjects was common, and often considered justifiable, despite its obvious illegality as an act of assault. Acquittals, overlooking violence and lenient sentences were all visible aspects of this. Issues connected to lower-class men in the courts however, came increasingly apparent in the later years of the nineteenth century, although it had less to do with violence than the condition of their existence in the treaty ports, which be explored in the next subsection.

6. Poor Britons

Whilst the legal authorities’ primary functions were to discipline ‘unruly’ seamen, and punish acts of violence (or sometimes punish lightly or acquit racial violence) another feature becomes apparent: the presence of poor Britons in the courts. Rising levels of poverty were a problem Empire-wide. For example, in India nearly a quarter of the population were regarded as ‘poor whites’ and/or ‘Eurasians’, (which for social stigma reasons, were also more likely to be poor).¹¹⁸ Increasing rates of unemployment were partly because some people dismissed from companies for misconduct and found it difficult to regain employment with competition from Eurasian and Indians.¹¹⁹ It may also have been because young white men wrongly assumed that they could find jobs after moving from different parts of the British Empire.¹²⁰ Some in Shanghai may also have deserted from ships, as the summary case statistics showed a sizeable percentage of cases were for ‘desertion’.

In India, there were campaigns to rid of, hide and reform poor white men, many of whom were regarded as ‘loafers’.¹²¹ Fisher-Tiné has argued that there was an

¹¹⁷ The ‘rule of colonial difference’ as first put forward by: P. Chatterjee, *The Nation and its Fragments: Colonial and Postcolonial Histories* (New York, 1993), p. 10; With regard to legal rule of colonial difference see: Kolsky, *Colonial Justice*.

¹¹⁸ Mizutani, “‘Degenerate whites’”, p. 157; Eurasians in the nineteenth century were excluded from promotion in many jobs such as in the civil service and Army. K. Ballhatchet, *Race, Sex, and Class under the Raj* (London, 1980), p. 4.

¹¹⁹ Fisher-Tiné, ‘Britain’s other civilising mission’, p. 307.

¹²⁰ *Ibid.*, pp. 308-9.

¹²¹ *Ibid.*, pp. 296-338; also see: Arnold, ‘European orphans’; Kolsky, *Colonial Justice*.

‘internal’ civilising mission campaign upon poor whites in India.¹²² These included not only legislative and penal punishments (vagrancy legislation was introduced in British India in the 1860s)¹²³ but also workhouses to ‘rehabilitate’ the poor.¹²⁴ It was a prominent issue, precisely because many were European, which undermined colonial rule built upon the discourse of the ‘superiority’ of the European ‘race’.¹²⁵ Poor Britons blurred the boundaries between the colonised and coloniser and were both the object of punishment as well as having their low social status determining a degradation of their ‘whiteness’.¹²⁶

In the China context, as Robert Bickers has suggested for the SMP in treaty port Shanghai, policing the foreign destitute in the Settlement was more about the perceived danger to the discourses of ‘prestige’ and ‘race’ than their nuisance.¹²⁷ So who were being brought to the courts for vagrancy and other offences and why? The next section will examine cases in more detail and suggest that the role of the legal authorities was also repeat offenders, and those whose offences took place in particular areas, using law and punishment as a deterrent to others.

Begging, intoxication, vagrancy

A sample of summary court cases from 1898-1899 demonstrates many cases involving poor subjects, and offences of begging and intoxication offences. In *R. vs. George Ferguson*, Ferguson, who was stated as unemployed, was charged with ‘begging from foreigners on the Bund’. He was also charged with ‘being destitute and without any visible means of subsistence’. The charge was retracted and the case dismissed as the foreigner who took him into custody objected to

¹²² Fisher-Tiné, ‘Britain’s other civilising mission’, p. 303.

¹²³ K. Ballhatchet, *Race, Sex, and Class under the Raj*, pp. 124-5.; Fisher-Tiné, ‘Britain’s other civilising mission’, p. 303 and p. 311.

¹²⁴ Fisher-Tiné, ‘Britain’s other civilising mission’, pp. 296-338; also see: Arnold, ‘European orphans’

¹²⁵ Robert Bickers has also noted the role of the SMP arresting rowdy and inebriated men that undermined British prestige publically from the Chinese view, and for enforcing social discipline: R. Bickers, ‘Ordering Shanghai: policing a treaty port, 1854-1900’, in D. Killingray, M. Lincoln and N. Rigby (eds), *Maritime Empires: British Imperial Trade in the Nineteenth Century* (Aldershot, 2004), pp. 188-9.

¹²⁶ *Ibid.*

¹²⁷ R. Bickers, ‘Who were the Shanghai Municipal Police, and why were they there? The British recruits of 1919’, in R. Bickers and C. Henriot (eds), *New Frontiers: Imperialism’s New Communities in East Asia, 1842-1953* (Manchester, 2000), p. 175.

him being charged.¹²⁸ In *R. vs. James Price*, 31 August 1898 a sailor of S.S Dunfermline, Price was charged with ‘being drunk in the Whangpu Road’.¹²⁹ He had previous convictions for drunkenness and was found on the present occasion standing outside the Post Office, begging for money from foreigners and Chinese people inside. He was sentenced to a \$10 fine or two weeks imprisonment. On 3 September he was charged and convicted of being drunk on the Whangpu Road.¹³⁰ He was noted as having previous convictions and was sent to gaol for two weeks. In *R. vs. Bhaget Singh*, 21 December 1897, Singh was found drunk and incapable on the Garden Bridge and convicted with a \$20 fine or one month in gaol.¹³¹ In *R vs. Bhaget Singh*, 17 August 1898 Singh, stated as unemployed, was charged with being ‘drunk and incapable on the Bund’, and found ‘asleep on a bench’.¹³² Singh was fined \$20 or a two weeks’ imprisonment forfeit. Possibly the same man in *R. vs. Bhaget Singh*, 16 March 1898 was charged with ‘being drunk and disorderly on the Cemetery Road at 4pm’. He was ‘annoying the people there who were looking at the races ... pushing them about ... he then dropped down helpless.’ Singh was sentenced to two weeks imprisonment.¹³³ In *R vs. Daniel Sullivan*, Sullivan was charged with being drunk and incapable in the Broadway.¹³⁴ He was noted as being ‘found drunk and walking about’ and had attracted a ‘great crowd’ of Chinese.

The cases together all suggest that place in the crime might have mattered. The Bund, post office, and public Gardens were places of respectability. The Bund was a space that demonstrated foreign mercantile success and a leisured space where well-to-do foreigners strolled. Indeed, the Bund, as Robert Bickers has argued, was also a site a display of foreign warships and shipping vessels; the military and economic might of the treaty powers.¹³⁵ Likewise the Public Gardens was a space that was for many years exclusionary; there was a regulation for example that placed restrictions on Chinese subjects with

¹²⁸ TNA: FO1092/192 *R. vs. George Ferguson* 23 May, 1898.

¹²⁹ TNA: FO1092/192 *R. vs. James Price (SS. Dunfermline)*, 31 Aug., 1898.

¹³⁰ TNA: FO1092/192 *R. vs. James Price (SS. Dunfermline)*, 3 Sept., 1898.

¹³¹ TNA: FO1092/192 *R. vs. Bhaget Singh*, 21 Dec., 1897.

¹³² TNA: FO1092/192 *R. vs. Bhaget Singh*, 17 Aug., 1898.

¹³³ TNA: FO1092/192 *R. vs. Bhaget Singh*, 16 Mar., 1898.

¹³⁴ TNA: FO1092/192 *R. vs. Daniel Sullivan*, 17 Jan., 1898.

¹³⁵ R. Bickers, ‘Incubator City: Shanghai and the crises of empires, *Urban History*, 38, 5, (2012), p. 865.

conditions that those admitted had to be ‘respectable’ and well dressed. One wonders whether this also applied to poor whites.¹³⁶ Notable too, is the statement of begging from Chinese subjects and drawing crowds of Chinese in some of the reported incidents; the public display of destitution in Chinese view seemed to matter in the conviction of some of these men. Judges may have seen the need to punish people who committed crimes relating to poverty in certain places and when it attracted Chinese attention.

Deterrence and repeat offenders

The problem of vagrancy and its increasing numbers, (or at least its perception) was also evident in a particular court case in 1898. Previous to the case, Charles Mulready had already been charged and convicted of being drunk and assaulting a Chinese police officer.¹³⁷ For that offence, the judge sentenced him to one weeks’ imprisonment with hard labour. A day after his release, however, he was before the British summary court again. This time charged by the French police with ‘soliciting on the yangkungpang’ (French Concession).¹³⁸ Attached to the court report was an attached letter from the chief of police to the British judge:

there are many of these disreputable characters who hang about our settlement and beg of passers by ... [I hope] ... the culprit will be severely dealt with in order to serve as a good example to others.¹³⁹

Mulready was duly sentenced to one week’s imprisonment with hard labour for his plight. In the eyes of the police, and enforced by the British legal authorities therefore, such offenders needed to be punished to deter others. This was most likely a fruitless strategy however, as many offenders were serial repeat offenders. Perhaps one of the most problematic serial offenders was Arthur Harvey. In the hearing of *R. vs. Arthur Harvey*, 27 June 1898 Harvey, stated as unemployed was found guilty of being drunk and incapable on the Sicawei Road at 3.30pm and was sent to gaol for one week.¹⁴⁰ A month later, on the 26 July, Harvey was again before the courts, found guilty of stealing food from servants

¹³⁶ R. Bickers and J. Wasserstrom, ‘Shanghai’s Chinese and Dogs Not Admitted’ sign: history, legend and contemporary symbol, *The China Quarterly*, 142, (1995), p. 445.

¹³⁷ TNA: FO1092/192 *R. vs. Charles Mulready*, 2 Jul., 1898.

¹³⁸ TNA: FO1092/192 *R. vs. Charles Mulready*, 11 Jul. 1898.

¹³⁹ *Ibid.*

¹⁴⁰ TNA: FO1092/192 *R. vs. Arthur Harvey*, 27 Jun. 1898.

of a property on Markham road. He was sentenced to one week's imprisonment with hard labour.¹⁴¹ Again a month later, Harvey was charged with being drunk and incapable, asleep in a rickshaw, again convicted with a weeks' hard labour.¹⁴² The next day, Harvey was charged with being drunk and incapable in the Public Gardens.¹⁴³ He was found on a bench 'too drunk to move', and fined \$20 or two weeks' imprisonment with hard labour. Unable to pay, Harvey went to gaol. On 12 September he was again charged with being drunk and incapable in a rickshaw on Woochang Road, this time sent to gaol for a month with hard labour.¹⁴⁴ Finally, on 17 October he was charged with being 'drunk and incapable in the Pekin Road.' He was sentenced to a \$20 fine or a month in prison with hard labour.¹⁴⁵ This time however, Harvey stated that he had a chance of leaving Shanghai, and the court thereby dismissed him with a caution.

Vagrants: race, class and deportation

The summary cases point to an increased number of poor British subjects in Shanghai, and suggestions that the police and British legal authorities saw their presence as problematic; sentences were often far more severe than for acts of violence. The spatial aspect of their crime also appeared to result in heavier sentences suggesting that vagrancy itself was not so much a problem, as the social implication of poverty as displayed in certain areas that were thought of as spaces for the more well-to-do European population, such as the Public Gardens and the Bund. This suggests that poor whites particularly undermined race and class values in these places. Vagrancy as punished in the courts was moreover a male phenomenon; there were no women on trial in the summary courts. This suggests that either there were few poor women, that there were social institutions for destitute women, or that they were less likely to be vagrants.¹⁴⁶

¹⁴¹ TNA: FO1092/192 R. vs. *Arthur Harvey*, 26 Jul., 1898.

¹⁴² TNA: FO1092/192 R. vs. *Arthur Harvey*, 26 Aug. 1898.

¹⁴³ TNA: FO1092/192 R. vs. *Arthur Harvey*, 27 Aug., 1898.

¹⁴⁴ TNA: FO1092/192 R. vs. *Arthur Harvey*, 12 Sept., 1898.

¹⁴⁵ TNA: FO1092/192 R. vs. *Arthur Harvey*, 17 Oct., 1898.

¹⁴⁶ Many European women coming to treaty port China came as wives or missionaries for example. On European women in the twentieth century in China, see: Bickers, *Britain in China*, pp. 88-9; the 'Door of Hope' for example was an institution for women, with Chinese women rescued from being kidnapped were sometimes sent there. It may have also been used for European women.

The heavy sentences suggest the priorities of the British authorities and police were to deter, punish and hide ‘disreputable’ characters using imprisonment. However, there is little evidence to suggest that the gaols were attempting to rehabilitate vagrants, with gaols (as section one explored) being primarily used as short-term lock ups for minor offences. Arthur Harvey’s time in the courts reveals several further aspects of everyday life and legal governance. Firstly, intoxication, ‘vagrancy’ and begging often came together to bring individuals to court. Secondly, repeat offenders for vagrancy offences accumulated heavier sentences, alongside the place of the offences. This not only suggests that such people were hard to rehabilitate but that accumulation of offences were more likely to see a person in the courts. Finally, that the court was willing to simply dismiss Harvey for his last offence after his statement that he could leave Shanghai showed that the primary object of the consular legal and penal authorities was to not rehabilitate Harvey, but – like sailors – to facilitate or hope that he could be deported. This was a strategy in common with the American authorities.¹⁴⁷ The ‘problem’ of vagrants was a familiar one to other treaty port powers. Eileen Scully has argued that near the turn of the century US discourses over national prestige, race, class and nationality were precipitated by an influx of poor whites in Shanghai, including vagrants and prostitutes. The result in the context of the American authorities was a ‘more restrictive privilege and more rigorous surveillance over “whiteness”, including ‘a discourse of a “vagrant other”, who appeared as an ‘unpatriotic, self-seeking and dangerous individual.’¹⁴⁸ Although case records do not reveal the discourses of vagrancy in the British context, examining British criminal case records show that the British authorities used the courts not to punish all poor Britons, but specific ones showcasing their lack of respectability and ‘uncivilised’ manners and behaviours through poverty in particular spaces, circumstances, or through repeat offences.

Conclusion

Court cases are an excellent lens onto aspects of everyday life and legal governance. Through examining summary and high court criminal cases, the

¹⁴⁷ *Ibid.*, p. 95.

¹⁴⁸ Scully, *Bargaining*, pp. 89-90.

chapter has argued four points. Firstly, crime scenes, the courtroom and gaols were sites where the local, regional and global came together. British subjects could include a wide variety of people from parts of the British Empire as the majority were sailors in this period. Summary court cases also reflect everyday interaction and violence towards Chinese subjects, usually policemen and rickshaw pullers. Secondly, the function of the summary court was primarily aimed at dealing with intoxication offences, enforcing ship discipline and violence. In the high court, offences were overwhelmingly concerning violence. In this sense, violence was a key part of everyday life and legal governance. However, violence was often interrelated with race, and race often affected verdicts and sentencing patterns. Depending on the race of the victim, perpetrators could often receive lighter sentences. In the summary courts, everyday violence towards Chinese subjects, especially rickshaw pullers were often overlooked. The courts therefore were often reluctant to charge and convict interracial offences, as they upheld racial prejudices. In many senses, the criminal courts in Shanghai operated and reflected other British criminal courts in port cities of the British colonial Empire. Although Shanghai was not a colonial settlement, issues of crime, disorder, race and class were the same as in colonial contexts. Thirdly, court cases demonstrate the predominance of poor men in the courts. These included not only sailors, but increasing numbers of the unemployed and vagrants. In specific circumstances, vagrants were punished for their offences, but the courts could not and did not punish all poverty-stricken individuals. Finally, an important strategy of dealing with problematic individuals such as seamen, (and when possible vagrants) was to move them on, enforcing sailors back on ships. There was little emphasis on rehabilitation, and such men represented a type of ambiguity and lawlessness within the foreign settlements.

In the next chapter, I take forward my interest in law and change during the second half of the century, exploring the difficulties of law and order, and demographic change in relation to British Indians in the courts in the twentieth century. As it will show, criminal jurisdiction continued to be of vital importance to the British authorities, with violence, desertion, and political offences shaping legal responses in new ways.

Chapter 5

Law, Court Cases and British Indian Subjects in the Early Twentieth Century

Introduction

As chapter four explored for the nineteenth century, Shanghai and many other treaty ports attracted large numbers of people from different parts of the world. At the turn of the twentieth century, Shanghai, as the most affluent and populous treaty port, attracted even greater numbers. The majority of these people were Chinese; some were political refugees, and others came to find work or a better life. There were many foreigners too, coming from elsewhere in Asia and from different places across the globe, not connected to seafaring. Amongst them was an increasing British Indian population. British Indians included a range of people from different social, ethnic and religious backgrounds who had usually been domiciled in India. They included Hindu and Muslim British Indians, as well as Gurkhas and Parsi amongst others. However, Sikhs made up the majority of the British Indian community in the early twentieth century, consisting of roughly three quarters of the British Indian population, with many drafted into the foreign municipal police forces for buttressing law and order in the treaty ports.¹ Much like sailors – as shown in the previous chapter – they became both integral, yet simultaneously problematic, to British authority in China. There are few studies that focus on British Indians in the treaty ports, particularly on legal jurisdiction as related to British Indians subjects, crime and legal authority.²

¹ C. Markovits, 'Indian communities in China c.1842-1949', in R. Bickers and C. Henriot (eds), *New Frontiers: Imperialism's New Communities in East Asia, 1842-1953* (Manchester, 2000), p. 62; as the vast majority of those involved in court cases and the police force were also Sikhs, 'British Indian' is used interchangeably with 'Sikhs', although the chapter also does not attempt to claim that all Sikhs or those in the Shanghai Municipal Police were part of a unitary group.

² The most comprehensive research on Sikh policemen in treaty port China is Isabella Jackson: I. Jackson, 'The Raj on Nanjing Road: Sikh policemen in treaty-port China', *Modern Asian Studies*, 46, no.6, (2012), pp. 1672-704; Robert Bickers has also highlighted aspects of the Sikh police force in the SMP, see: R. Bickers, *Empire Made Me: An Englishman Adrift in Shanghai* (London, 2003), esp. pp. 64-84; Thomas Metcalf has noted the movement of British Indians across the colonial and imperial world see: T. Metcalf, *Imperial Connections: India in the Indian Ocean Arena, 1860-1920* (Berkeley, 2007), pp. 124-31; For research on British Indian (especially merchant) communities see: Markovits, 'Indian communities in China c.1842-1949', pp. 55-74.

Although their numbers were comparatively few compared to the overall Chinese, (as well as foreign and even British population), this chapter explores the disproportionate presence of Sikhs in the consular courts. The chapter will show how and why they mattered to the British legal authorities, and how they shaped extraterritoriality. This chapter primarily examines law and court cases from 1900-c.1920. The dates reflect the richness of the sources for this era and the importance of the years and events before, during, and just after the First World War. The chapter demonstrates how ideas of race, class, gender and British Indian ‘criminality’ were interconnected, as well as how local, regional and global events all came together in consular court jurisdiction over British Indian subjects, to challenge and shape British extraterritorial legal authority and their legal responses.

The first set of perceived legal challenges for the British China authorities concerning British Indian subjects were localised issues such as labour strikes, ‘litigiousness’, recidivism, and petty violence against Chinese subjects. From 1914 onwards this was accompanied by fears of transnational anti-British Indian nationalism. In particular, the use of China as a site for anti-British agitation and the Great War shaped extraterritorial legislative changes. Like the American consular system, crimes of ‘seditious libel’ aimed to prosecute those engaging in Indian national (and communist) political groups, or those in possession of political material.³

As Robert Bickers and Isabella Jackson have shown, British Sikh policemen in the treaty ports demonstrate how the formal and informal British Empire overlapped, with Sikh policemen both an iconic symbol of the British Raj and a defence force.⁴ This adds to literature showing how British India was an important influence in the wider formal and informal British Empire.⁵ This chapter offers a different perspective showing how extraterritorial law and penal

³ E. Scully, *Bargaining with the State from Afar: American Citizenship in Treaty Port China, 1844-1942* (New York, 2001), pp. 155-6.

⁴ See: Bickers, *Empire Made Me* p. 86; Jackson, ‘The Raj on Nanjing Road’.

⁵ T. Ballantyne, *Orientalism and Race: Aryanism in the British Empire*, (Basingstoke, 2002); R. J. Blyth, *The Empire of the Raj: India, Eastern Africa and the Middle East, 1858-1947* (Basingstoke, 2003); also see on the British Indian influence in the Indian Ocean region: Metcalf, *Imperial Connections*.

practices over British Indian subjects forged a transnational link between the treaty ports, India and the metropole. Legal governance was inherently connected to local as well as wider regional and global considerations and events: local Indian communities, British Indian politics, and the First World War. The response of the China British authorities to these perceived threats was to create emergency laws, closed courts and use deportation for suspects and offenders. These legal and penal strategies were similar to the metropolitan and other British colonial contexts, and legislation amendments were aided by British Indian officials and moulded upon British Indian and metropolitan emergency legislation. However, as the chapter will show, despite transnationally constituted laws, finding, punishing and deporting Indian subjects often proved difficult. British Indians in the police forces could mass mobilize, whilst others led transitory lives, moving frequently to find work. Many formed transnational networks, informing them of better opportunities elsewhere facilitating more British Indians to move. Finally, the plural legal environment in the treaty ports meant that sometimes they could evade the jurisdiction of both foreign municipal and extraterritorial jurisdiction.

The chapter is split into three sections: 1900-1914: policemen, law and dissent; 'criminality' and continuing problems of British Indian subjects in the open courts; and the rise of Indian nationalism and extraterritorial legal responses: 1914-c.1920. The date selection reflects the significance of legal changes brought principally just before, during and after the Great War. As in chapter four, cases have been selected from both the summary court and His Britannic Majesty's Supreme Court for China (HMSC). Where records allow, particular cases are examined in more detail. In each instance, the method of case selection is noted before analysis, and statistics are given in number form with parentheses or in tabulated format.

1. 1900-1914: Policemen, Law and Dissent

New communities

The late nineteenth and turn of the twentieth century presented a period of uncertainty and uneasiness for British authorities and settler communities in many parts of the British Empire. Popular anti-colonial uprisings threatened British political authority and white privilege in parts of Africa and Asia. These included, most notably, the Madhi uprisings in Sudan (1885-6; 1896), the creation of the Indian National Congress in India (1885) alongside growing Indian protests, and the Boer war in South Africa (1899-1902). In China, the anti-foreign Boxer uprising (1900-1901) likewise challenged foreign imperialism, with a siege of the foreign legations in Beijing eventually being suppressed. Social, economic and political disruption with the faltering Qing dynasty made the global trade port of Shanghai an attractive option for migrants and dissidents. Accompanying a larger Chinese populace in the ports was an increase (although comparatively smaller) of foreign residents, with the British population in China nearly doubling from 1903 to 1910, to around 10,140.⁶ The ports were now not only populated by a transient sailor community, but also home to foreigners who had been resident in Shanghai for many years.⁷ Included in the resident population were a number of British Indian subjects that came to China between the late nineteenth and early twentieth centuries. Whereas in the earlier decades, as chapter four explored, lascars and ‘Asiatics’ (a broad term for peoples of South Asia) had formed a sizeable portion of the transient population in the treaty ports, by the turn of the century there was a greater number of resident British Indians. Their presence was linked to the policies of the British dominated Shanghai Municipal Council and its police force, the Shanghai Municipal Police (SMP) in the International Settlement of Shanghai. Since the locally agreed Land Regulations of 1845, the establishment of the Shanghai Municipal Council (SMC) came alongside the rights of territorial municipal

⁶ R. Bickers, ‘Shanghaianders and others: British communities in China 1843-1957’, in R. Bickers (ed.), *Settlers and Expatriates: Britons over the Seas* (Oxford, 2010), p. 232.

⁷ Robert Bickers has written the most on some of these resident Britons. See, amongst others: R. Bickers, ‘Shanghaianders: the formation and identity of the British settler community in Shanghai 1843-1937’, *Past and Present*, 159, no.1, (1998), pp. 161-221.

jurisdiction including policing. The initial force was composed of a small number of Chinese watchmen, but, as explored in chapter four, after the Small Swords rebellion (1853), and an influx of Chinese refugees during the Taiping Rebellion (1850-64), the SMP was formed.⁸ As the International Settlement population increased, so did arrests. Steadily increasing rates of crime and disorder are recorded in the SMC annual reports. For example the SMC recorded a 10,000 increase – nearly double – to around 24,000, of those arrested by the SMP and charged in the Mixed Court in 1896 after an influx of Chinese residents.⁹ By 1901 this figure was over 28,000.¹⁰ The SMC therefore responded by increasing its policing force.

Sikhs from the Punjab, already proving a success in British colonial and imperial armed forces in Africa, Southeast Asia and for policing in Hong Kong, were an attractive option for the SMC.¹¹ A small number before the turn of the twentieth century were already used in the SMP: recruitment from the Punjab started in 1885, and recruits were largely ex-Sepoy from poor rural families.¹² As Robert Bickers has argued, they were drafted in, for economic, defence and 'display' reasons.¹³ Hiring Sikh policemen was cheaper than European policemen, and they were viewed as more trustworthy than Chinese. The racial hierarchy in the SMP for pay and trustworthiness between Europeans, British Indians and Chinese was in that descending order: Europeans, British Indians, Chinese.¹⁴ Sikhs were also preferred over Chinese as they were considered a 'martial' race

⁸ For more on the SMP, see: R. Bickers, *Empire Made Me*; R. Bickers, 'Ordering Shanghai: policing a treaty port, 1854-1900', in D. Killingray, M. Lincoln and N. Rigby (eds), *Maritime Empires: British Imperial Trade in the Nineteenth Century* (Aldershot, 2004), pp. 173-94; R. Bickers, 'Who were the Shanghai Municipal Police, and why were they there? the British recruits of 1919', in R. Bickers and C. Henriot (eds), *New Frontiers: Imperialism's New Communities in East Asia, 1842-1953* (Manchester, 2000) pp.170-191; On the early municipal policing in the English Settlement, see: Z. Bin, *Shanghai yingzujie xunbu zhidu jiqi yunzuo yanjiu (1854-1863)* [*The Shanghai Municipal Police Force and its Development*] (Shanghai, 2013).

⁹ *Shanghai Municipal Council Report for the year 1897 and budget for the year 1898*, p. 38.

¹⁰ *Shanghai Municipal Council Report for the year 1901 and budget for the year 1902*, p. 45.

¹¹ As Thomas Metcalf has shown, British Indians were also part of a Britain's connected global empire an were integral to sustaining Britain's formal and informal empire, including treaty port China. See: Metcalf, *Imperial Connections*, pp. 124-31.

¹² Jackson, 'The Raj on Nanjing Road', p. 1678 and p. 1680.

¹³ Bickers, *Empire Made Me*, p. 86; Jackson, 'The Raj on Nanjing Road', p. 1678.

¹⁴ Bickers, *Empire Made Me*, p. 65; Bickers, 'Ordering Shanghai', p. 181; After the 1890s such hierarchies based on assumptions of character and physique was also applied to different Chinese in the same manner, so for example northern Shandong men were preferred for their tall stature. See: Bickers, *Empire Made Me*, pp. 82-3.

in contemporary British colonial understanding, providing a symbol of empire and imposing physical figure upon Chinese subjects.¹⁵ Sikhs were also considered loyal to British authority. Many had, for example, helped the British colonial authorities crush the 1857 rebellion in India, and at the turn of the century Sikhs formed 20 per cent of the Indian army, despite their overall population in India being roughly one per cent.¹⁶ They were therefore ideal candidates for policing roles in many places in the British Empire, as the front line of police supervised by European superior officers as in the Indian army.¹⁷ As the Captain Superintendent of police stated with satisfaction in his 1897 Municipal Report for the SMP, 'as the Sikh is a born soldier, the result is very creditable'.¹⁸ The prospect of increasing the number of Sikhs in the SMP was considered in many ways a perfect fit for the British consular authorities in treaty port China to buttress numbers in police and a solution to problem of law and order; or so they thought.

Trouble brewing in the police 1905-1910: using law to punish British Indian policemen

Following the 1905 riots in Shanghai over a Mixed Court incident, the SMC and British consular authorities decided that it was necessary to recruit more British Indians into the SMP.¹⁹ Thereafter, the British Indian (Sikh) police doubled in number from around 250 to 500.²⁰ Most of the recruits were constables, forming the lowest rank in the police force. Accompanying these policemen were other British Indian subjects attracted to treaty port China, most probably because of a result of word of mouth from treaty port Indian residents and potential pay opportunities as watchmen. Although there is no comprehensive data on how many British Indian subjects came to the treaty ports in this era, it did not amount to a significant portion compared to the overall British population, which

¹⁵ Jackson, 'The Raj on Nanjing Road'.

¹⁶ Ballantyne, *Between Colonialism and Diaspora*, p. 64; Jackson, 'Raj on the Nanjing Road', p. 1683.

¹⁷ Sikhs formed roughly just over 20 per cent of the SMP from 1910-1930, with between 159 to 513 recruits, dropping to fourteen and ten per cent in 1930 and 1940 with 691 and 524 policemen. Their overall numbers rose but larger numbers of Chinese policemen in the SMP decreased their percentage: Jackson, 'Raj on the Nanjing Road', p. 1679.

¹⁸ *Shanghai Municipal Council Report for the year 1897 and budget for the year 1898*, p. 35.

¹⁹ The 1905 Mixed Court incident will be explored in more detail in chapter six.

²⁰ Shanghai Municipal Archives (hereafter SMA) U1-2-374, Havilland de Sausmarez, HMSC to David Landale, SMC Chairman, 22 Mar., 1910.

was estimated in 1903 at 5,662 rising to 9,256 by 1906.²¹ In Shanghai, Sikh and Punjabi Muslims in 1912 were estimated at 1,250 men, suggesting a figure of roughly just over ten per cent of the British population in China in the second decade of the twentieth century.²² This amounted to a tiny fraction of the overall population, with the total British population estimated at under one per cent of the total population of Shanghai.²³ Nevertheless, very quickly, the British Indian subjects largely drafted in for buttressing law and order became perceived as a significant source of disorder. This resulted in legal changes to counteract their ‘criminality’.

In particular there were two differences from the early period when ‘Asiatic’ sailors comprised a portion of the British population. The first was related to the occupations of the new migrants. Lascars and other seamen had to some extent been under some social and informal legal control of *ghat serangs*, who acted like headmen. This was not only important for hiring lascars onto ships, but because they were key figures mediating petty disputes amongst lascars.²⁴ British Indians in the treaty ports of China after 1900, however, were not related to seafaring, and there is no indication that they had any connection to *ghat serangs* as non-seamen. The *Jemader* was the most senior member of the Sikh police branch and was crucial for maintaining order in the Sikh police branch, with *Havildars* and *Naiks* – equivalent to sergeants and corporals overseeing the rank and file constables.²⁵ Although *Gurdwaras* and other religious associations formed as the Indian community grew (the first *Gurdwara* was established in 1908)²⁶ it is uncertain to what extent members acted in informal dispute resolution. Certainly, in the first decade of the twentieth century there was no indication that British legal authorities felt there were any such people to enforce social order – whether inside police ranks or outside of them. Indeed, in 1905 after a murder case (*R. vs. Chanda Singh, Sultan Singh and Verdava Singh*)

²¹ Bickers, ‘Shanghaianders and Others’, pp. 282-3.

²² Markovits, ‘Indian communities in China’, p. 61.

²³ R. Bickers, ‘Shanghaianders: the formation and identity of the British settler community’, p. 176.

²⁴ See for example, TNA: FO 1092/338. *R vs. Mohammed* 17, Nov., 1865.

²⁵ Jackson, ‘The Raj on Nanjing Road’, p. 1682.

²⁶ *Ibid.*, p. 1695

HSMC Chief Judge Havilland de Sausmarez concluded that there was a ‘great deal of lawlessness’ within certain Indian communities.²⁷

Associated with the new occupations, British Indian subjects were also far more mobile than those of previous decades. While lascars had been tied more to the ports and to the maritime world of seafaring, the newer wave of British Indian subjects were often transitory, proving difficult for the consular authorities to track down. Many did not register at consulates, and some ‘wandered into the interior’, from the ports, presumably in search of better paid opportunities.²⁸ This was a particular legal difficulty when British Indian courts issued warrants for Indian subjects in the treaty ports; British consuls sometimes could not locate such people.²⁹ A further issue was that although many joined foreign municipal police forces and therefore could be more easily monitored and disciplined by the British authorities, many more that came to the ports worked for private companies as guards and watchmen, and therefore were not under such controlled surveillance. According to the British Consul for Hankou, as of December 1906, more than half of the British Indian population did not work for the municipal police force.³⁰ Of the total British Indian subjects in Hankou (109), there were fewer than half employed in this way (49). Others worked in foreign firms (26), British firms (11), Chinese firms (ten), for railway companies (seven); or in ‘other’ miscellaneous jobs, or unemployed (six). British Indians were not an easily managed body of people for the legal authorities.³¹

Secondly, from a very early period after the turn of the century, British Indians employed in the SMP became disillusioned and dissatisfied with their pay and aspects of British authority. The lure of working in the SMP was initially attractive; pay was up to five times more than that in the Indian Army.³²

²⁷ TNA: FO656/106 Havilland de Sausmarez, HMSC to Ernest Satow, Ambassador at Beijing, 14 Jul., 1905.

²⁸ TNA: FO656/109 E.H. Fraser, Consulate-General Hankow to Sir John Jordan, Ambassador at Beijing, 21 Nov., 1906.

²⁹ TNA: FO656/101 Havilland de Sausmarez, HMSC to Secretary of the Government of India, Foreign Department, 16 Jul., 1906.

³⁰ TNA: FO656/109 British Municipal Council, Hankow to E. H. Fraser, Consul General, Hankow ‘employment of natives of India as police’, 17 Nov., 1906.

³¹ *Ibid.*

³² Jackson, ‘The Raj on Nanjing Road’, p. 1680.

However, in Shanghai the SMC had rejected calls for pay rises, and as the British consul for Hankou noted, some Sikhs were deserting their posts as they had heard through their informal networks that policing and watchmen jobs with higher pay were on offer in Manchuria and California.³³ Desertion and ‘insubordination’ in the ranks of the SMP was therefore an emerging critical issue for the British consular and municipal authorities. They were keen to punish policemen for their infractions and disloyalty, yet they needed them to continue in their jobs as they made up a sizeable portion of the police force. The consular authorities and HMSC judge Sausmarez’s initial legal and penal strategy was to use deportation for those who refused their duties.³⁴ Deportation, as explored in the previous chapter, was a simple solution to the problem of some criminal offenders, and those causing a nuisance to the British authorities especially sailors and repeat offenders. However, this tool of extraterritorial governance was not a satisfactory option to use on dissenting policemen, as deportation provided a free route out of the treaty ports for those wanting to leave China and return to India, as well as leaving a potential shortage in the police.³⁵ The last thing the British authorities wanted was to expedite an exodus of men crucial for maintaining law and order.

A new method of legal governance was required, and was hastened through a turn of events in 1906 when there was a wave of British Indian police strikes, or as the authorities termed them, large scale acts of ‘refusal of duty’. A letter from Sausmarez to the Chairman of the Municipal Council on these years before legal changes summed up the perceived dangers, and proposed a legal strategy to contain and punish such men:

A result of the increase of the strength of the Indian branch of the police is that a large number of Indians are attracted to Shanghai most of whom serve as watchmen. All these men are removed from the restraints which life in their own community imposes on them, and the organisation of extraterritorial jurisdiction is ill fitted to deal with so numerous a body of this nature. The matter has long engaged my attentions, and I eventually drafted the enclosed Regulations ... Their primary object is to bring all Indians, either policemen or watchmen, under some organised control,

³³ TNA: FO656/109 E. H. Fraser, Consulate-General Hankow to John Jordan, Ambassador at Beijing, 21 Nov., 1906; Jackson, ‘The Raj on Nanjing Road’, p. 1693.

³⁴ TNA: FO656/106 Havilland de Sausmarez, HMSC to John Jordan, Ambassador at Beijing, 31 Dec., 1906.

³⁵ *Ibid.*

and to make punishable by the British courts offences which as policemen these men ought not to be guilty of [striking], but which do not all come within the criminal law of England or existing King's Regulations.³⁶

Striking was therefore understood as a dangerous criminal offence, and one that was directly associated with British Indian subjects. It was not long before a further strike expedited the regulations from being an 'urgent' issue in September 1906, to an 'emergency' one, a month later.³⁷ The strike began with 60 men and by the next day, 105 out of the regiment of 165 had refused to perform their duties. Sausmarez used the opportunity to summon the assumed ringleaders to court on charges of endangering property by breach of contract, to find out the nature of their complaints. Sausmarez, concluded that 'they have a grievance real or imaginary' and that he was 'inclined to think that they have been injudiciously treated by their employers'.³⁸ The subjects on trial were naturally reluctant to elaborate on their complaints, as Sausmarez had warned they were likely to be charged as ringleaders of a more serious offence. In turn, the men asked that their grievances be heard as a whole with all 105 standing together. However, Sausmarez 'refused absolutely in view of their misconduct to listen to anything from them as a body' and further insisted that they were to remain on duty a month before their grievances will be heard.³⁹ Eventually the British authorities deported ten of the men to India, but this was not a satisfactory solution.⁴⁰ With the legal authorities refusing to listen to, understand, or address the complaints of a body of dissatisfied men, the only option was to create and apply a new set a draconian emergency laws to suppress the grievances and strikes of British Indian subjects.

Moulding extraterritorial laws to combat disorder

Shortly before, during and after the October strike, correspondence between HMSC Chief Judge Havilland de Sausmarez, John Jordan, the Ambassador at

³⁶ SMA: U1-2-374 Havilland de Sausmarez, HMSC to David Landale, SMC Chairman, 22 Mar., 1910; Robert Bickers has noted the use of the King's Regulation and closed courts in 1910. See: Bickers, *Empire Made Me*, pp. 90-1.

³⁷ TNA: FO656/106 Havilland de Sausmarez, HMSC to John Jordan, Ambassador at Beijing, 2 Oct., 1906.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Jackson, 'The Raj on Nanjing Road', p. 1694.

Beijing and Henry Keswick, the Chairman of the Municipal Council discussed proposals for changes in extraterritorial legislation and jurisdiction. The problem was that as it stood, common law and Acts of Parliament could be used on more serious breaches of disobedience, but were of questionable legality as applied to more minor acts of indiscipline and refusal of duty.⁴¹ Striking was interpreted as a criminal offence, yet there were no specific metropolitan laws against striking until the Police Act, 1919. As such, the trial of the ‘ringleaders’ of the 1906 strikes on the charges of endangering property by breach of contract, for example, could be applied to police refusal of duty *en masse*, but not for smaller or individual cases. An initial proposal for a military code administered under courts martial was put forward, but considered to be ‘inexpedient, if not impossible’.⁴² There is no elaboration of why in the records, but it is probable that as the creation of a military code needed metropolitan legislation and ratification, it would have taken a long time to establish and might have raised questions of legality and practicality. Instead, a more reasonable and efficient option was seen as the extension of the powers of jurisdiction of HMSC through a King’s Regulation. The King’s Regulation, as outlined in chapter two, gave the Ambassador at Beijing - a senior diplomatic representative for Britain residing in Beijing - the powers of legislation, including emergency legislation, akin to powers of a Governor in a colony. Sausmarez, already considering the matter for some time, discussed the subject with John Jordan, the Ambassador at Beijing.⁴³ Citing the need for ‘wartime’ emergency measures, following the meeting Sausmarez drafted a piece of legislation, modelled on parts of the ‘Indian Articles of War’.⁴⁴ After completion of the draft, Sausmarez forwarded a copy to Henry Keswick, the SMC Chairman for amendments, notified the Foreign Office, and then sent it to Jordan. The extent of the proposed King’s Regulations was to cover all British subjects anywhere in China.⁴⁵ In the meanwhile, Jordan passed an emergency King’s Regulation in 1906, making it an offence to desert

⁴¹ TNA: FO656/106 Havilland de Sausmarez, HMSC to John Jordan, Ambassador at Beijing, 2 Oct., 1906.

⁴² TNA: FO656/106 Havilland de Sausmarez, HMSC to Secretary of State, 28 Sept., 1906.

⁴³ TNA: FO656/106 Havilland de Sausmarez, HMSC to John Jordan, Ambassador at Beijing, 2 Oct., 1906.

⁴⁴ TNA: FO656/106 Havilland de Sausmarez HMSC to John Jordan, Ambassador at Beijing, 28 Sept., 1906.

⁴⁵ TNA: FO656/106 Havilland de Sausmarez, HMSC to Sir John Jordan, Ambassador at Beijing, 31 Dec., 1906.

the police or disobey police orders.⁴⁶ For serious breaches of duty, the offender would be tried in HMSC. For minor breaches, the Captain Superintendent of Police could fine police officers and order confinement in their quarters.⁴⁷ Such measures however had drawbacks; not least because of the fear that fines negatively affected the men and their families in India who were dependent on their pay.⁴⁸

By 1910, following another strike by Indian police officers, a comprehensive King's Regulation on the police was promulgated. It provided for the delegation of legal authority to the chief of police in a summary closed court. Sausmarez summarized the content and justification thus:

I feel strongly that when a policeman is convicted in open court of even a trifling crime he must lose the respect and confidence of the public and thereby depreciate his usefulness as a police officer. The only solution which presented itself to my mind, is that the Captain Superintendent should be made a British magistrate or justice of the peace ... to deal with offences against discipline by British subjects of whom the great majority of the foreign population of the Shanghai Municipal Police consist ... As this power is placed in the Captain Superintendent's hands to obviate the loss of self-respect and usefulness which must follow a conviction in a public court, his court will not be open to the public, but provision is made for the attendance of an Inspector, or in the case of Indians, a Jemadar and men of his own rank of who two are chosen by the accused.⁴⁹

Sausmarez's summary is insightful as to the justification for the King's Regulation and its content.⁵⁰ Firstly, it is clear that the aim of the changes was to hide dissent and to protect the public image of the police. As Robert Bickers has shown in his study of the SMP, the SMP's rank and file were not ideal recruits and many policemen were dismissed, punished for misdemeanours, or swayed by

⁴⁶ TNA: FO656/109 'A King's Regulation made under Article 155 of The China and Corea Order In Council 1904, No.1 of 1906, Peace, Order and Good Government of His Majesty's Subjects serving in the Shanghai Municipal Police.'

⁴⁷ SMA: U1-2-374 Havilland de Sausmarez HMSC to David Landale, SMC Chairman, 22 Mar., 1910.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Both Robert Bickers and Isabella Jackson have noted the King's Regulation for giving the Police Superintendent these legal powers. See: Bickers, *Empire Made Me*, p. 90; Jackson, 'The Raj on Nanjing Road', p. 1694.

the vices of Shanghai.⁵¹ Although there were earlier instances of dissatisfaction of SMP recruits in the 1880s because of pay amongst other reasons, it was clear that the British legal authorities felt that by 1900-1910, organised strikes in the police necessitated adaptations to extraterritorial law as a legal response.⁵² It was also clear that the image of the SMP was important and the British authorities were keenly aware of the need to shield the existence of bad behaviour and dissent from the public eye as much as possible. The jurisdictional extent of the regulation was broad. In particular, the offences under the regulation were for a wide array of misdemeanours, including amongst others drunkenness, being absent without leave and the ambiguous catch-all category of ‘insubordination’.⁵³ This gave the regulation a great scope of application for a variety of suspected offences, that had proved difficult to charge and convict under pre-existing English laws enforced in the consular courts. The Regulation was also to apply to all policemen under the rank of sub-inspector; i.e. aimed at the two lowest ranks in the police: constables and sergeants.⁵⁴ Secondly, as official correspondence in 1906 showed, these changes in legislation were initiated by the actions of, and primarily aimed at, British Indians. Refusal of duty and striking was viewed as dangerous criminal offence. Thus, this was a piece of legislation that tackled two issues in one: infractions by all lower ranks of policemen, and British Indian labour strikes.

Accompanying the legal changes were regulations for the punishment of those convicted under the new regulations. To this end, such persons were punished in a separate way to ordinary prisoners:

in order that a sentence of imprisonment passed by the captain superintendent should be as little derogatory to policemen as possible ... policemen will be kept entirely separately from ordinary prisoners, so that though in name the sentence is one of imprisonment, [and hard labour], such a sentence is rather a sentence of detention, and the part of the jail set apart for the reception of policemen is rather a detention barrack than a prison. In this way I hope that it may be possible to avoid dismissals for the force which are a heavy expense in themselves, but

⁵¹ Bickers, *Empire Made Me*, pp. 69-71; pp. 87-9; Robert Bickers has also noted this problem from as early as the 1860s: Bickers, ‘Ordering Shanghai’, pp.180-1.

⁵² Bickers, ‘Ordering Shanghai’, pp. 182-3.

⁵³ SMA: U1-2-374 Havilland de Sausmarez, HMSC to David Landale, SMC Chairman , 22 Mar., 1910.

⁵⁴ For details of the hierarchy and roles within the SMP, see: Bickers *Empire Made Me*, p. 346.

which also lead to persons who are brought from home being left unemployed in the Far East.⁵⁵

The Regulation was carefully designed focusing on punishing dissent and misdemeanours in such a way to both kept out of public view and to not adversely affect the income of the offender. As was shown in chapter four, growing numbers of the unemployed were already a problem in Shanghai, and vagrancy could further undermine British prestige.

In sum, whilst both Isabella Jackson and Robert Bickers have noted the police strikes and the introduction of the King's Regulation for the discipline of SMP infractions, this section has underlined more specifically how challenges posed by British Indians in the police force moulded extraterritorial law. Greater numbers of British India migrants to treaty port China, their transnational networks of communication informing them of comparative pay, and their collective and individual cases of dissent posed significant perceived problems for the British legal authorities. In turn, it led to new laws, courts and penal powers. The changes however, were carefully considered to avoid local political and social issues such as poverty and the damage to the image of the SMP. Yet, if the legislation aimed to hide disorder within the police ranks, as the next part will show, this did not solve the issue of British Indian 'criminality', nor did it shield this 'criminality' away from the public eye.

2. 'Criminality' and Continuing Problems of British Indian Subjects in the Open Courts

Tuesday 16th June 1908 *R. vs. Bagga Singh* (police constable)
 Charge: Drunk and disorderly on the Yangkepoo Rd, at 8pm on the 13th instant, also violently assaulting one Wong ah ming by striking him on the head with a fly whip at the same time and place
 Wong ah Ming (affirmed): 'I have a fruit stall in an alleyway in Yangkepoo Road. I know the accused, he came to the stall, took a peach, ate it. He then took 3 and walked away. I asked him for money, I got no money. I laid hold of him, he struck me on the head with the stick - (stick is shown to the court). I called out, 3 foreigners came up. I was struggling with accused, they laid hold of accused, a sergeant came and

⁵⁵ SMA: U1-2-374 Havilland de Sausmarez, HMSC to David Lansdale, SMC Chairman, 22 Mar., 1910.

took accused to the station. I was hit five times, I was not offered any money. He was alone, he was drunk. I tried to run away [when being attacked].⁵⁶

The case of *R. vs. Bagga Singh*, a police constable, is a typical example of a summary criminal court case in the post-1900 era.⁵⁷ The case, and many more after it, serves to illustrate first and foremost that despite the attempts of the British consular authorities to deal with problematic British Indian policemen and others with emergency laws in a closed court, there was a continuation of a public display of disorder on the streets of the treaty ports that the legal and penal amendments could not hide. British Indians, like everyone in the treaty ports, interacted with others in a distinctly public domain. As the plaintiffs and witness were not policemen, these incidents could not be tried in closed courts.

Bagga Singh's case was by no means extraordinary. Court case statistics show the preponderance of British Indian subjects in court on charges of assault. In a total of 37 cases contained within a Police Magistrate's notebook for 1908, for example, there were 56 defendants with the majority having forenames, and surnames - 'Singh' - that suggest they were Sikh subjects (see Table 5.1). Where occupational status could be clearly discerned, watchmen, policemen and the unemployed predominated, with far fewer sailors than in the earlier years (see Table 5.2, below).⁵⁸ Aside from cases prosecuted by the crown or SMP directly, there was a mix of plaintiffs (see Table 5.3, below). The main offences were assault, drunkenness, theft, and absence without leave/work offences (see Table 5.4 below).

⁵⁶ TNA: FO1092/210 *R. vs. Bagga Singh* 16 Jun., 1908.

⁵⁷ The cited case although taking place before the 1910 Regulations was selected for its detailed account of the incident, but remains typical of those within the post 1910 era.

⁵⁸ TNA: FO1092/210 'Police Magistrate's Notebooks 1908 No.54'. The notebook contained a total of 37 cases, thus the use of 37 for analysis. The Police Magistrate's Notebooks were the written proceedings of the trial of minor criminal offences and violations of local ordinances, such as bye-laws, and the Police Court was the successor of the Law Secretariat. As noted in chapter four, although there are limitations with assuming names to indicate race and ethnic heritage, the surnames of 'Singh' and accompanying occupations of watchmen strongly suggest Sikh heritage. Turkish subjects were often protected as protégé subjects by the British and the German authorities, (or such subjects sometimes requested legal protection from either) although there was no formal legal agreement that forced Turkish subjects to submit to the jurisdiction of either authority. The Jewish, British-Chinese and Turkish defendants were all directly identified as such in the judges' notebook.

Table 5.1 Defendants in the Summary Court (1908 selection)

Defendants in the Summary Court	
'Singh' surnames	38
'European' surnames	15
Jewish	1
British-Chinese	1
Turkish	1
Total	56

Source: TNA: FO1092/210

Table 5.2 Occupations of defendants in the Summary Court (1908 selection)

Occupation in summary court	
Watchman	11
Unemployed	8
Policeman	6
Sailor	4

Source: TNA: FO1092/210

Table 5.3 Plaintiffs in the Summary Court (1908 selection)

Plaintiffs in the Summary Court	
European surnames	10 (3 shipmasters)
Chinese	8
'Singh' surnames	5
British-Chinese	2
Jewish	1
Total	26

Source: TNA: FO1092/210

Table 5.4 Charges in the Summary Court (top four offences) (1908 selection)

Charges (top four)	
Assault	18
Drunkenness	8
Theft	7
Absent without leave/refusal of duty	5

Source: TNA: FO1092/210

In another set of 50 cases from a judge's notebook in 1911, a similar snapshot

emerges.⁵⁹ Of the 50 defendants, ‘Singh’ surnames again predominated (see Table 5.5, below). Where the employment status could be discerned, those stated as unemployed again made up a sizeable portion of the defendants (18). Similar to the 1908 statistics, few were directly identified as sailors (six), and the rest did not have an occupation explicitly stated. The most common offences were: drunkenness, assault, theft and criminal damages.

Table 5.5 Defendants in the Summary Court (1911 selection)

Defendants in summary court	
‘Singh’ surnames	29
European Surnames	14
British-Chinese	5
Jewish	2
Total	50

Source: FO1092/217

Table 5.6. Offences in the Summary Court (top four)(1911 selection)

Offences in Summary Court (top four)	
Drunkenness	22
Assault	13
Theft	9
Criminal damages	5

Source: 1092/217

Both sets of cases show a distinctive change from that of the pre-1900 era. Whereas sailors with European names formed the majority of defendants in the pre-1900 summary court cases, after 1900 the majority of defendants were Sikhs, who were watchmen, policemen or unemployed. There were also slightly more British-Chinese, reflecting demographic changes resulting from more immigration from different parts of the British colonial world. Given that British Indian subjects totalled roughly ten per cent of the British population as outlined in section one, the statistics suggest that the courts were charging a disproportionate number of British Indian men compared to the overall British populace.

⁵⁹ TNA: FO1092/217.

These sets of figures also suggest another change compared to the pre-1900 era. Although drunkenness and assault remained the most common charges in the summary courts as it did in the pre-1900 era, there is a difference in the preponderance of interracial assault cases in the summary courts. As chapter four explored, the majority of cases were intra-racial (white on white violence) although racial violence (white on Chinese violence) was also prominent. This corresponded to Eileen Scully's conclusion for the American consular courts that upwards of 75 per cent of cases criminal and civil were offences against, or disputes between, Americans and other Americans or other foreigners.⁶⁰ However, taking the two sets of summary court criminal records above, and discounting all the cases that were not offences against another person (i.e. cases of drunkenness or absence without leave, traffic offences etc.) only 50 per cent and 40 per cent respectively of cases were between foreigners.⁶¹ This means that approximately half or slightly more of all cases involved British subjects (many British Indians) and their violence towards Chinese subjects. These subjects either stood directly as complainants, or the Crown or Police stood on their behalf as prosecutor. This dynamic of people in the courts therefore made the British consular courts different from the American consular courts.

Through examining criminal cases in both the summary courts and HMSC criminal court another trend emerges. Although sex offences are statistically few in the records, British Indian men were overwhelmingly the majority of those tried and convicted for sexual assaults, including same-sex offences. In the case of penetrative sexual acts, the victim (or accomplice) was always a Chinese subject and catamite. Taking a look at one case in HMSC can reveal further details of a typical example. In *R. (French police) vs. Balwart Singh*, on 18 August 1911, the defendant was charged with 'outrage public à la pudeur' (outrage of public decency).⁶² The offence took place on the Kunleeyuen wharf, where Li Ah Sai, a Chinese 'coolie' testified to seeing 'an indecent action' halfway up the jetty one evening. The catamite was a Chinese man, Hu Hae Chu, a 'cast shop' servant. After being arrested, Hu, as a Chinese subject, was sent to

⁶⁰ Scully, *Bargaining*, p. 8.

⁶¹ TNA: FO1092/210; FO1092/217.

⁶² TNA: FO1092/217, *R. (French Police) vs. Balwart Singh*.

the French Mixed Court and later convicted and sentenced to ‘eight days expulsion’ from the French Settlement. He confessed to the crime without witnesses, claiming that Singh had penetrated him without his consent. He was summoned to the British consular court shortly afterwards. He stated that he recognised Singh, a wharf watchman, and retold his version of events. A series of Chinese wharf workers gave witnesses statements testifying to seeing illicit acts between the pair; Singh as standing behind Hu, who was bending over. In his defence statement, Singh claimed that he had a history of trouble with Hu, and, moreover, that tensions between Chinese and Sikhs lay behind the complaint against him. There was, he stated, ‘always quarrelling between Sikhs and Chinese’. Singh nevertheless was found guilty under the Criminal Law Amendment Act 1885, Section 11 for buggery, and sentenced to two months’ hard labour. An examination into why British Indians were linked with criminality, specifically as perpetrators of both physical and sexual assault will be explored next.

Explanations and consequences of British Indians in the open courts

The statistics suggest that British Indian subjects were the majority of the defendants in the British consular courts in the period after 1900, despite their relatively small population within the broader whole British community. Whilst both European and Sikh policemen were punished for maltreatment of Chinese subjects on the streets, as Jackson has noted,⁶³ it is worth questioning why the summary courts were charging and convicting a disproportionate number of Sikhs for such offences. Furthermore, was Singh’s claim that there was ‘always quarrelling between Sikhs and Chinese’ significant for understanding colonial race relations and criminality?

The first consideration is that of familiarity with British courts and language. As Gerard McCann argues for the Straits Settlements, many British Indians were familiar with colonial legal bureaucracy, and proficient in understanding English. This helped to develop a reputation of litigiousness; as McCann puts it, ‘a

⁶³ Jackson, ‘The Raj on Nanjing Road’, p. 1691.

product of their very proximity to colonial rule'.⁶⁴ Although the consular court cases in Shanghai tend to show that many British Indians did not have good English language skills, language was not a barrier for use of the courts. The British consular courts - shaped by their cosmopolitan environment - employed translators for a range of languages. This may have encouraged Sikh men to file suits against other Sikh men.

Another reason for the appearance of Sikhs is the number of cases involving moneylending. In the criminal courts, many money disputes descended into incidences of owing to disputes over payment. As Robert Bickers has highlighted, moneylending was a common side-line employment for British Indians in the treaty ports, including within the SMP.⁶⁵ Although statistics for China are not known, in Singapore during the same era, it is estimated that up to 80 per cent of British Indians were also moneylenders.⁶⁶ Part of the reason for this was that it supplemented a low income, and was an option for those who could not find jobs.⁶⁷ Indeed, unemployment was an increasing problem within the Indian community.⁶⁸ Continuing from the late nineteenth century, as explored in chapter four, court cases from the first two decades of the twentieth century attest to the rising numbers of the unemployed. Certainly, there is some evidence to suggest that alcohol, moneylending and disputes amongst the British Indian community led to many court cases in other treaty ports outside of Shanghai, such as in Hankou.⁶⁹

The public nature of offences was another reason for the predominance of Sikhs. The courts overwhelmingly punished incidents that took place on the streets and alleyways, where there were more witnesses to testify the version of events and policemen to apprehend individuals. Sikh policemen and watchmen were often stationed on, or patrolling public areas, and thus came into contact with Chinese

⁶⁴ G. McCann, 'Sikhs and the city: Sikh history and diasporic practice in Singapore' *Modern Asian Studies*, 45, no.6, (2011), p. 1478.

⁶⁵ Bickers, *Empire Made Me*, p. 86.

⁶⁶ McCann, 'Sikhs and the city', p. 1472.

⁶⁷ *Ibid.*, p. 1473.

⁶⁸ Jackson, 'The Raj on Nanjing Road', p. 1680.

⁶⁹ TNA: FO656/109 Consulate-General Hankow to John Jordan, Ambassador at Beijing, 21 Nov., 1906.

subjects regularly. Many were employed as traffic wardens and watchmen for roads and alleyways, and presumably had a more intimate knowledge of certain places and the local populace that lived or walked past the same areas every day. They were easily recognisable figures; imposing in stature, with iconic turbans and facial hair.⁷⁰ It is therefore perhaps not unusual to find that Sikhs were easily identified as a specific group and had regular interaction with Chinese subjects in the public domain. In terms of same-sex acts it is worth noting that policemen were housed in barracks – communal living spaces. As they knew the alleyways and streets well and as same-sex acts were illegal in both Chinese and English law it is likely that some sexual acts took place in such public areas and alleyways.

Race categorisation and race relations also played their part. As well as European racism towards Indians, as Frank Dikötter has shown, race as a discourse was important in the history of China, including the late Qing era and early twentieth century.⁷¹ Although there is no particular reference to Sikhs or British Indians by Dikötter, many Chinese discourses of race drew upon Social Darwinism to relegate non-European ‘white’ and non-Chinese ‘yellow’ peoples into a distinctly inferior category.⁷² This may have shaped prejudice towards Sikhs, especially assumptions of their ‘brutality’ towards Chinese subjects.⁷³ This was compounded by the police use of Sikhs as a frontline against Chinese protestors and for law and order. Judge Sausmarez considered Sikhs good for the ‘rougher work of keeping order among the Chinese in the streets’.⁷⁴ The imagery of Sikh brutality was magnified through subsequent events in Shanghai when British Indian and Chinese policemen shot on orders at Chinese protestors in the May Thirtieth incident in 1925. After 1925, Sikhs were part of the Reserve Unit called out to quell strikes and street violence, and each carried a four-foot long *lathi*, a weapon made of bamboo and tipped with brass.⁷⁵ The image of brutality can therefore not only explain in part why British Indians were more likely to be

⁷⁰ Jackson, ‘The Raj on Nanjing Road’, p. 1685.

⁷¹ F. Dikötter, *The Discourse of Race in Modern China* (London, 1992),

⁷² *Ibid.*, pp. 61-96.

⁷³ Jackson, ‘The Raj on Nanjing Road’, pp. 1674-5.

⁷⁴ TNA: FO656/106 Havilland de Sausmarez, HMSC to John Jordan, Ambassador at Beijing, 31 Dec., 1906.

⁷⁵ Jackson, ‘The Raj on Nanjing Road’, p. 1687.

charged and convicted of offences, but perhaps also served to undermine Sino-British relations. It is not particularly surprising therefore that Singh's defence statement in the sexual assault case used race relations to claim his innocence; it was well known that relations between Sikhs and Chinese could be fraught, and he drew on this to claim that animosity of Chinese subjects towards him lay behind the charges.

Colonial discourses connecting gender, sexuality and race may also have worked against Sikhs. McCann has shown how in Singapore for example, Sikh men were stereotyped as usurious moneylenders, which was often interlaced with racial and gendered stereotyping and their bachelor status; their usurious exploitation was sometimes expressed in socio-sexual terms.⁷⁶ The Sikh community was almost exclusively male; men lived abroad without wives, mainly because most could not afford to bring them from India and exogamy within the Sikh community was a social taboo. As a result, some acquired an unjustified reputation for sodomy and pederasty.⁷⁷ Sikhs in treaty port China, as far as can be ascertained, were also commonly bachelors. Compounding this image were contemporary British colonial racial and gendered ideas of Sikhs and Chinese. The dynamic of same-sex acts also shared commonalities with gendered notions of race of both. In British colonial discourses, Sikh men were thought of as a martial race, and men from the Punjab were considered to be naturally 'tough' due to the cold winter climate of the mountain states of northwest India.⁷⁸ Chinese men on the other hand, were often considered distinctly effeminate.⁷⁹ This may well explain why British Indians as sodomisers, and Chinese men as catamites, appeared in the courts rather than white men; this gendered sexual dynamic perhaps made more sense to the police and legal authorities that arrested and charged such men.

⁷⁶ McCann, 'Sikhs and the city', pp. 1473-4.

⁷⁷ *Ibid.*, p. 1474.

⁷⁸ Jackson, 'The Raj on Nanjing Road', p. 1683; Also see: H. Streets, *Martial Races: The Military, Race and Masculinity in British Imperial Culture, 1857-1914* (Manchester, 2004).

⁷⁹ R. Fox, *Lions of the Punjab: Culture in the Making* (Berkeley, 1985); M. Sinha, *Colonial Masculinity: The "Manly Englishman" and the "Effeminate Bengali" in the Late Nineteenth Century* (Manchester, 1995); on references to effeminate Chinese, see: Bickers, *Empire Made Me*, p. 82; on Chinese 'effeminate' men as sexually attractive to western men, see: A. Brady, 'West meets east: Rewi Alley and changing attitudes towards homosexuality in China', *East Asian History*, no.9, (1995), p. 102; on the feminisation and infantilisation of Chinese officials, also see: Edmund Hornby, *An autobiography*, (London, 1928), p. 234 and p. 236.

Assumptions of Indian nature as more lascivious than Europeans may have also served to condemn Indians as perpetrators of sexual assault.⁸⁰

Notably absent however, are white subjects charged and convicted for sexual offences. This appeared to be the case both for same-sex acts, and for rape more generally, with only one case of a sexual assault on a Chinese woman noted in the perusal of cases for this research.⁸¹ In terms of sodomy, this was not because there were no white men who were involved in such acts. Indeed as Robert Bickers has noted, some men in the SMP and 'foreign' (white) civilians saw Chinese constables as a pool of potential sexual partners, and there are instances of police dismissal for sexual assault.⁸² Annie-Marie Brady has also suggested that there was an openness and availability of male prostitutes in the treaty ports in her examination of the life of Rewi Alley, a white New Zealander.⁸³ Whilst this may have been correct, her analysis does not consider race as a factor in the criminalisation of same-sex acts. It may have also suggested that British Indian men, with lower incomes, were not able to afford the privacy of male prostitutes in establishments. Therefore they were more likely to have encounters on the street, and be punished for their public displays when caught.

Overall, language, moneylending, the public nature of offences, race relations and ideas of gender and sexuality are all suggestive of the reasons why British Indians predominated in the courts, especially as defendants. However another reason after 1914 would further implicate British Indians in the criminal courts.

3. Law, Indian Nationalism and the Great War

Before 1914, the perceived danger posed by British Indian subjects to the British legal authorities was primarily through strikes and, to a far lesser extent, the

⁸⁰ K. Ballhatchet, *Race, Sex, and Class under the Raj* (London, 1980), p. 5.

⁸¹ John Anderson Exshaw in 1911 was convicted of sexually assaulting a Chinese woman. He was sentenced to eight months imprisonment but had his sentence mitigated because he was suffering from syphilis: TNA: FO656/127 Havilland de Sausmarez, HMSC, to John Jordan, Ambassador at Beijing, 13 May 1913.

⁸² Bickers, *Empire Made Me*, p. 84.

⁸³ Brady, 'West meets east', p. 104.

reputation of Sikh brutality against Chinese subjects that had the potential to antagonise race relations. The First World War (1914-1918), however, and political developments in British India brought a new aspect of concern to the British legal authorities in China; anti-British Indian nationalism. In particular, the events in India during the late nineteenth and early twentieth century signalled new challenges for British Indian colonial authorities. Organised protests against colonial authority and revolts came in multiple forms, from peasant uprisings such as the Munda tribal Revolt on the Bengal-Bihar border (1899-1900) to the agitation of native elites in political movements, such as the Swadeshi nationalist movement (1905-8), which was led by an urban educated elite.⁸⁴ Whereas Sikhs were considered loyal to the British colonial authorities in the nineteenth century, by the twentieth century Sikh Punjabi nationalism added to the challenges towards British Indian colonial authority.

The threat of British Indian nationalism to the British Indian and China authorities became more prominent as British Indian nationals moved between parts of the British Empire in greater numbers; transnational networks of communication and ideas followed them. From the opening of the treaty ports, there were strong links to India, with language, architecture, people, and trade connecting them to the Raj.⁸⁵ In the twentieth century, Indian migrants likewise brought with them ideas forged in India, including nationalist and communist ideologies. Shanghai as a global international city offered financial opportunities, attracting larger numbers of people from India, but the complex plural legal environment in the treaty ports also provided a refuge for political dissidents. The plural legal environment could be manipulated so that individuals and organisations could evade municipal and national jurisdictions. The ports therefore became both a refuge for political activists as well as a hub of émigré communities where ideas could be transmitted. Revolutionaries and anti-imperial activists from a range of countries made their home in Shanghai, as did Chinese

⁸⁴ Bose and Jalal (eds), *Modern South Asia*, p. 86.

⁸⁵ See for example on aspects of the Raj in Treaty port China: Bickers, *Britain in China*, pp. 76-7; Bickers, *Scramble for China*, p. 105; also see on the trade and merchant connections between India and China: Markovits, 'Indian communities in China', pp. 55-74.

communists.⁸⁶ As will be explored next, Indian nationalism and the Great War converged to present a particular legal issue for the China British authorities, with Indian nationalism in China construed as both a threat to the wider British Empire and Britain in war against the axis powers.

Legislative amendments and political crimes – Britain, India and treaty port China

Following the outbreak of the Great War, legislative changes were enacted for the security of Britain and the British Empire. In Britain, the Defence of the Realm Act (1915) gave the government a range of powers including censorship and the creation of political offences to imprison political suspects and anti-war activists. Whereas in India the Vernacular Press Act (1878) banned anti-British reports in the Indian-language press and provided powers to punish dissent well before the War, the Defence of India Act (1915) allowed the Indian government a range of authoritarian powers, including holding suspects for indefinite periods and trial by extra-legal courts without a jury. These powers were effective in stifling violent political activity in India.⁸⁷ However, these laws were only effective within the territorial limits of India. As a result, both the British Indian and British China authorities became increasingly concerned that the treaty ports were being used by British Indians as a safe haven for developing Indian nationalism beyond the borders of India. In particular, they feared that revolutionary zeal against British rule could be influential amongst Indian communities if propagated by leaders of the *ghadr* movement (Sikh and Hindu anti-British revolutionaries).⁸⁸ It was recognised by both the British Indian and China authorities that such movements were inherently transnational, facilitated through networks and links between colonial and semicolonial domains. This included Indian ‘plotters’ in Singapore and in treaty port China.⁸⁹ These fears were far from unfounded. The 1915 mutiny in Singapore sent shockwaves through the British Empire and to the metropole, some newspapers reported it as

⁸⁶ R. Bickers, ‘Incubator city: Shanghai and the crises of empires’, *Urban History*, 38, no.5, (2012), pp. 863-4.

⁸⁷ C. Bates, *Subalterns and Raj: South Asia since 1600* (New York, 2007), p. 118.

⁸⁸ TNA: FO656/139, Sir John Jordan, Ambassador at Beijing, to Viscount Grey, Foreign Office, 12 Sept., 1916.

⁸⁹ *Ibid.*

the greatest threat to British power since the Indian uprising of 1857.⁹⁰ Singapore was very much part of an interconnected chain of port cities across Asia, for networks of Indian nationalism.⁹¹ The rise of popular anti-British protests and boycotts in India also shared similarities with growing Chinese anti-foreign boycotts and Chinese nationalism.⁹² This was a potentially dangerous mix for not only law and order, but wider British interests of transnational security.

During 1916, the issue of Indian nationalism in China and the powers of deportation were raised amongst the British authorities resulting in a series of letters highlighting how British extraterritoriality was shaped through global considerations in the treaty port context. In August, the Ambassador at Beijing, John Jordan sent correspondence to the Foreign Office following the deportation of Tehl Singh, a British Indian.⁹³ Singh had been successfully deported using existing laws and legal powers under the Order in Council 1904 (OIC1904), presumably for political offences. Jordan stated that he thought existing laws were adequate to deal with cases such as Singh. However, over the next few months, following further consultation with various consuls in China, Jordan was coming round to the idea that it was in the interests of both British authority in China, and particularly of the Indian government, if an OIC could be issued to grant him powers of deportation upon any British Indian suspected to be engaging with axis powers or any activities understood to be endangering the state.⁹⁴

In particular, the rise of the Indian revolutionary movement presented an inherent threat to Britain and the British Empire for two reasons: the role of German collaboration with Indian nationalists, and the legal and political environment of the treaty ports that provided a hideout for revolutionaries. Fears that German agents had tried to utilise disaffected Indians to galvanise anti-British agitation

⁹⁰ T. Harper, 'Singapore, 1915, and the Birth of the Asian Underground', *Modern Asian Studies*, 47, no.6, (2013), p. 1784.

⁹¹ *Ibid.*, p. 1797; also see on transnational 'webs' of Sikhs and the construction of Sikh identity, culture and nationhood: T. Ballantyne, *Between Colonialism and Diaspora* (Durham, 2006).

⁹² The rise of Chinese nationalism, and anti-extraterritorial protest will be considered in more detail in chapter six.

⁹³ TNA: FO656/139 John Jordan, Ambassador at Beijing to Viscount Grey, Foreign Office, 16 Aug., 1916.

⁹⁴ *Ibid.*

were not without foundation; intelligence reports from the testimonies of captured Germans had suggested that there were German agents working with British Indian subjects.⁹⁵ The reports were no doubt reinforced by the rumour of Indian mutineers and German agents collaborating in the mutiny in Singapore in 1915.⁹⁶ The political and legal situation of the treaty ports compounded the issue of law and security. Firstly, China was (until 1917) a neutral territory in the war. As such, political activists were drawn to the US, ‘Manila’, the Dutch East Indies, Siam and China - ‘notably Shanghai’, according to Jordan – as safe sites for their political activities.⁹⁷ The second was the problem of territorial jurisdiction and transnational criminality. It appeared that suspects from different parts of the Empire were fleeing to places such as Shanghai. Whereas the Fugitive Offenders Act (1881) would have given powers to the British China authorities to deport them, finding them and uncovering evidence of their activities was made more difficult due to the transnational nature of their movements. German collaboration and legal environment factors were compounded further by other considerations. Citing the case of H. L. Gupta in Tientsin – a political suspect released through lack of evidence - Jordan was beginning to see that the standards of evidence needed to arrest and convict political offenders meant that many suspects were not being prosecuted.⁹⁸ Moreover, prosecuting such people in open courts could endanger the security and interests of the British authorities. Summarising the issue, Jordan suggested that legislative changes may be needed, and most likely, by drawing upon the Defence of the Realm Acts of Britain and India to help create an Order in Council that could deal with this legal issue.⁹⁹

Following correspondence to the British Indian authorities, a delegate from the Government of India, David Petrie, was sent for the special purpose of assisting the China British authorities in discussions over legal strategies to deal with

⁹⁵ *Ibid.* Robert Bickers also notes the fear of German-Indian Nationalist collaboration: Bickers ‘Incubator city’, p. 871.

⁹⁶ Harper, ‘Singapore,’ p. 1785.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

Indian subjects suspected of political offences in China.¹⁰⁰ If Jordan had held some reservations before Petrie's visit, these had disappeared by its end. After discussions, Jordan stated that Petrie:

Convinced me that we should take advantage of extraterritorial rights in China to prevent this country [China] from being used as a base whence seditious propaganda can be conducted with virtual impunity.¹⁰¹

In particular Petrie suggested that the Jordan should be vested with greater powers for deportation of suspects of political offences.¹⁰² Jordan agreed and it was also suggested that such measures would be desirable for use in peacetime as a permanent executive-legal power, as 'a deterrent to the disaffected' especially those 'exposed to the leaders of the *Ghadr* movement'.¹⁰³ Petrie's visit was indeed successful for the British Indian authorities. It was, as other scholars have shown in different contexts for various western powers in Southeast Asia, a successful cooperative attempt by the British colonial authorities to extend control and surveillance transnationally across parts of Asia, to counteract political movements and ideas that threatened to destabilise the existing order.¹⁰⁴ In this case, it was between India and treaty port China in legal and penal measures.

The legal and penal measures both drew upon more established practices in the British Empire in Asia as well as presenting some new problems with aspects of legality. The consideration of the use of deportation was of course not unique to the British legal authorities in China, nor was it an uncommon practice for the British China authorities to deal with problematic individuals. As chapter two, three and four have already suggested, the deportation of British fugitives, vagrants, 'lunatics', long term prisoners and British Indian nationals in Yunnan and Xinjiang were all familiar practices. In the wider British Empire, deportation was also familiar. In Malaya, from 1911, the British authorities had increasingly

¹⁰⁰ TNA: FO656/139, John Jordan, Ambassador at Beijing, to Viscount Grey, Foreign Office, 12 Sept., 1916.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ See for example, on the role of the US and colonial European officials working together in South East Asia: A. Foster, *Projections of Power: the United States and Europe in Colonial Southeast Asia, 1919-1941* (London, 1995).

used the punishment of banishment on political dissidents.¹⁰⁵ In India, the use of transportation to the Andamans, Mauritius, the Straits Settlements and Burma predated the twentieth century, where the British deported convicts including political prisoners from the Indian mainland.¹⁰⁶ Indeed in Shanghai, the Mixed Court expelled troublesome subjects including left wing activists and sympathisers from the International Settlement (usually without success as the offenders returned).¹⁰⁷ The issue at hand however, was the use of arrest and deportation on questionable standards of evidence and its use both as a wartime measure and a peacetime measure. Correspondence was sent to HMSC for the advice and suggestions of Sausmarez. As he was away on circuit, HMSC assistant judge Skinner Turner provided his view. Drawing on his experience in Siam, he stated that breaches of Siamese neutrality were a violation of Siamese law, and therefore foreign governments were legally obliged to deport any individual that violated Siamese neutrality.¹⁰⁸ He therefore saw no issue with the proposition for use in China. A month later, Sausmarez gave his general assent to the proposal, but stopped short of advocating its use in peacetime; the legality of applying such laws outside of war, he suggested, was dubious.¹⁰⁹

After negotiation with the Foreign Office, sanction was given for a King's Regulation to be used as an immediate emergency measure, however the Foreign Office stated that it was not to be used in peacetime.¹¹⁰ In the meanwhile, an OIC was being prepared, which was made a year later: the China (War Powers) Order in Council (1917). It provided for a more detailed and wider application of the definition of sedition. In particular, it stipulated that where there were reasonable grounds for believing that any British subject has acted, was acting or was about to act in a manner prejudicial to the public safety, or to the defence, peace or

¹⁰⁵ Harper, 'Singapore', pp. 1798-9.

¹⁰⁶ C. Anderson, 'The transportation of Narain Sing: punishment, honour and identity from the Anglo-Sikh Wars to the Great Revolt', *Modern Asian Studies*, 44, no.5, (2010), pp. 1115-45; C. Anderson, 'Sepoys, servants and settlers: convict transportation in the Indian Ocean 1787-1945', in F. Dikötter and I. Brown (eds), *Cultures of Confinement: A History of the Prison in Africa, Asia and Latin America* (London: Hurst and Company, 2007), pp. 185-221.

¹⁰⁷ Kotenev, *Mixed Court and Council*, pp. 191-4.

¹⁰⁸ TNA: FO656/139 John Jordan, Ambassador at Beijing, to Viscount Grey, Foreign Office, 12 Sept., 1916.

¹⁰⁹ TNA: FO656/139 John Jordan, Ambassador at Beijing to Viscount Grey, Foreign Office, 3 Oct., 1916.

¹¹⁰ TNA: FO656/139 Viscount Grey, Foreign Office to John Jordan, Ambassador at Beijing, 12 Dec., 1916.

security of the British dominions, a warrant could be placed on the suspect.¹¹¹ The Ambassador at Beijing could then order in writing that such person could be deported, or held in custody, or imprisoned for a term with or without hard labour for up to three years.¹¹² Soon after its promulgation there is evidence that it was used frequently, with many cases of deportation against British Indian suspects reported.¹¹³ The legislative changes therefore were put to good use by the China British legal authorities, and the forced removal of political suspects strengthened the legal and penal connection between China and India. Although HMSC heard the trials of men with warrants under the order, newspaper reports claimed the judge's role was merely to ascertain the identity of the suspect and his nationality before deportation.¹¹⁴ There was at least a perception that there was no real trial; anyone suspected of any offence under the OIC could be deported. However, there are a number of occasions where Sausmarez queried the evidence against suspects, suggesting that some were being held without any tangible evidence.¹¹⁵ It is unclear, however, whether they were still deported. Regardless, it appears that Sausmarez was in many instances uncomfortable with the new powers. Here, parallels may be drawn with the US courts, where, as Eileen Scully has highlighted in the case of Gilbert Reid, the legal authorities were not always willing to prosecute suspects of political offences.¹¹⁶

The war powers were reflective of two things. First, was the role of the British Indian government in helping to make the China British legal authorities strengthen laws, in order to counteract a transnational legal issue. Although the question of political offenders was certainly on the mind of Jordan and other officials, the visit of the Indian government official David Petrie appeared key in persuading Jordan to press the Foreign Office for changes to his powers. Secondly, the penal link served to strengthen the connection between treaty port China and India. Drawing parallels to chapter three in the case study of Yunnan,

¹¹¹ TNA: FO656/143 'The China (War Powers) Order in Council of 1917'.

¹¹² *Ibid.*

¹¹³ TNA: FO656/142; FO656/143; FO656/144.

¹¹⁴ TNA: FO656/142 Havilland de Sausmarez, HMSC to Beilby Alston, H. M. Chargé d' Affaires, 30 Jun., 1917.

¹¹⁵ TNA: FO656/142 Havilland de Sausmarez, HMSC to Beilby Alston, H. M. Chargé d' Affaires, 7 Jul., 1917; HMSC to Beilby Alston, H.M. Chargé d' Affaires, 9 Jul., 1917.

¹¹⁶ Scully, *Bargaining*, p. 155.

the issue of territorially bounded colonial jurisdiction was essentially extended into China through extraterritorial laws through these new powers. The arms of colonial jurisdiction, although not itself being exercised in China in the same way, had helped to create extraterritorial powers that facilitated a jurisdictional and penal connection between China and the treaty ports in regards to political offenders.

However, China was not India and the legal and penal link was diminished after 1918. In particular, this was because of the context of British Indian legal system and legislation as opposed to that of extraterritorial law in China, which was based on metropolitan legislation. The issue was put into sharp relief directly after the war. In India, the Anarchical and Revolutionary Crimes Act (1919) - also known as the Rowlatt Act - provided additional legal and penal measures involving seditious propaganda. After the recommendations of the Sedition Committee of 1918, the measures were rushed through the imperial legislative council despite the unanimous opposition of Indian members. The Act provided for adaptations to legal procedure so that the power to try certain political offences without juries and sentence offenders to imprisonment without trial for up to two years could be exercised.¹¹⁷ They were justified by the concern over the rising tide of communism following the establishment of the Soviet Union and spread of communist political dissidents.¹¹⁸ In China, however, the War Powers OIC ended with the war in 1918. British jurisdiction in China was tied to metropolitan law, and the Foreign Office (rightly predicted by Sausmarez) did not, and could not, allow for the extension of wartime measures into peacetime. As such, the British legal authorities fell back on their pre-war era uses of deportation – where it could be used – on political suspects and those guilty of refusal of duty in the SMP. Hence whereas the British authorities exercised powers in a similar fashion to British India and other contexts, the nuances of extraterritorial law in this instance prevented the British China authorities from exercising similar law after the war.

¹¹⁷ Bates, *Subalterns and Raj*, pp. 130-1.

¹¹⁸ *Ibid.*

The retraction of the War Powers OIC was compounded by (or perhaps facilitated) a continuing rise of Indian nationalism, left wing communist politics and strikes. As Robert Bickers has noted, there were issues of suspected Bolshevism behind SMP strikes of 1918-19, and further Police Orders were issued, forbidding active participation and circulation of Indian nationalist propaganda.¹¹⁹ Clearly there were still problems regarding strikes and nationalism. It was not the end of the link between India and the China British authorities however. There were also transnational attempts with the establishment of a special branch of the SMP to find those guilty of ‘sedition’ and other related offences, and the use of spies.¹²⁰ There are many legal documents detailing the apprehension, imprisonment and deportation of British Indian nationals for political crimes, and police files on political offenders ranged to over a thousand men in the late 1920s alone.¹²¹ This constituted nearly two thirds of the British Indian population.¹²² Surveillance over British Indians increased with an Indian Section of the Crime Intelligence Department in 1927 and later the Special Branch Section Four. Including surveillance, other measures involved for example, the censorship of literature.¹²³ Spies were present as early as 1917. However their effectiveness was dubious; in *R. vs. Atma Ram*, Ram was charged with killing Harman Singh, a government spy, after revealing his identity.¹²⁴ This serves to demonstrate that policing and intelligence gathering may not have always proved very effectual.

Another problem still plaguing the treaty ports – especially Shanghai - was the problem of jurisdiction that facilitated the evasion of law.¹²⁵ Despite campaigns by the various Chinese authorities to stifle communist publications and networks, left wing political dissidents and publication remained in Shanghai. For the British authorities, the continued existence of the Indian Youth League in the

¹¹⁹ On Indian propaganda: Bickers, *Empire Made Me*, p. 86; on strikes: Bickers, *Empire Made Me*, p. 89.

¹²⁰ Bickers, ‘Incubator city’, pp. 872-74; Bickers, *Empire Made Me*, p. 86; Bickers, ‘Who were the Shanghai Municipal Police?’, p.175; Jackson, ‘The Raj on Nanjing Road’, pp. 1698-9.

¹²¹ Bickers, ‘Incubator city’, p. 872.

¹²² Jackson, ‘The Raj on Nanjing Road’, p. 1699.

¹²³ *Ibid.*

¹²⁴ FO656/142 Havilland de Sausmarez, HMSC to Alston, H.B.M’s Chargé affaires, Beijing, 9 May, 1917; although Robert Bickers notes some successes of the Special Branch and the work of spies against communists in 1931: Bickers, ‘Who were the Shanghai Municipal Police?’, p.175.

¹²⁵ Bickers, ‘Incubator city’, p. 872.

1920s – a hotbed for Indian revolutionary nationalists – established in the north of Shanghai in the district of Zhabei, suggests that jurisdictional powers to apprehend suspects was complicated by extraterritoriality itself, with organisations evading British and SMC jurisdiction through successful manoeuvring. In the Youth League case, SMC territorial laws and policing were only effective in the International Settlement of Shanghai, for which reason the League was strategically placed outside. That extraterritorial laws could not be used to close the League suggests either that the League was very good at keeping its members and organisation undercover or outside the jurisdiction of British nationality, or that effective extraterritorial legal powers required an effective policing unit that was dedicated to eradicating such groups. Although, as Isabella Jackson notes, in 1930 there were eight members arrested for anti-British literature distributed by the Indian Youth League, the option to decrease the size of the Sikh police force afterwards showed that the municipal authorities – and British extraterritorial law – found it difficult to contain and punish those for anti-British agitation.¹²⁶

Overall, the issue of British Indian nationalism during the 1910s and 1920s is insightful for understanding the relationship between India, China, transnational legal governance, war and the limitations of law. The rise of Indian nationalism and the Great War played a strong role in determining extraterritorial legal policy during 1914-1918. Strategies of law were made malleable to counteract a transnational threat with emergency laws convicting British Indians on sometimes dubious evidence of revolutionary intent. The role of the British Indian colonial authorities was important. Not only were spies and intelligence passed between India and China but the colonial government of British India played an active role in persuading the China British authorities of the need to strengthen a transnational legal jurisdiction. This resonates with other research that has found similar transnational attempts of colonial western powers in south-east Asian contexts.¹²⁷ The establishment of emergency laws and closed courts mirrored the legal responses to British Indian dissent in the police a decade earlier, but the War Powers were much more extensively applied over those

¹²⁶ *Ibid.*

¹²⁷ Harper, 'Singapore', p. 1799; Also see: A. Foster, *Projections of Power*.

suspected of 'sedition'. Powers of deportation forcibly removed Indian émigrés from the treaty ports to India, strengthening their legal and penal connection. Despite these measures, metropolitan law constrained the use of emergency powers that linked the ports to India, and Indian nationalism and communism remained in Shanghai. The plural legal environment of the treaty ports also shielded nationalists. Whilst the SMC had territorial jurisdictional powers municipal limitations, as the Indian Youth League demonstrated, moving outside of its territorial limits showed the shortcomings of municipal jurisdiction. The reduction in Sikh police numbers by 1930 suggested that the British authorities were ultimately powerless to counteract the issue of political suspects.

Conclusion

This chapter has explored the interaction of British Indian (largely Sikh) population with that of British legal governance in treaty port China. It has shown three things. Firstly, British Indian subjects and their 'criminality' shaped extraterritorial legal governance. Legal changes were contingent upon local, regional and global events; local police strikes and social networks, regional political developments in India and the migration of Indian subjects, and the event of the Great War. All three converged after 1914, to shape extraterritorial governance to counteract the transnational threat of British Indian subjects and their extraterritorial networks. The British Indian government helped persuade the British China authorities to amend extraterritorial powers to facilitate the arrest, detention and deportation of political suspects. As chapter three explored in the case of Yunnan, British colonial jurisdiction was thus linked to extraterritoriality, despite territorial borders. In such a way, extraterritorial law in the war period was both constituted transnationally – through the joint efforts of the British Indian, British China and metropolitan authorities - as well as itself facilitating transnational links of deportation to counteract transnational crime. Whereas previously historians have explored the role of cross-empire links of information, spies, intelligence, and of revolutionary nationalism across parts of Asia, this chapter provides a new perspective highlighting the ways in which they were connected to British legal and penal jurisdiction.

Secondly, the method of extraterritorial governance used to deal with these challenges was in many respects similar to colonial regimes in Asia and the metropole. These included emergency laws, closed courts and, the use of deportation. Dealing with Indian strikes in 1906 and 1910, as well as political offences from the First World War onwards in 1917, British Indian nationals were a perceived threat to British legal authority, and dealt with in a similar way. Deportation served to link India and the treaty ports, similar to Xinjiang, as chapter three showed, where a separate OIC for Kashgar allowed the consulate-general powers of deportation and imprisonment in India. However, extraterritorial law was shaped by metropolitan legal frameworks, and whereas in India emergency laws continued past 1918, the War Powers OIC was not continued after 1918 in China. Shanghai also remained a refuge for political dissidents – despite extraterritorial laws and police surveillance. This highlights the limitations to extraterritorial jurisdiction and foreign municipal jurisdiction.

Finally, British Indian ‘criminality’ was not just political but also included an on-going stereotyping of British Indians with physical and sexual violence. Sikh men were disproportionately represented as defendants in the consular courts, and this may have been because of several interlayered factors: their presence on the streets, their involvement in moneylending, and gendered, sexual and racial assumptions linked to ‘criminality’. Although the British Indian population was small, they certainly became an important consideration to the British legal authorities in their interpretation of law and order and the exercise of legal governance.

The twentieth century, however, was not just an era of the criminalisation of Indian subjects and challenges and shortcomings of extraterritoriality as posed by Indian nationalists. Chinese subjects and authorities including the rise of nationalism, and onset of war all had a part to play in challenging extraterritoriality. This will be the focus of the next chapter. It will examine the role of both criminal court cases and the Chinese authorities in diminishing British consular jurisdiction, as well as the role of Japanese imperialism.

Together, alongside the Second World War, these factors finally brought to an end of over a century of British legal authority in China.

Chapter 6

The Demise of Extraterritoriality: Sino-British Court Cases, Chinese Contestation and Japanese Imperialism, 1900-1943

Introduction

The late Qing and Republican period was an era of significant change in China. Political, economic and social upheaval came alongside, and was intertwined with, China's quest to regain legal sovereignty. The 1911 revolution overthrowing the Qing gave way to a weak republic, factionalized under military leaders controlling different parts of China. With the growth of left wing and nationalist ideologies in the 1920s, the Communist and Nationalist parties (CCP and GMD respectively) became an important part of the Chinese political landscape. Both parties were dedicated to eradicating foreign privileges. The abolition of consular jurisdiction was considered central to regaining national sovereignty, and for China to be considered an equal nation state in the modern world. By 1927 the GMD had assumed control of China. Despite the government's intent and Chinese demonstrations to end foreign extraterritoriality, diplomatic negotiations between the GMD and British and American diplomats stalled. The Japanese occupation of Manchuria after 1931 put negotiations on hold, with the Sino-Japanese war commencing in 1937. Despite the warzone environment, British extraterritoriality remained until shortly after Britain's declaration of war on Japan in 1941, with the Sino-British treaty for the Relinquishment of Extraterritorial Rights in China coming into effect on 1 January, 1943.

Extraterritoriality as it was entangled in the politics of the period is richly documented in China historiography.¹ However, few studies focus specifically

¹ For a detailed overview of the foreign presence and Chinese politics in the 1920s and 1940s, see for example, amongst others: N. Clifford, *Spoilt Children of Empire: Westerners in Shanghai and the Chinese Revolution* (Hanover, 1991); on the role of Britain and British interests during the period, see for example: R. Bickers, *Britain in China: Community, Culture and Colonialism 1900-1949* (Manchester, 1999), pp. 115-63.

on the exercise of British consular jurisdiction in the decades before its end.² This chapter explores how high profile Sino-British court cases tied into the better known political and legal developments of the era, enriching our understanding how court cases featured in the prelude to abolition.

There are a number of studies that explore the demise of extraterritoriality and reasons for abolition either directly or as part of a broader analysis relating to metropolitan policies. Most focus on the diplomatic negotiations between Britain, China, and the US from 1924 to 1943.³ They point to the role of the political situation of China (especially Japanese imperialism), political negotiation, and the wartime environment in facilitating (and in some ways also delaying) abolition. Other scholars demonstrate how China's legal and 'cultural' modernization precipitated its abolition.⁴ Both Robert Bickers and Eileen Scully show that from the mid-1920s, British and American metropolitan authorities were beginning to narrow their safeguarded interests in China, shaped by the political sensitivity of the foreign presence in China.⁵ The May Thirtieth Movement (1925), where British-led police opened fire on protestors, and the rise of Chinese nationalism and the Nationalist Revolution (1926-7), made the treaty power presence in China even more heavily politicised. Examining court cases adds a new perspective to the ways in which British officials understood

² Although not the focus of his study, Robert Bickers has noted two high profile cases in the HMSC that will be discussed in more detail below: the Loh Tse-Wha case, see: R. Bickers, *Empire Made Me: An Englishman Adrift in Shanghai* (London, 2003); the Judd and Peters case: pp. 123-5; R. Bickers, *Empire Made Me*, p. 262; R. Bickers, *Britain in China*, p. 81.

³ K. C. Chan, 'The abrogation of British extraterritoriality in China 1942-43: a study of Anglo-American-Chinese Relations', *Modern Asian Studies*, 11, no.2, (1977), pp. 257-91; E. S. K. Fung, 'The Chinese Nationalists and the Unequal Treaties 1924-1931', *Modern Asian Studies*, 21, no.4, (1987), pp. 783-819; S. Li, 'The extraterritoriality negotiations of 1943 and the New Territories', *Modern Asian Studies*, 30, no.3, (1996), pp. 617-50; on diplomatic relations and Japanese imperialism in the context of US extraterritoriality, see: W. Fishel, *The End of Extraterritoriality in China* (Berkeley, 1952).

⁴ On Chinese legal reforms in the abolition of extraterritoriality, see: T. Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (Cambridge, 2010); on 'culture', which encompassed both religious, and also legal cultural norms, see: G. Gong, *The Standard of 'Civilization' in International Society* (Oxford, 1984); Ruxton suggests that both legal reform and diplomatic negotiations helped abolish extraterritoriality in Japan. See: I. Ruxton, 'The ending of extraterritoriality in Japan', in B. Edström (ed.), *Turning Points in Japanese History* (Manchester, 2002), pp. 84-96.

⁵ R. Bickers, *Britain in China*, pp. 4-5 and pp. 115-62; Scully argues that American metropolitan authorities were keen to shore up the GMD and avoid antagonising the Japanese authorities. See: E. Scully, *Bargaining with the State from Afar: American Citizenship in Treaty Port China, 1844-1942* (New York, 2001), pp. 168-9; also see: Clifford, *Spoilt Children of Empire*; Li, 'The extraterritoriality negotiations', p. 619.

the exercise of extraterritoriality within this narrowing-interest framework, as well as showing the growing political and practical difficulties of exercising consular jurisdiction in an increasingly hostile environment.

The chapter therefore has two aims. Firstly, it situates high profile court cases within the context of the increasing Chinese challenges towards extraterritorial jurisdiction. The Chinese authorities assumed jurisdiction over ex-central powers and Russian nationals, as well as Sino-British counterclaim cases. Both served to erode the legitimacy of British consular jurisdiction and limit the exercise of British extraterritoriality. Court cases also show the increasing sensitivity of Sino-British murder trials as they were subsumed in wider issues of consular injustice. Whereas chapter four uncovered the more public nature of everyday violence, high profile cases also point to the importance of Sino-British violence that became sensitive and sometimes politicised in the era of calls for the abolition of extraterritoriality. As Eileen Scully has argued in the context of the US, the British courts became a ‘lightning rod’ for foreign and Chinese grievances in the political climate of the twentieth century.⁶ The chapter draws on Elizabeth Kolsky, who focused on British Indian cases in the twentieth century, and Pär Cassel, who focused on British consular court cases in Japan in the late nineteenth century. Both scholars have shown how cases were subsumed within the context of challenging British (legal) authority by Indian and Japanese organisations and movements.⁷

Secondly, the chapter examines how Japanese imperialism affected the practical exercise of British jurisdiction before abolition.⁸ Operating in wartime, with an increasing Japanese interference in the 1930s and early 1940s, made aspects of

⁶ Scully, *Bargaining*, p. 131; conversely, Robert Bickers has shown how the case of murder of a British subject John Thorburn by a Chinese colonel caused controversy, generating some British ‘Shanghaiander’ opposition to extraterritoriality treaty reform: R. Bickers, ‘Death of a Young Shanghaiander: the Thorburn case and the defence of the British communities in China in 1931’, *Modern Asian Studies*, 30, no. 2, (1995), pp. 271-300.

⁷ P. Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (New York, 2012); E. Kolsky, *Colonial Justice in British India: White Violence and the Rule of Law*, (Cambridge, 2010), pp. 185-229.

⁸ See: Fishel, *The End of Extraterritoriality*; Shian Li has also noted the practical difficulty of the operation of British courts in 1942: S. Li, ‘The extraterritoriality negotiations’, p. 626; For the ways in which a Japanese presence factored into aspects of law and order in Shanghai see: F. Wakeman, *Policing Shanghai 1927-1937* (Berkeley, 1995), pp. 272-3.

the hearing of trials increasingly problematic. Cases point to how Japanese interference (or claimed interference) affected the credibility of witness evidence and confessions. The warzone environment contributed to levels of increased poverty of Chinese subjects, many of whom (in the opinion of juries and judges) acted out of desperation, falsifying claims and engaging in illicit activities. This compounded existing race and gender prejudices about the mendacity of Chinese and female witnesses and complainants, making it more difficult to convict defendants. By 1942, after declaring war on Japan, British consular courts could no longer operate in a place under Japanese control, and Her Britannic Majesty's Supreme Court for China (HMSC), formerly in Shanghai, moved to Yunnan. However, by this time both Chinese opposition to extraterritoriality, Japanese imperialism and wartime exigencies worked together to make the exercise of British consular jurisdiction ineffective and politically unfavourable for the British authorities in the wider context of war.

The chapter uses judges' notebooks and British officials' correspondence, including those between the British authorities in China and the Chinese authorities. It also draws on newspaper reports, especially the English language *North China Herald (NCH)*, and to a lesser extent *Shenbao*, which contained less information on particular cases. The analysis acknowledges that newspapers have their own agendas and limitations in the reporting of trials and did not speak for the whole English-language or Chinese-language community. Another limitation of the sources is that court cases, verdicts and sentences are often not explicit about racial prejudices. It is often necessary to read between the lines of judgments and details of the case to understand how certain verdicts have been reached. This can be augmented with archived correspondence on cases that provide additional information. One may also question to what degree singular high profile cases represent or reflect general trends or remain exceptional instances of certain phenomenon. Certainly, high-profile cases are not statistically representative, nor can every high-profile case be analysed here. However, high profile cases (particularly the ones selected in this chapter) often generated popular attention not just because of the incident in question but because they reflected, and were embedded within certain social and political

tensions of the time. They are therefore an extremely useful lens onto these background events as well as how they added to, or magnified, certain tensions.

The chapter proceeds chronologically in four sections: growing Chinese contestation towards foreign legal powers, 1900-1908; court cases in context, 1908-1925; recognition of the shortcomings of consular jurisdiction and Chinese legal successes, 1925-1937; and the final blow: war in China and the Japanese occupation 1937-1943.

1. Growing Chinese Contestation of Foreign Legal Powers

1900-1908

The turn of the twentieth century was memorable for the British authorities and communities in China. Although there had always been sporadic Chinese protests and riots directed against foreigners, the infamous Boxer uprising (1900-1) was in some ways a turning point of indigenous resistance, with some parallels and connections to anti-colonial uprisings elsewhere.⁹ In Shanghai, friction between the local populace, the Chinese authorities, and foreign authorities involved a range of jurisdictional wrangles in the first decade of the twentieth century. Increasing tensions between the Chinese and foreign municipal authorities arose over the rules of the Mixed Court, warrants and arrests in different municipal jurisdictions, and the Shanghai Municipal Council's (SMC) expansion of the International Settlement's boundaries after 1898.¹⁰ Municipal battles were also distinctly legal and penal. In 1905, a dispute erupted over the housing of female Chinese prisoners sentenced by the Mixed Court.¹¹ Although disagreements between foreign and Chinese authorities over the Mixed Court had dogged its existence from 1864, the 1905 incident

⁹ R. Bickers and T. G. Tiedemann, *The Boxers, China and the World*, (Lanham, 2007), pp. 147-152.

¹⁰ See, on the issue of warrant and arrests: A. Kotenev, *Shanghai: Its Mixed Court and Council: Material relating to the History of the Shanghai Mixed Court and the History, Practice and Statistics of the International Mixed Court* (Shanghai, 1925), pp. 84-7.

¹¹ For more details of the incident, see: Kotenev, *Mixed Court and Council*, pp. 127-9.

generated particular public interest and debate over foreign legal powers.¹² The SMC and western assessors had pressed for a guilty verdict on charges of kidnapping for a certain high profile Chinese woman. After the verdict, the SMP were ordered to make sure she was not lodged at the Chinese-run Mixed Court Gaol. The Chinese authorities asserted it was their right to imprison female prisoners, and they had always housed such prisoners in practice. A popular Chinese protest at both the verdict and housing of the prisoners turned into a riot. The fracas and riot reflected the importance of what was at stake. Law and jurisdiction was an integral part of political and legal control over subjects within the whole International Settlement. Law and order, jurisdictional and penal powers were a vital part of governance. Discourses also underpinned the attempted exercise of foreign legal power. The legitimacy of consular jurisdiction, and law more broadly, rested heavily upon social and cultural-legal arguments. It was claimed that Western law was claimed to embody the principles of justice, impartiality, and ‘humane’ penal methods, and these reasons were put forward in part to justify taking control over the prisoners.¹³ Chinese law was juxtaposed as a means of enforcing social norms, corrupt and arbitrary in its administration, and posited as inherently punitive and vindictive.¹⁴ This dichotomy was critical for supporting and justifying foreign legal rights. As will be explored later on in this chapter, this legal discourse was challenged in later decades through Chinese jurisdictional practices and British consular miscarriages of justice.

As there was little constitutional basis for the SMC assuming control over the housing of Chinese female prisoners, the female prisoners were returned to the

¹² On aspects of the operation of the Mixed Court prior to 1911 see: Kotenev, *Its Mixed Court and Council*.

¹³ On the ‘humane influence’ of European assessors in the Mixed Court and reformation of punishments, see: Kotenev, *Mixed Court and Council*, pp. 90-3 and p. 126; and on warrants, see: Kotenev, *Mixed Court and Council*, p. 100-1; for conflicts in the Mixed Court, see: M. Eiichi, ‘H. A. Giles v. Huang Chenyi: Sino-British conflict over the Mixed Court, 1884-5’, *East Asian History*, 2, no.1, (1996), pp. 135-57.

¹⁴ For discourses on Chinese and Western legal differences, see: A. Kotenev, *Shanghai: Its Municipality and the Chinese* (Shanghai, 1927), p. 222; Kotenev, *Mixed Court and Council*; T. Stephens, *Order and Discipline in China: The Shanghai Mixed Court, 1911-1927* (Seattle, 1992); Contemporary western commentators were fascinated by, and prone to exaggerate about, Chinese and ‘Oriental’ torture practices used to elicit confessions and punish; see: T. Brook, J. Bourgon and G. Blue (eds), *Death by a Thousand Cuts* (Cambridge, 2008).

Mixed Court Gaol.¹⁵ However, whilst the question over the jurisdiction of prisoners was resolved, the incident showed that such cases opened fresh disputes between the Chinese and foreign authorities over foreign legal rights. It was within this context that a 1908 court case of T. J. Stephenson showcased the way in which high profile Sino-foreign cases could provide such a storm, although one which the British authorities were for the time being able to weather.

The T.J. Stephenson case of 1908: strained Sino-British relations and the mechanisms of consular justice

On September 23 and 24, 1908, HMSC acting judge Frederick Bourne and a jury of twelve heard the trial of *R. vs. T.J. Stephenson*.¹⁶ The case concerned an incident between Stephenson and Ch'en So-Wen, a rickshaw puller, resulting in the death of Chen.¹⁷ The local Chinese district official, the Shanghai Daotai, sensing the significance of the case sent the Chinese magistrate from the city of Shanghai along with an interpreter to watch the trial. The case opened with the background of the accused and the narrative of events. Stephenson was a long term resident in China, who had worked as a mechanical engineer for seventeen years. He lived in a houseboat by a creek, and on the night in question he had spent time drinking in various establishments. At the end of the night he found a rickshaw man - Chen - to take him home. On the way back, Stephenson claimed Chen had taken him the wrong way (intending to rob him) and turned the rickshaw into a culvert. They then came to blows and Stephenson stated he had acted in self-defence. As Chen allegedly attacked him, Stephenson had an attack of angina pectoris. Stephenson then pulled on Chen's *queue* (a Chinese braided ponytail) to force him into the muddy water, but was rendered unconscious from angina which stopped him witnessing Chen suffocating. After regaining consciousness he came out of the creek, stumbled to a local house to report the incident and ask for help. Circumstantial evidence and witness statements, however, served to challenge his version of events. He had - according to one witness - admitted that he had 'licked' (hit) a rickshaw driver and killed him.

¹⁵ Kotenev, *Shanghai: Its Mixed Court and Council*, pp. 127-9.

¹⁶ Details of the trial as found in: *NCH*, 26 Sept., 1908, pp. 786-9.

¹⁷ Ch'en So-Wen was also known as 'Zung Zu-Vung' in some correspondence and newspaper reports.

Another witness had seen him throw the rickshaw into the creek after he climbed out, suggesting he had tried to alter the crime scene. The prosecution also highlighted that the body of Chen was found seventeen yards away from where the fight was claimed to have taken place, suggesting that Chen had tried to flee.

Since Stephenson had admitted to attacking Chen leading to his death, the case did not rest on whether or not Stephenson was responsible for Chen's death but to what degree he was responsible. The jury appeared to have a relatively straightforward case of ascertaining murder or manslaughter. Summarising the case for the jury, the defence delivered two points for the jury to consider when they retired for a verdict. First was the assessment of the witness statements. In particular, how reliable was the Chinese woman who stated she had seen Stephenson pushing the rickshaw into the creek to alter the crime scene. Second, was the medical practitioner's assessment of Stephenson compatible with an attack of angina. Judge Bourne summed up for the jury: a manslaughter verdict could be entertained if it was understood that Chen had pursued him, and Stephenson had fought back to protect himself. However, if Stephenson had held Chen's head underwater, it must be considered murder. The jury retired, but it could not at first come to the required unanimous verdict. The foreman of the jury suggested that a minority of the others were unreasonably holding out for a particular verdict. After retiring again, a verdict was eventually reached: manslaughter, with a strong recommendation for mercy. The lengthy decision-making time and the mercy plea suggests that the deliberations were between manslaughter and, quite astonishingly, acquittal. Judge Bourne sentenced Stephenson to one year's imprisonment with hard labour, adding that had it not been for the jury's express recommendation he would have inflicted a heavier sentence.

The case gives a detailed insight into a high profile Sino-British criminal trial. It was unusual because Stephenson admitted legal responsibility for killing Chen in his defence statement. Therefore the case was one of the clearest instances of how juries were unwilling to convict Europeans for the murder of Chinese subjects. The deal for conviction was furthermore obtained with a specific recommendation of mercy, and showcased how British justice was often

dependent on a jury system that was reluctant to convict white subjects. It serves as a relatively clear example of a phenomenon of racial prejudices in jury verdicts, as seen in many colonial contexts.

The Stephenson case is further significant because of the difficulties it caused after the verdict. The lenient sentencing inflamed local Sino-foreign tensions and the Chinese authorities took the initiative to press the British authorities on the unfairness of the sentence. In particular, on behalf of Chen's family the Shanghai Daotai Tsai wrote to British consulate-general, Sir Pelham Warren condemning the verdict.¹⁸ He also sent a translated copy of the opinion of magistrate Li on the case to Warren and judge Bourne.¹⁹ Li expressed his views on the proceedings of the trial, especially the unjust verdict and his understanding of British consular jurisdiction in China. He started by outlining the contradictions inherent in the case; that Bourne had declared the evidence and the witness testimonies as perfectly clear leaving no room for doubt. He added that the doctor's report had stated the deceased's eyes were clotted with mud, showing that the victim was pressed down into the mud whilst still alive causing death by suffocation. Remarking on other particulars on the unfairness of the trial, Li highlighted the petition of Chen's family. Chen's father, Chen Wan-Mao, was barred from attending the hearing, and only learned of the judgment in Chinese newspapers the next day. Chen Wan-Mao lamented the sentence:

were a Chinese accidentally to kill a foreigner, would this case be taken as a precedent? ... How can justice be considered to have been administered in connection with the protection of Chinese life when Stephenson is only sentenced to a term of one year's hard labour?²⁰

Li ended his letter by stating that the judge and jury had found that Stephenson intentionally killed Chen, but that the sentencing was too lenient.

How, indeed, could the British authorities justify the outcome of the case? Pelham Warren forwarded Daotai Tsai's letter to Bourne and asked him to justify his sentence. Bourne replied that the law was just and there was no provision in

¹⁸ TNA: FO656/101 'Translation: Tsai taotai to Pelham Warren' 17 Oct., 1908.

¹⁹ *Ibid.*

²⁰ *Ibid.*

English law for compensation for the families of deceased victims of crime.²¹ Nor was there provision in English law to augment sentences after they had been pronounced. The witness statements had strongly indicted Stephenson, but it was the jury's verdict of manslaughter and recommendation of mercy that had prevented a heavier sentence.²²

Leeway for mitigation of the sentence, however, could be considered. At the same time as the Chinese petition was under consideration, Stephenson sent a petition to Bourne asking for a reduction in his sentence on the grounds of ill health; petitions to mitigate sentences were common and often successful in cases of bad health or good behaviour in prison.²³ However, anticipating that a mitigation of the sentence would further inflame the Chinese authorities, Bourne asked the Foreign Office for advice; this demonstrates that the case was potentially damaging enough to Sino-British relations that metropolitan authorities' guidance was needed on how to proceed further.²⁴ The position of the Foreign Office, ultimately adopted by Bourne, was that the crime was 'a bad one', and although inclined to mitigate the sentence, doing so would 'weaken our administration of justice and be detrimental to our relations with the Chinese government and people'.²⁵ There were, however, other ways to render Stephenson's life less severe in prison. To this end, Bourne asked for reports on Stephenson, and the consular prison's physician updated him; Stephenson had his own private room, access to medical treatment, and a special workroom with his own engineering tools.²⁶ Stephenson, it appeared, had a relatively comfortable life inside jail.

The whole Stephenson case – the incident, trial, verdict, sentencing and punishment - is significant because it gives a view on the relationship between the operations of justice, Sino-foreign relations and punishment. Firstly, it

²¹ TNA: FO 656/101 Frederick Bourne HMSC to Pelham Warren, Shanghai Consulate general 28 Oct., 1908.

²² *Ibid.*

²³ TNA: FO656/101 Frederick Bourne, HMSC to Pelham Warren, Shanghai Consulate General 8 Dec., 1908.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ TNA: FO656/101 Ernst L. Marah, H.B.M Consular Gaol Shanghai, to Frederick Bourne, HMSC 7 Dec., 1908.

showed that even in cases where acquittal was almost legally impossible, white juries still struggled to come to unanimous decisions that convicted white defendants of murder and manslaughter verdicts of Chinese. Secondly, it reveals that the Chinese authorities were mounting pressure on the British through such cases. They sent legal officials to watch and report on cases, and took up the petitions of Chinese individuals to contest verdicts. It appears that the Chinese authorities were well aware of their significance in the broader political and social context. Thirdly, although the case reflected the increasing political and social tensions generated through Sino-British criminal incidents, the *Shenbao* did not report extensively on the case and there was a notable absence of calls for the abolition of extraterritoriality. Although there may have been reports in other newspapers and media, and *Shenbao* was certainly not a mouthpiece for the Chinese government, the case did not seem to generate much interest or wider public reaction. This resonates with Pär Cassel's conclusions for the pre-1912 period in China, that the Qing authorities and media did not use consular cases to press for the abolition of extraterritoriality.²⁷ Despite this, there was awareness that injustice in Sino-British consular court cases might fuel popular discontent. Fourth, the case shows that the British authorities in China, and especially the Foreign Office in London, were concerned about the wider political and social significance generated by high profile Sino-foreign cases. Although law prevented judge Bourne from rehearing the case or making a sentence more severe *post facto*, it was also understood that mitigating a sentence would inflame local sensitivities. There was another option: mitigating a sentence without public knowledge by making prison life far easier for certain people. In this respect, the strategy in the Stephenson case reflects Eileen Scully's assertion that American consular court legal inequity was not in public view, 'but in pre-trial preemption and post-verdict manoeuvring behind the scenes through channels much less visible or accessible to Chinese.'²⁸ Although the British authorities managed to avoid stirring widespread public discontent over the Stephenson case, mounting challenges to consular court injustices and foreign legal powers were evident in the next decade.

²⁷ Cassel, *Grounds of Judgment*, pp. 160-3.

²⁸ Scully, *Bargaining*, p. 17.

2. Court Cases in Context: 1911-1925

The start of the second decade in the twentieth century appeared to be one of increasing foreign legal powers in Shanghai. In 1911, the Qing regime collapsed and, after the local Shanghai Daotai fled, the foreign authorities assumed administrative control of the Mixed Court.²⁹ The court played an important role in Shanghai as a court with legal powers over Chinese subjects as defendants to petty crime. Although the court had a Chinese magistrate and administered Chinese law, foreign assessors (who were usually junior consuls of various treaty power nations) also had a role in the court. Their role was ambiguous according to the Mixed Court rules, but increasingly from the late nineteenth century, and certainly after 1911, assessors leveraged a much greater influence in the court.³⁰

However, whilst foreign legal influence increased in the Mixed Court, China soon began limiting the exercise of consular jurisdiction in stages. One of the first successes for the Chinese authorities was the acquisition of jurisdiction over nationals formerly protected under extraterritoriality after 1917.³¹ China's declaration of war on the central powers (Germany and Austria-Hungary, the Ottoman Empire and Bulgaria) on 14 August, 1917 made bilateral treaties with the former two redundant. Germany and Austria-Hungary thereby lost all legal authority over their subjects and the protégés (which included Ottoman subjects).³² Thereafter, these nationals charged with any crime were now turned over to the jurisdiction of the Chinese law courts and made subject to Chinese law. Concurrently, after the Bolshevik revolution in 1917, Russia pledged to abolish extraterritoriality. After a delay, and some confusion, Russian subjects lost their extraterritorial status in September 1920.³³ It was arranged, however,

²⁹ See: Kotenev, *Mixed Court and Council*, pp. 168-177.

³⁰ See: Kotenev, *Mixed Court and Council*; T. Stephens, *Order and Discipline in China: The Shanghai Mixed Court, 1911-1927* (Seattle, 1992).

³¹ Wesley Fishel emphasises the Great War as a turning point for the demise of extraterritoriality for the same reasons: Fishel, *The End of Extraterritoriality*, p. 1.

³² For details of Chinese jurisdiction over German and Austria subjects after 1917, see: Kotenev, *Mixed Court and Council*, pp. 215-25; protégés were subjects of other nations that were considered under the jurisdiction of a certain treaty power.

³³ Shanghai Municipal Archives (SMA) U1-3-969 'Extraterritorial rights' H.M. Consul-General to the Chairman of the Municipal Council, 6 Oct., 1920; for details of Chinese jurisdiction over Russians after 1920, see: Kotenev, *Mixed Court and Council*, pp. 227-37; Fishel, *The End of Extraterritoriality*, pp. 43-9.

that Russians should have a Russian consular assessor present at Mixed Court hearings and that Russian law be applied in certain civil cases.³⁴ With the upheaval of the revolution in Russia, many refugees came to China, resulting in a large population of foreigners under the jurisdiction of the Chinese authorities.³⁵ According to some estimates, the population of Germans, Austria-Hungarians and Russians amounted to approximately 300,000 persons.³⁶ Many resided in or near Shanghai, with at least 100,000 Russians living in or near the Chinese north-eastern city of Harbin alone by 1927.³⁷ In the nineteenth century numbers of ‘unrepresented’ foreigners subject to Chinese jurisdiction were insignificant,³⁸ these numbers now represented a major victory for Chinese legal sovereignty.

Meanwhile, Chinese authorities continued legal and penal reforms with an eye to weakening the legitimacy of consular jurisdiction.³⁹ The Mackay Treaty (1902) between Britain, the US and Japan, and similar treaties with other treaty power nations, resulted in an agreement to abolish extraterritoriality when China’s legal and penal system had reached an acceptable, but crucially undefined, western standard. As such, the Chinese authorities established new courts, new laws and prisons modelled on western philosophy and institutions in the first two decades of the twentieth century.⁴⁰ The Washington Conference (1921) provided an opportunity for China to report on its legal progress, and present its case for the abolition of extraterritoriality. The conference, convened by the US and attended by many nations for the discussion of issues in the Pacific and East Asia, promised to listen to the Chinese delegation on the matter. The delegation put forward its case, stating that extraterritoriality breached China’s sovereignty and was a cause of national humiliation.⁴¹ Further, the plural legal environment in China was extremely complex which made it impractical for effective legal

³⁴ These privileges were abolished by 1924, see: Kotenev, *Mixed Court and Council*, pp. 228-30.

³⁵ On refugees in Shanghai, see for example: Ristaino, M. *The Jacquinet Safe Zone: Wartime Refugees in Shanghai*, (Stanford, 2008).

³⁶ Fishel, *The End of Extraterritoriality*, pp. 49-50.

³⁷ *Ibid.*, p. 120.

³⁸ ‘Unrepresented’ foreigners were those without extraterritorial privileges, or a protected subject of a treaty power nation with these privileges, and thus under the jurisdiction Chinese law, see: Kotenev, *Mixed Court and Council*, pp. 69-84; p. 213.

³⁹ X. Xu, *Trial of Modernity: Judicial Reform in Early Twentieth Century China, 1901-1937* (Stanford, 2008); On Chinese penal reform, see: J. Kiely, *The Compelling Ideal: Thought reform and the prison in China, 1901-1956* (New Haven, 2014).

⁴⁰ For a more in-depth study of Chinese legal reform, see: X. Xu, *Trial of Modernity*.

⁴¹ Fishel, *The End of Extraterritoriality*, p. 57.

governance, and allowed many foreigners and Chinese to evade prosecution.⁴² Although the delegation failed to persuade the foreign powers to consider immediate abolition, it was agreed that the treaty powers would form a commission to review the practice and administration of consular jurisdiction, as well as the progress of Chinese legal and penal reforms.

These two developments – Chinese jurisdiction over Russian and former axis power subjects and protégés, and the commission to assess conditions for the abolition of extraterritoriality – were of significance for several reasons. Firstly, it was the first wave of China’s reclamation of jurisdictional rights over a large section of foreigners in China. Secondly, the notion of Chinese jurisdiction over foreigners (especially Europeans) challenged one of the primary reasons for consular jurisdiction in the first place; that Chinese law should and could not be applied to Europeans.⁴³ Thirdly, the commission’s visit allowed China to showcase its legal developments and how it could competently apply jurisdiction over foreigners.

Evidence of the importance of these three aspects was reflected in a case in Tianjin in 1922.⁴⁴ With the Washington conference appointed commission due to tour the region, a trial of a Russian subject for armed robbery was due to be heard in the local Chinese court. The Chinese authorities hoped it would be the perfect opportunity to showcase their jurisdictional powers over non-Chinese subjects, strengthening their case for the abolition of all treaty-power extraterritoriality.⁴⁵ Equally realizing the significance of the trial, British commentators from the Tianjin English-language newspaper *The Oriental Times* attempted to smear the Chinese handling of the trial.⁴⁶ They claimed, for example, that there were violations of the defendant’s rights when detained and many miscarriages of justice.⁴⁷ However, the proposed commission was delayed

⁴² *Ibid.*

⁴³ Fishel, *The End of Extraterritoriality*, p. 199; Fung also highlights the significance of China regaining sovereignty over German and Austrian subjects in the broader campaign against extraterritoriality: Fung, ‘The Chinese Nationalists’, p. 793.

⁴⁴ Details of the case from: L. Zhou and Y. Wang (Tianjin Archives), *Waiguoren zai jiu tianjin* [*Foreigners in Old Tianjin*] (Tianjin, 2012), pp. 198-201.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, p. 200.

⁴⁷ *Ibid.*

in its visit and did not view the case, much to the disappointment of the Chinese authorities. The case was not alone in generating tension over Chinese jurisdiction upon ex-treaty power subjects. A year later, a Chinese court passed a sentence of death against the Russian defendant, Alexis Korniloff.⁴⁸ Jurisdictional powers over Russians clearly perturbed some British reporters, arguably because they recognised the significance of the cases; they were not simply ordinary criminal cases but were being used by the Chinese authorities to challenge the legitimacy of extraterritoriality more broadly.⁴⁹

As well as Sino-foreign cases in the Chinese courts, Sino-British consular cases could also become ‘lightning rods’ for broader calls for the abolition of consular jurisdiction.⁵⁰ Unlike the Stephenson case seventeen years earlier, rising Sino-foreign tensions magnified one of the most famous trials heard in HMSC: the case of Loh Tse-Wha (19-25 April 1923).⁵¹ Robert Bickers has highlighted the case and the furore it caused.⁵² Two Shanghai Municipal Police (SMP) officers - J.F. Gabbutt and Albert Balchin - were charged with the torture of a Chinese man in custody, Loh Tse-Wha.⁵³ Loh had suffered extensive internal injuries from police ‘interrogation’, including being tied to a ladder and stretched by the head and feet in opposite directions, and beaten until insensible on a number of occasions. Such was the scandal of the case, news of the trial was reported in the colonial Australian press.⁵⁴ The *Adelaide Advertiser* described it as ‘one of the most terrible events that have occurred, from the white man’s point of view’, with ‘grave anti-foreign feeling ... likely to develop in consequence’.⁵⁵

The trial lasted six days, and through the hearing it emerged that ‘third degree’ (torture) methods had been frequently adopted and even approved of by policing

⁴⁸As reported in the *Far Eastern Times*, 5 Dec., 1923: Fishel, *The End of Extraterritoriality*, p. 255.

⁴⁹ Although to some extent, as Robert Bickers has highlighted, the influx of poor Russians refugees after 1917-1 meant that Russians were often not considered socially (or racially) the same as Europeans, such that taboos on interaction with them could be as strong as Asians. See: Bickers, *Britain in China*, p. 72.

⁵⁰ Scully, *Bargaining*, p. 131.

⁵¹ TNA: FO1092/356 *R. v. J.B. Gabbutt and A.E. Balchin*. 19 Apr., 1923.

⁵² See: Robert Bickers, *Empire Made Me*, pp. 123-5.

⁵³ TNA: FO1092/356 *R. v. J.B. Gabbutt and A.E. Balchin*. 19 Apr., 1923.

⁵⁴ *The Advertiser*, (Adelaide) May. 1, 1923 ‘British Police Methods in China: Startling Charges, the “Third Degree.”’

⁵⁵ *Ibid.*

superiors. Despite the huge body of evidence against the two SMP defendants, which amounted to an acknowledgement that Loh's injuries had been received in police custody, the jury returned a verdict of not guilty. In *Shenbao*, the case received extensive coverage over a period of several weeks, but the reporting of the trial itself was limited, and it did not pass any judgment.⁵⁶ However, the Australia press reported that the wider Chinese press had 'furious articles' on the case.⁵⁷ This included calls for potential anti-British boycotts, a petition to further inquiries, and calls for the abolition of extraterritoriality. It also included an attack on the discourses that legitimised consular jurisdiction. They highlighted the inherent contradiction between arguments by foreigners for the retention of consular jurisdiction – that Chinese justice was alien to the spirit of the foreigner – and the outcome of the case. The Chinese point of view in the press was that since the British had been guilty of allowing inhuman practices in connection with the administration of justice, the Chinese had a right to abolish foreign courts throughout the republic.⁵⁸

The case was therefore significant for three reasons. Firstly, as Robert Bickers has pointed out, it tarnished the image of the SMP as an arm of the SMC and foreign (especially British) governance.⁵⁹ Secondly, it arguably also served to undermine a central concept that legitimised foreign power in China; that Britain and other foreign powers held more exemplary, 'civilising' methods of governance including policing, law and penal philosophy.⁶⁰ They were often contrasted with Chinese corruption and torture in policing, arbitrary legal decisions. It was clear that these discourses which underlay the legitimacy of consular jurisdiction were challenged through the scandal and resulting verdict. It also points to the ways in which many injustices perpetrated by foreign authorities and foreign individuals were not just everyday violence on the streets,

⁵⁶ *Shenbao*, 24 Feb., 1923 'Le an zuo ri kai shen' [Yesterday's opening of the Loh case]; 29 Feb., 1923 'Le Zhihua anshen xunji' [the Loh Tse-Wha case investigation proceedings]; 30 Feb., 1923 'Le zhihua an xu an ji' [The continuation of the Loh Tse-Wha case].

⁵⁷ *The Advertiser*, May. 1, 1923 'British Police Methods in China: Startling Charges, the "Third Degree."'

⁵⁸ *Ibid.*

⁵⁹ Robert Bickers, *Empire Made Me*, pp. 123-5.

⁶⁰ For more on concepts of 'civilization' and its application to China, see: Gong, *The Standard of Civilization* (Oxford, 1984).

but behind-the-scenes acts of torture.⁶¹ Finally, unlike the Stephenson case, this trial sparked a more popular general anti-foreign and anti-British backlash (or at least that was the perception in some sections of the western media) adding political sensitivity to Sino-foreign court cases. As Cassel noted for Japan in the run up to extraterritorial abolition in 1898,⁶² the Loh Tse-Wha case is one of the first clear examples in which a British consular court case was swept up in the intense political sensitivity of the era, in turn galvanising broader anti-foreign movements and ultimately culminating in calls for the end of extraterritoriality.

In the same year that the Loh case galvanised anti-extraterritoriality movements, the Chinese authorities were beginning to claw back jurisdictional rights formally protected by British extraterritoriality. In early 1925, a Sino-British commercial suit, *Reiss and Co. vs. Yuan Ch'ang*, arose in Hankou, which involved a dispute over the price of cotton.⁶³ Since the Chinese firm was the defendant, the trial was heard as usual in the Chinese court. In the course of the trial, the Chinese firm sought to press counterclaim charges against Reiss and Co. Such counterclaim charges ordinarily meant that the extraterritorial rights of the British company were honoured in a separate court hearing in the British consular court. However, to the surprise of the British authorities, in a memorandum from the Chinese Ministry of Foreign Affairs - the Waijiaobu - to Her Britannic Majesty's legation in Beijing, the Chinese authorities announced their support of the Chinese Supreme Court action declaring that it was not against treaty or Mixed Court rules to assume jurisdiction and hear the trial in the same Chinese court as the original case.⁶⁴ In response, the British authorities registered a complaint to the Waijiaobu, as any legal action against a British person or company invoked British extraterritorial jurisdiction. The Waijiaobu, after consulting the Chinese Ministry of Justice regarding British objections, maintained that it would hear the case in the Chinese court.⁶⁵ The British

⁶¹ A. Rao, 'Problems of Violence, States of Terror: Torture in Colonial India', *Interventions: International Journal of Postcolonial Studies*, 3, no.2, (2001), pp. 186-205; T. Sherman, 'Tensions of colonial punishment: perspectives on recent developments in the study of coercive networks in Asia, Africa and the Caribbean', *History Compass*, 7, no.3, (2009), pp. 659-77.

⁶² Cassel, *Grounds of Judgment*, p. 159.

⁶³ TNA: FO656/180 'translation of memorandum from Wai Chiao Pu to H.M's legation', 20 Mar., 1925.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

authorities in Beijing wrote to Turner Skinner, an HMSC judge, saying they were doubtful whether it was worth arguing the point given the refusal of the Chinese Ministry of Justice to consider hearing the trial in the British consular court.⁶⁶ It appears as though the British authorities, who would have previously hotly contested challenges to the extraterritorial rights of British subjects and companies, were beginning to choose their jurisdictional battles with the Chinese authorities carefully.

Part of the reason behind conceding jurisdiction was the increasing awareness that the tide of anti-extraterritorial sentiment was strong. As such, Britain needed to be careful to not allow cases to generate of wider calls for Chinese legal sovereignty. Amongst the documents over the *Reiss and Co.* case are numerous correspondence letters of various British officials about how to preserve extraterritorial jurisdiction despite increasing recognition that it could have a limited future.⁶⁷ It appears as though conceding this battle was a minor concern in the broader war of preserving consular jurisdiction. Therefore the narrowing of safeguarded interests was apparent in the British legal authority's limitation of the exercise of extraterritoriality. On the other hand, the Chinese authorities were taking back aspects of legal sovereignty from consular jurisdiction in practice, even while diplomatic negotiations were stalling. China was thus very much engaged, and successful in, the jurisdictional jockeying of legal orders, albeit here over extraterritorial powers and the Chinese legal state.⁶⁸ Counterclaim cases were, however, not the only types of cases over which Chinese authorities won jurisdictional battles. As the next part of the chapter will show, events after 1925 included both practical jurisdictional successes and greater opposition to consular jurisdiction in Shanghai.

⁶⁶ TNA: FO656/180 'British Legation, Beijing, to Turner Skinner, HMSC', 18 Mar., 1925.

⁶⁷ TNA: FO656/180.

⁶⁸ L. Benton, 'Historical perspectives on legal pluralism, *Hague Journal on the Rule of Law*, 3, no.1, (2001), pp. 57-69.

3. Recognition of the Shortcomings of Consular Jurisdiction and Chinese Legal Successes, 1925-1937

The successes of regaining aspects of legal sovereignty came alongside political events that challenged foreign governance and extraterritoriality. Popular Chinese nationalist and left wing politics facilitated anti-foreign and anti-extraterritoriality campaigns and protests. The infamous May Thirtieth incident was significant both as an anti-imperialist protest and for the role of the Shanghai Municipal Police (SMP) in a bloody suppression. A series of strikes and protests, initially directed against Japanese mill owners, evolved into a broader anti-imperialist strike and a mass demonstration. Over the course of events, a unit of the SMP opened fire on a crowd of Chinese protestors. Although the fatalities were few, it strengthened the link between injustice, police brutality and foreign imperialism. Although not all Chinese public opinion was anti-foreign or called directly for the end of the SMC, the May Thirtieth incident encouraged a variety of Chinese commercial and other organisations, as well as some western Christian and women's groups, such as the American Federation of Labour and National Federation of Women's Clubs, to call for treaty reforms.⁶⁹

The call for the rendition of the Mixed Court in the International Settlement of Shanghai was heeded in 1927. The problems of the Mixed Court included long delays, corruption and the ambiguous status of assessors.⁷⁰ In 1927, after the May Thirtieth incident, political pressure, and sustained calls for its rendition, the court finally closed. The Shanghai Provisional Court replaced the Mixed Court, followed by the Jiangsu-Shanghai Number One Special District Court in 1930.⁷¹ Likewise in the French Concession, the Jiangsu Shanghai Number Two Chinese Special District Court replaced the French Mixed Court in 1931.⁷² It was a major victory for Chinese legal sovereignty. The new courts were integrated with the

⁶⁹ J. Fox, 'Common sense in Shanghai: the Shanghai General Chamber of Commerce and political legitimacy in Republican China', *History Workshop Journal*, no.50 (2000), pp. 22-44; Fishel, *The End of Extraterritoriality*, pp. 100-1.

⁷⁰ On aspects of the operation of the court see: Stephens, *Order and Discipline in China*.

⁷¹ On the changes of the court from the Mixed Court, see, amongst others: Y. Yao, *Shanghai gonggong zujie tequ fayuan yanjiu [Research on the Shanghai Special District Court in the International Settlement of Shanghai]* (Shanghai, 2011), pp. 30-5.

⁷² Yao, *Shanghai gonggong zujie tequ fayuan yanjiu*, pp. 35-6.

Chinese legal system, bringing Chinese defendants under the full authority of Chinese administration.

At the same time, the British Foreign Office began to view its policies and interests in China with caution.⁷³ For some time since the turn of the century, the British government was aware of the rising sensitivity and political instability in China about the extent of its interests in China. After the May Thirtieth incident, anti-British sentiment erupted into protests, boycotts and small uprisings. It was at this point that the British metropolitan authorities began to renegotiate policies with selected safeguarding of interests. As seen in the *Reiss and Co.* case, this included conceding jurisdiction in counterclaim cases. By 1927, the revolution and Nationalist government pressed for the reduction of foreign privileges, and the Foreign Office recognized the sensitivity surrounding certain concessions and adopted a more conciliatory attitude towards Chinese demands. During 1927-31 Britain relinquished a number of concessions: Hankou, Jiujiang, Xiamen, Zhenjiang, and the lease of Weihaiwei. However, the Foreign Office was less enthusiastic about potentially returning Hong Kong or abolishing the International Settlement of Shanghai. Both were important for political and economic reasons, and it was also recognized that Sino-British treaties and extraterritoriality protected these areas.⁷⁴ As such, the whole question of legal rights was intimately tied into the wider political, administrative and legal landscape of semicolonial China and the politics of the era.⁷⁵ It was possibly one reason why Sino-British diplomatic negotiations over abolishing extraterritoriality remained frustratingly slow for the Chinese authorities. However, Belgium, Denmark, Italy, Portugal and Spain agreed to revise the treaties for the abolition of extraterritoriality, and Mexico's extraterritorial rights were allowed to lapse in 1928.⁷⁶

In the meanwhile, after a four-year delay, the Washington conference commission finally toured parts of China. The commission was composed of

⁷³ Bickers, *Britain in China*, pp. 115-63.

⁷⁴ Fishel, *The End of Extraterritoriality*, pp. 59-60.

⁷⁵ BPP, HC: 1927, [Cmd.2797] *Declaration and memoranda by the Chinese commissioner presented to the commission on extra-territoriality in China*, p. 4.

⁷⁶ For more detail on treaty negotiations with various nations: Fishel, *The End of Extraterritoriality*, pp. 147-9.

thirteen members, representative of the foreign imperial powers in China. Its remit was to investigate the operation of the Chinese administration of justice and the exercise of the extraterritorial courts.⁷⁷ The report dedicated many pages to aspects of Chinese legal reform and the difficulties posed to law and order through war and recent political turbulence.⁷⁸ It noted some progress, but suggested that the legal reforms were still not in line with the expected standard. It also reviewed the system of consular jurisdiction, deeming it satisfactory but noting that difficulties remained in its operation. Extraterritoriality limited China's jurisdictional freedom and consular legal systems were slow and unwieldy when operating as part of a complex plural legal landscape.⁷⁹ Serious crimes committed by minor treaty power nations resulted in a jurisdictional process outside of China, and appeal systems of nearly all powers reverted to the metropole or elsewhere outside of China. This resulted in long delays and high expenses.⁸⁰ Furthermore many consuls had little or no legal training.⁸¹ In addition, there were a large number of people and businesses claiming extraterritorial rights, far more than suspected *bona fide* nationals.⁸² Although the commission addressed these shortcomings it stopped short of advocating the immediate abolition of extraterritoriality. This was disappointing to the Chinese authorities; the Chinese commissioner emphasised that the commission had acknowledged but skirted over the core problem of exercising consular jurisdiction: the concept of extraterritoriality, let alone its practice, was simply contrary to International law and the current political zeitgeist.⁸³ Wilsonian idealism, which emphasised national self-interest and territorial legal sovereignty, made extraterritoriality an aberration.

The overall summary of the report recommended the relinquishment of extraterritorial rights after improvements to Chinese laws, the legal system and its administration.⁸⁴ Five years later, another report, by a South African judge

⁷⁷ *Report of the Commission on Extraterritoriality in China* (1926)

⁷⁸ *Ibid.*, pp. 51-242.

⁷⁹ *Ibid.*, p. 20.

⁸⁰ *Ibid.*, p. 21.

⁸¹ *Ibid.*

⁸² *Ibid.*, p. 22 and pp. 24-5.

⁸³ BPP, HC: 1927, *Declaration and memoranda by the Chinese commissioner presented to the Commission on Extra-Territoriality in China*, pp. 4-15.

⁸⁴ *Report of the Commission on Extraterritoriality in China*, pp. 107-9.

commissioned by the Municipal Council in 1931, similarly concluded that the relinquishment of the International Settlement and extraterritoriality should be delayed until China was politically more centralised, when internal disturbances had subsided, and when more constitutional checks had been developed.⁸⁵ Scholars who have discussed the commission have emphasised that it reinforced the notion that Chinese legal reforms, which were a crucial factor in abolishing extraterritoriality, fell short of western expectations.⁸⁶ Indeed, Chinese reforms were limited, and the Nanjing era (1927-1937) was a period of retracting juridical independence with increasing politicisation of the judiciary from the Nationalist state.⁸⁷ However, although the report was defensive of consular jurisdiction, on the whole, it did serve to underline that there it was found wanting in some respects.

The reports bought extraterritoriality more time, but by the 1930s China had regained aspects of legal sovereignty and had eroded the legitimacy of extraterritoriality. This included the abolition of the Mixed Court, the pursuit of counterclaim cases in Chinese courts, the appropriation of jurisdiction over former axis power nationals, and continual references to the impracticality and anomalous state of consular jurisdiction. By 1936, another sensational Sino-British case demonstrated racial injustice in the consular courts, and ultimately gained notoriety as many rallied behind an unlikely figure.

Ma Debiao: the death of a beggar, the SMP and challenging racial injustices in court

12th February 1936.

The case of Murder of a Chinese subject
Two Foreign Police Officers Found Not Guilty

Yesterday morning saw the sentencing of the Jiaying road police officers, Judd and Peters, accused of the murder of a Chinese subject Ma De-Biao at the British Supreme Court for China. Judge Mossop alongside the assessors [the jury] considered the evidence. The jury

⁸⁵ E. Green, 'Judge Feetham surveys Shanghai: a digest', *Pacific Affairs*, 4, no.7, (1931), pp. 586-614; 'The Feetham report: volume II' *Pacific Affairs*, 4, no.9, (1931), pp. 806-25.

⁸⁶ Kayaoğlu, *Legal Imperialism*; J. Kiely, *The Compelling Ideal: Thought Reform and the Prison in China, 1901-1956* (New Haven, 2014).

⁸⁷ On politicisation of the judiciary, see: X. Xu. *Trial of Modernity: Judicial Reform in Early Twentieth Century China, 1901-1937* (Stanford, 2008); on legal and penal reforms: Kayaoğlu, *Legal Imperialism*; J. Kiely, *The Compelling Ideal*.

retired and came back with a verdict after 42 minutes of not guilty. The judge addressed the court, declaring that they were both acquitted.⁸⁸

Reading the *Shenbao* report of the Judd and Peters 1936 murder trial, it would appear to be a case like any other. However, the case was by no means ordinary. The hearing of *R. vs. Ernest William Peters and William Alfred Judd* opened on 4 February 1936.⁸⁹ *NCH* claimed it as ‘one of Shanghai’s most sensational trials of recent years’; it was watched in court by one of the largest crowds ever seen.⁹⁰ The case was unusual as the defendants – both police officers – were charged with the murder of a Chinese man, Ma Debiao.⁹¹ The incident took place on 1 December 1935, and Ma died five days later. It was another trial of the SMP, and another notorious case, but it was surprising because the victim was one who would ordinarily receive little, if any, sympathy: a beggar.

The case lasted a week in HMSC; the judges’ notebook of the trial spans 200 pages, mainly with evidence from twenty-nine witnesses testifying for the prosecution. The prosecution put forward the case that Peters and Judd had found Ma in a semi-conscious state when on patrol in the early hours of the morning. They picked him up in their car, but instead of directing the chauffeur to take them to the hospital, they ordered the driver to stop by a creek. They took Ma out of the car, and then threw him into the nearby creek, leaving him for dead. The defence claimed that Judd and Peters had found Ma, but as they had spotted a ‘beggar boat’ in the creek (a boat that collected vagrants) they decided it was better to bring him there than take him to hospital. They ordered the chauffeur to stop, took Ma outside and lowered him onto the boat. Unbeknownst to them, Ma subsequently fell from the boat on his own, resulting in the medical condition of which he died. However, one of the key witnesses in the case was Judd and Peters’ chauffeur, who described hearing Ma being thrown into the water by Judd and Peters with a splash – a ‘hua’ ‘hua’ sound - and reported it to his

⁸⁸ Translation my own, from: *Shenbao*, ‘bein kong shahai huaren an: liang butou jingpan wuzui’ ‘The case of Murder of a Chinese subject: two police officers found innocent’ 12 Feb., 1936. See Appendix (Translation 6.1 for the Chinese translation p. 227).

⁸⁹ Details from the case from: TNA: FO 1092/360 *R. vs. Ernst William Peters and William Alfred Judd* 4 Feb., 1936; Robert Bickers has also highlighted this trial in relation to racial bias in correspondence letters between British officials: Bickers, *Britain in China*, p. 81.

⁹⁰ *NCH*, 19 Feb., 1936, p. 321.

⁹¹ Robert Bickers also notes this case: Bickers, *Empire Made Me*, p. 262.

superior. Meanwhile, a Chinese hawker spotted Ma in the water when walking by, and alerted a number of others to help pull him out, with the cry for help: ‘*jiu ming*’. None of the twenty-nine witnesses saw a beggar boat in the creek, and enquiries into the movement of these boats confirmed that they did not ply, and never had plied, its waters. The witness statements formed a huge body of evidence against Judd and Peters. The chauffer, hawker, those who helped Ma out of the water and doctor pointed to Judd and Peters as responsible for the death of Ma; either intentionally, or at least, unintentionally.

However, the jury acquitted both Peters and Judd of any responsibility for Ma’s death. The court case and its verdict was a damning reflection of the racial prejudice of juries. As Robert Bickers has pointed out in reference to British officials’ correspondence in 1929, British officials were aware of this jury prejudice; juries would simply not convict a white man of murder of a Chinese subject.⁹² The Judd and Peters case served to further prove this point, not only in the verdict but also in the way in which the case proceeded. Particular emphasis in the trial was given to the cross examination of the Chinese witnesses, the defence trying to play on existing racial prejudices of the mendacity and criminality of Chinese subjects, through suggesting the unreliability of their oral testimonies and their backgrounds.⁹³

Shenbao did not pass judgment on the trial and verdict. It merely stated in subsequent reports after the verdict that both Judd and Peters had resigned from their posts.⁹⁴ Despite this, the decision to press charges against two policemen for the death of a lowly beggar, and the sensation caused by the trial, suggests that attempts were made to challenge racial injustices through the British consular courts, or at least bring it to the public’s attention. In addition, as Eugenia Lean has explored in a high profile assassination trial in 1934, court cases were increasingly turned into a forum of debate for the literate Chinese population, with the potential for cases to generate outpourings of public

⁹² Bickers, *Britain in China*, p. 81.

⁹³ This will be explored in more detail in the next section.

⁹⁴ *Shenbao* Feb. 19, 1936, ‘Beicong shahai huaren, liang butou cizhi’ [‘Two policemen accused of murder resign’].

sympathy (*tongqing*).⁹⁵ Although it is difficult to assess the extent, *tongqing* may also have been an element in bringing the case to court and its subsequent notoriety. Regardless, the case was certainly another trial of the SMP, showing how consular court cases brought public attention – Chinese and western – in an already politically sensitive environment. Although the defendants (and consular jurisdiction) once again weathered a storm, a new challenge to consular jurisdiction - in the form of war and the Japanese presence - provided new difficulties. This will be the focus of the final section of this chapter.

4. The Final Blow, 1937-43: War in China and the Japanese Occupation

Although from the mid-nineteenth century Japan, like China, had struggled to rid itself of western extraterritoriality, by the turn of the twentieth century Japan had not only abolished consular jurisdiction but had itself become an imperialist power in East Asia. After the Sino-Japanese War (1894-5) ended with a resounding victory for the Japan, the Treaty of Shimonoseki (1895) abolished Chinese extraterritorial rights in Japan. It also placed Japan's previous extraterritorial rights in China on a level footing with those of the western nations. By 1898, Japan had succeeded in abolishing all foreign extraterritorial rights on its shores. Japanese courts were further established in both Taiwan and Korea as part of its colonial empire. With the defeat of Russia in the Russian-Japanese war (1905), Japan extended its sphere of influence to China's north-eastern region of Manchuria. Thereafter, Japan expanded its political and economic interests in China. A large body of citizens and subjects were protected by Japanese extraterritorial privileges, which reportedly numbered over one million Japanese subjects, by 1924, including 800,000 Koreans and nearly 8,000 Taiwanese subjects.⁹⁶

⁹⁵ E. Lean, *Public Passions: The Trial of Shi Jianqiao and the Rise of Popular Sympathy in Republican China* (Berkeley, 2007), p. 112.

⁹⁶ *Commission on Extraterritoriality*, p. 25; for more on Japanese colonial citizenship over Koreans and Taiwanese, see: B. Brooks, 'Japanese colonial citizenship in treaty port China: the location of Koreans and Taiwanese in the imperial order', in R. Bickers and C. Henriot (eds), *New Frontiers: Imperialism's New Communities in East Asia, 1842-1953* (Manchester, 2000), pp. 109-24.

Japanese extraterritoriality, however, included not only jurisdiction over people but also over railway lines. Between 1905 and 1931, Japan took over Russian railway companies, making them quasi-official joint stock companies. The companies not only had various administrative powers but also included extraterritorial powers attached to them and their lines.⁹⁷ This was significant not only for Japanese economic interests in trade and transport, but later also for political reasons; in 1931, Japan claimed that there was an incident of Chinese aggression on its Antung-Mukden railway line, which Japan then used as a pretext for military occupation of Manchuria. With diplomatic negotiations between the US, Britain and China on the abolition of extraterritoriality already stalling, the Japanese presence in Manchuria put all negotiations on hold.⁹⁸

Japan quickly established a puppet government in Manchuria, and renamed the new state Manchukuo. This included a legal system based upon Japanese legal codes and courts.⁹⁹ A pan-Asian ideology underscored its empire building; an appeal to the peoples of Taiwan, Korea and China as part of the same 'race' to be gathered under the tutelage and guidance of Japan.¹⁰⁰ The occupation of Manchuria from 1931 onwards was a key moment for US extraterritoriality in China according to Wesley Fishel. It was precisely after the Japanese occupation that extraterritoriality 'first sickened and died ... [and] after 1931 the rate and area of decay of the extraterritorial system was in direct proportion to the speed and extent of Japanese encroachments in China'.¹⁰¹

Indeed, Britain had already lost consular jurisdiction in Taiwan and Korea through Japanese occupation. However, the role of extraterritoriality in

⁹⁷ For more on the Japanese railway companies see: R. Myers, 'Japanese imperialism in Manchuria: the South Manchuria Railway Company, 1906-1933', in P. Duus, R. Myers and M. Peattie (eds), *The Japanese Informal Empire in China, 1895-1937* (Princeton, 1989), pp. 101-32; E. Hotta, *Pan-Asianism and Japan's War 1931-1945* (New York, 2007), pp. 107-39.

⁹⁸ For a detailed narrative of the diplomatic negotiations and its deferral between the US and China and Britain, see: Fishel, *The End of Extraterritoriality*, pp. 169-87

⁹⁹ T. DuBois, 'Inauthentic sovereignty: law and legal institutions in Manchukuo', *Journal of Asian Studies*, 69, no. 3, (2010), pp. 749-70.

¹⁰⁰ Although pan-Asianism was often used and associated with aggressive Japanese imperialism, to others it may have represented as a genuine philanthropic and non-violent ideology: E. Hotta, *Pan-Asianism and Japan's War, 1931-1945* (New York, 2007), p. 16.

¹⁰¹ Fishel, *The End of Extraterritoriality*, p. 189.

Manchuria was more complex. Like the broader question of extraterritoriality in China, the question of consular jurisdiction in Manchukuo was heavily politicized. How was extraterritoriality configured in pan-Asianist ideology for the Japanese? To this end, Japan limited its exercise of extraterritorial rights in Manchuria, promulgating on 10 June 1936 the Treaty for Partial Abolition of Extraterritorial Privileges.¹⁰² At the same time, Japan tried to lure the other powers into recognizing Manchukuo in exchange for the continuation of their extraterritorial privileges there.¹⁰³ When the powers rejected the recognition of Manchukuo, Japan announced the abolition of all extraterritoriality in Manchukuo on 7 November 1937, coming into effect on 1 December 1937.¹⁰⁴ On the one hand it allowed the Japanese to try to distinguish themselves in the eyes of the Chinese, showing they were not infringing upon Chinese legal sovereignty like western nations. On the other hand, having established puppet courts and government in Manchuria, Japanese extraterritoriality was not integral to the Japanese presence.

The American authorities protested that the Japanese proclamation of the abolition of US extraterritorial rights in Manchuria was illegal.¹⁰⁵ As the US still recognised Manchuria as part of China, the Sino-US treaties still applied in Manchuria, and the US consular courts continued to operate until 7 December 1941 in areas under Japanese occupation.¹⁰⁶ However, there were reports of Japanese interference in American extraterritorial cases and many reports of Japanese attacks on foreigners.¹⁰⁷ In addition, many foreigners acquiesced to Manchukuo's commercial, civil and taxation laws for business purposes (notably not criminal law).¹⁰⁸ In other words, although American extraterritoriality had not ceased in Japanese occupied areas, the Japanese authorities were making the exercise of consular jurisdiction difficult for the western authorities.

¹⁰² *Ibid.*, p. 191.

¹⁰³ *Ibid.*, p. 191 and p. 208.

¹⁰⁴ *Ibid.*, pp. 191-2; Japanese radio and newspaper propaganda often used the continuation of western extraterritoriality in China to suggest that the Japanese presence was different in China from western imperialism. Gerrit Gong, *The Standard of Civilization*, p. 162.

¹⁰⁵ Fishel, *The End of Extraterritoriality*, p. 192.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*, p. 190, p. 192 and p. 200.

¹⁰⁸ *Ibid.*, p. 192.

The Japanese presence and war in Shanghai affecting British consular jurisdiction

The operation of justice - for US courts at least – was therefore made difficult in a warzone controlled by the Japanese army. In Shanghai, Japanese influence had been growing incrementally from the 1910s. A Residents' Association for Japanese subjects acted as a body with administrative functions over Japanese citizens and their affairs.¹⁰⁹ With swelling numbers of Japanese citizens and businesses in Shanghai, Japanese influence slowly made its way into the SMC. The first Japanese member was elected in 1916, followed by a second in 1927.¹¹⁰ By the eve of the Sino-Japanese war (1937-1945), there were approximately 25,000 Japanese in Shanghai: the majority of the foreign residents in the city.¹¹¹

In 1937, Japanese troops spread south from Manchuria, entering key cities including Shanghai. The French authorities and SMC both declared the French Settlement and International Settlement neutral zones, and the GMD government retreated from its capital in Nanjing to the west in Chongqing. A puppet government was established in Nanjing under the influence of Japan. Japanese naval and military units were present in the treaty ports and set up puppet institutions which collaborated with the Japanese. As both Isabella Jackson and Robert Bickers have shown, Japanese influence in the SMC and over the International Settlement was incremental from 1937 onwards.¹¹² Japanese control over political and legal institutions included the puppet government taking over the French concession Second Special District Court and the Kiangsu High court on 8 November, 1940.¹¹³ It also included the application of Japanese military law to anyone interfering with Japanese military operations.¹¹⁴ However, whilst the

¹⁰⁹ For more on the Residents' Association, see: J. Fogel, "'Shanghai-Japan': The Japanese Residents' Association of Shanghai', *Journal of Asian Studies*, 59, no.4, (2000), pp. 927-50.

¹¹⁰ I. Jackson, 'Managing Shanghai: the International Settlement administration and the development of the city 1900-1943', Ph.D. thesis, (University of Bristol, 2012), pp. 51-2.

¹¹¹ Fogel, 'Shanghai-Japan', p. 927; C. Henriot, "'Little Japan" in Shanghai: an insulated community, 1875-1945', in R. Bickers and C. Henriot (eds), *New Frontiers: Imperialism's New Communities in East Asia, 1842-1953* (Manchester, 2000), p. 148.

¹¹² I. Jackson, 'Managing Shanghai', p. 37; R. Bickers, 'Settlers and diplomats: the end of British hegemony in the International Settlement, 1937-1945', in C. Henriot and W. Yeh (eds), *In the Shadow of the Rising Sun: Shanghai under Japanese Occupation* (Cambridge, 2004), p. 247.

¹¹³ For more on the Japanese take-over of the French concession, see: C. Cornet, 'The bumpy end of the French Concession and French influence in Shanghai, 1937-1946', in Henriot and Yeh (eds), *Shadow of the Rising Sun*, pp. 257-76.

¹¹⁴ Fishel, *The End of Extraterritoriality*, p. 198.

settlement and administrative bodies were entangled in the war and Japanese influence, British extraterritoriality continued. Fishel asserts that the rise of Japan in China's north caused the rapid decay of extraterritoriality and interfered with the operation of consular jurisdiction in the American courts in Manchuria. If this is the case were the British consular courts affected by the Japanese presence in Shanghai between 1937 and 1942? A high-profile Sino-British case in HMSC in 1939 suggests that Japanese interference was a factor in crimes and the assessment of evidence in the British courts.

On 31 October, 1939, HMSC heard *R. vs. John Dudley Morris* – the last sensational criminal trial held in HMSC.¹¹⁵ John Morris was charged with unlawfully killing Song Kyung Dan, a brothel owner in the Shanghai International Settlement. He pleaded not guilty. Morris and two friends - a Jewish man and another of 'Asiatic' descent - spent the evening drinking at several cafés. At the end of the night they entered a brothel. Shortly after arriving, a dispute arose between Morris and the Chinese owner, Song Kyung Dan. A separate witness claimed the argument was due to a dispute about the payment of a prostitute. Morris claimed he was unaware that the establishment was a brothel, and a scuffle ensued over the misunderstanding between him and Song. Morris hit Song four or five times, whereupon Song fell to the floor. The testimonies of Morris and his two friends varied and contradicted one other, all three claiming another was responsible for entering the brothel and the succession of events. After being surrounded by an angry crowd on the street, Japanese policemen and soldiers arrived on the scene.

Although the defendants and witnesses differed in their version of events, the case rested on two findings. First was the medical practitioner's report, stating that Song already suffered from a blood clot and that any blow would have been fatal. His probable life expectancy was two months, and although there were no other signs of disease, he was most likely 'older than he looked'.¹¹⁶ This served to diminish the responsibility of Morris for the death of Song, as the direct cause of death would not have been the punch, but the impact of his fall in the context

¹¹⁵ Details from the case from: TNA: FO1092/360 *R. vs. John Dudley Morris* 31 Oct., 1939.

¹¹⁶ *Ibid.*

of his existing medical condition. This suggested that Morris was guilty of manslaughter, at most. It was a typical example of medical evidence that protected white perpetrators of violent crime from murder and other criminal charges, as evidenced in other parts of the British colonial world, such as India and Burma.¹¹⁷ Medical conditions, such as Indians' supposedly 'enlarged spleens', were important to criminal jurisprudence, serving to diminish the responsibility of Europeans perpetrators of interracial acts of murder.¹¹⁸ Indeed, it appears that Jordanna Bailkin's assertion that it became harder to convict British subjects of murder in India, in part due to medical 'evidence' is reflected in British criminal justice in China.¹¹⁹

However, there was another equally important extenuating circumstance. Morris claimed that the Japanese police and military personnel had forced him and the witnesses to make false statements and accusations.¹²⁰ As such, the witnesses and his statement of admission of the events when first arrested were all unreliable because of Japanese manipulation. This invalidated all witness statements, making a manslaughter sentence inapplicable. Whether or not the Japanese military had actually intervened, the jury took just thirty minutes to reach a verdict of not guilty. The case revealed that on top of existing jury prejudices in Sino-British murder trials, and 'racialised' medical evidence, allegations of Japanese interference could make statements of evidence difficult to prove credible in consular courts. Indeed, Japanese interferences and cover-ups concerning acts of violence against British subjects were not unheard of. As Robert Bickers relates in the death of Maurice Tinkler there was an accurate and widespread belief that the Japanese authorities were involved in his death despite their claim that they were not.¹²¹ Therefore, it is very possible that the Japanese police may have interfered in the Morris case.

¹¹⁷ On rape and medical reports, see: J. Saha, *Law Disorder and the Colonial State: Corruption in Burma c.1900* (London, 2013), pp. 97-125; E. Kolsky, "'The body evidencing the crime": rape in colonial India, 1860-1947', *Gender and History*, 22, no.1, (2010), pp. 101-30.

¹¹⁸ J. Bailkin, 'The boot and the spleen: when was murder possible in British India?', *Comparative Studies in Society and History*, 48, no.2, (2006), pp. 462-93.

¹¹⁹ *Ibid.*, p. 463.

¹²⁰ TNA: FO1092/360 R. vs. *John Dudley Morris* 31 Oct., 1939

¹²¹ Bickers, *Empire Made Me*, pp. 282-92.

If the Japanese were interfering with incidents and witness statements how could consular jurisdiction reliably operate? Although the Morris case was the last high profile case of its kind in the latter years of consular jurisdiction, there were still prominent summary consular court cases, which pointed to how the wartime environment shaped criminal cases. As the Sino-Japanese war began Shanghai, along with many other areas of north and east China, suffered bombing and street warfare. The impact of war, poverty, and the movement of the poor and the homeless, all caused difficulties when considering witness evidence. This compounded existing prejudices against Chinese and especially Chinese women, as plaintiffs in the consular courts

In two cases where Chinese women brought charges of rape and sexual assault against British subjects (Indian watchmen) questions were raised over the reliability of poor witnesses.¹²² Rendered homeless through the Sino-Japanese war, the prevalence of prostitution among Chinese women, young and old, affected the credibility of sexual assault claims. It was often assumed that the conditions of war had forced many men – chiefly husbands – to put female family members into sex work. *R. vs. Tolloh Singh*, is reflective of these assumptions and the wartime environment shaping cases.¹²³ Dzung Yao Sz was the complainant, a 55 year-old mother who had recently moved to a new house after being evacuated from her family home. The new house however, was already badly shelled, leaving parts of it open. A watchman, Singh, patrolled the alleyways of the shelled area. Dzung stated that after her husband left, Singh came into her house, found her upstairs, and raped her. Singh on the other hand claimed Dzung's husband had begged him for money and suggested that Singh could sleep with his wife in exchange for \$1, which he did. Singh further claimed that this was not an uncommon practice, having slept with a number of women for as little as fifty cents. The charge of rape was brought upon him, he stated, when Dzung's husband asked for \$5 after intercourse. The evidence of the European police on his encounter with Dzung at the police station was emphasised at the trial. The officer stating that Dzung was 'afraid and a little

¹²² TNA: FO1092/360 *R. vs. Tolloh Singh* 16 Jun., 1938; FO 1092/360 *R vs. Bikar Singh* 8 Dec., 1939.

¹²³ TNA: FO1092/360 *R. vs. Tolloh Singh* 16 Jun., 1938.

marked, but not more than a normal China woman is. She appeared a little excited, speaking quickly, but very little different from normal.’¹²⁴ Cross-examined, he reiterated that ‘such Chinese demeanour was ordinary’.

The jury took just ten minutes to come to a verdict of not guilty. The speed of the verdict indicated that Dzung’s version of events was assumed to be false. The European policeman’s statement of Dzung’s behaviour, the poverty of her family, and Singh’s claim that he had previously slept with women for money was enough to absolve him. It appeared that the rape was understood as a result of sexual frustration, rather than a power dynamic. As such, Singh’s defence was convincing; with the widespread availability of prostitutes through the war, and his admission of paying for such services, why would a man resort to rape? Further, the warzone had produced unprecedented levels of poverty, which left Chinese subjects desperate for money. This compounded gendered and racial stereotypes of Chinese and female witnesses. As Kolsky as explored in colonial India, the theory of evidence in the courtroom rested on discourses of native mendacity, discrediting eyewitness and oral testimonies.¹²⁵

The case shared similarities with another trial a few months later, *R. vs. Bikar Singh*. In this case the defendant successfully convinced the jury that the complainant was part of a group of poor Chinese vagrants that wished revenge on him.¹²⁶ The sexual assault trials point to the ways in which the warzone not only shaped cases but compounded difficulties of the credibility of witness evidence by poor Chinese women. With such poverty and destruction in Shanghai, how could perpetrators be prosecuted when the principal witnesses (poor Chinese women and men), could not be believed?

With the continuing difficulties posed to consular jurisdiction through war and the Japanese presence, the final blow to extraterritoriality came in 1942. In December 1941 Japan bombed Pearl Harbor, and Britain, the US and their allies declared war against Japan. Japan finally took control of the SMC in 1941, and

¹²⁴ *Ibid.*

¹²⁵ Kolsky, *Colonial Justice*, pp. 108-41.

¹²⁶ TNA: FO1092/360 *R. vs. Bikar Singh* 8 Dec., 1939

with few consular establishments and the pervading conditions of war, extraterritoriality was now of diminished significance to British interests.¹²⁷ That year, it was suggested that HMSC be moved from Shanghai to Kunming (in the south-west province of Yunnan), which was still under GMD control.¹²⁸ Yunnan was the best and safest place, as many remaining British businesses were located in Yunnan, which had access to inland waterways and sea transport links.¹²⁹ The intention to relinquish extraterritoriality may have been reflected as early as the spring of 1942, when the GMD accused two British-Chinese subjects of espionage, to which the British government did not claim jurisdiction over the case.¹³⁰ Meanwhile, the Japanese military occupation spread to Singapore, Hong Kong and Burma and the Andaman Islands. The exercise of British jurisdiction lasted little more than a year, and extraterritoriality was finally abolished in 1943. Wartime exigencies may have also helped to speed up the negotiations for abolition, as British colonial possessions were under the threat by Japan, notably in Hong Kong and Burma, and China was a British ally.

Abolition received little attention in both China and the west,¹³¹ which attests to the all-encompassing nature of the Second World War that was being fought, and the insignificance of extraterritoriality by the time it was abolished. However, the seeds of destruction of extraterritoriality were arguably already in place when Japanese imperialism dealt the final blow. The erosion of extraterritoriality's legitimacy, revelations of injustice in high profile court cases, and political necessity in the context of war all worked together within the context of war and Japanese imperialism to erode British extraterritoriality as a discourse, a system and as a tenable and practical set of jurisdictional practices.

¹²⁷ Chan, 'The abrogation of British extraterritoriality', pp. 257-91; Li, 'The extraterritoriality negotiations', pp. 625-6.

¹²⁸ TNA: FO369/2719 'Transfer of H.M. Supreme Court in China from Shanghai to Yunnanfu and emoluments of officials'.

¹²⁹ Li, 'The extraterritoriality negotiations', p. 627.

¹³⁰ *Ibid.*, p. 625.

¹³¹ *Ibid.*, p. 618.

Conclusion

During the twentieth century, China's struggle for state sovereignty, the rise of nationalism, revolution and war were often entangled within the context of foreign imperialism and extraterritoriality. This chapter has situated court cases within the social and political climate of the era, especially within the context of anti-extraterritoriality movements and Japanese imperialism and war. In particular, court cases were reflective of increasing difficulties in operating consular jurisdiction during a period of heightened political sensitivity, and some of the mounting challenges China made upon extraterritorial jurisdiction. Consular jurisdiction was challenged both through the limitation of its exercise, through the discourses that underlay them, and through practical aspects of exercising law and criminal justice. Through counterclaim cases the Chinese authorities diminished a part of British consular jurisdiction in an era when the British authorities began to choose their legal battles with the Chinese authorities more carefully. In terms of the legitimacy of extraterritoriality, the Loh case and jurisdiction over ex-treaty power nationals helped to undermine some of the discourses that supported consular jurisdiction. The Chinese authorities also increasingly pursued Sino-British murder trials, challenging the actions of the SMP and individuals in incidents that clearly showed the racial injustices inherent in everyday life. Whereas the injustices in consular courts remained a continuous feature, as shown in chapter four for the pre-1900 era, they took on new significance in the twentieth century, undermining British authority.

Finally, Japanese imperialism and a warzone shaped consular court cases, and helped deal the final blow to extraterritoriality. War and chaotic conditions hampered the effective running of the courts and Japanese interference raised questions about the reliability of witnesses and evidence gathering. Thus, the consular courts faced practical difficulties in its operation of justice and jurisdiction. With fewer commercial interests and no interest in claiming jurisdiction over contested persons, the long-overdue Sino-British Treaty for the Relinquishment of Extraterritorial Rights abolished British consular jurisdiction, coming into effect on the 1 January 1943.

Chapter 7

Conclusion

Law and its exercise were central components of British power and privileges in China. Extraterritoriality encompassed a collection of legal institutions, alongside a set of legal practices and ideas. It formed an important part of the justification of the imperial presence and was a vital form of governance over British subjects as they encountered others. Despite this, there have been few studies on British consular jurisdiction. Therefore this thesis has explored three fundamental questions; how was the legal system formed and developed? What were the main functions of consular jurisdiction and why was it important? What challenges did extraterritorial jurisdiction face and how can we understand its demise? Through exploring these questions, the thesis has pieced together the development of the legal system in the nineteenth and twentieth centuries. It has shown how law and its exercise were constituted, adapted and shaped within the overlapping contexts of the local, regional and global. It has demonstrated the key functions of criminal jurisdiction and why it mattered. Finally, by putting consular jurisdiction within the local, regional and global context, the thesis creates a more nuanced picture as to how consular jurisdiction was challenged and its eventual demise. As a whole the thesis provides an institutional history, as well as advancing analytical and conceptual arguments about how we understand British consular jurisdiction in China.

By addressing the first question about the development of the legal system, the thesis has provided an important institutional history. Highlighting 1833 as a watershed moment, it pieces together the formation, consolidation and expansion of the legal system. Although the role of the Sino-foreign treaties on the development of the legal system has been noted before, this thesis has shown how metropolitan laws and regulations promulgated by the China British authorities were significant for its establishment and development. Key principles of jurisdiction were embodied in metropolitan-made laws, some of

which predated the Sino-foreign treaties. By adding an analysis on extraterritoriality as it spread towards and developed in the western regions, it also challenges the conceptualization of extraterritoriality as linked to maritime trade and the east coast. Although in many respects law exercised by British officials in Xinjiang and Yunnan operated in different ways from the east coast treaty ports, nonetheless these legal powers were exercised by virtue of the Sino-British treaties in both areas.

Law in many senses was malleable, and this allowed for connections between the extraterritorial legal system and British colonial legal systems. Forms of overlapping ('concurrent') jurisdiction provided for transnational governance in borderland areas between British colonial legal systems and the China extraterritorial system. Chapter two explored the connections between China and Hong Kong through extraterritorial legislation (Orders in Council) and through metropolitan legislation (the Foreign Jurisdiction Acts 1843, 1890, and the Fugitive Offenders Act, 1881). The overlapping of powers allowed British colonial law to be exercised within the frontier regions of China and consuls to exercise extraterritorial powers in British colonial settings in India, Burma and Hong Kong. More often than not, however, consuls gave colonial authorities more powers over British subjects in China by sending suspects, deporting prisoners or sending prisoners for imprisonment to Hong Kong, India and Burma. Connections also existed within the system of extraterritoriality. Concurrent powers existed between the consular courts, which at its height included China, Taiwan, Korea and Japan. The extraterritorial system was therefore transnational in and of itself. Connections existed both within the extraterritorial system, and between it and colonial legal systems via metropolitan and extraterritorial legislation. This provides a new perspective on 'webs' of empire and transnational and connected histories of Asian nations.¹ The role of law in global connections and connections across Asia has not been richly explored. This thesis shows how the extraterritorial system can be

¹ Metcalf, *Imperial Connections: India in the Indian Ocean Arena, 1860-1920* (Berkeley, 2007); P. Duara, 'The global and regional constitution of nations: the view from East Asia', 14, no.2, (2008), pp. 323-45.

understood as part of a jurisdictional web of British legal power that spanned across the region of East Asia and beyond.

Tracing the development of the legal system has also revealed how legislation and legal practices were continually reproduced and reconstituted over time. Demographic changes and events within the local, regional and global settings shaped extraterritorial jurisdiction. Chapters two and three uncovered how law was constituted in local frontier areas between Hong Kong and China, and in the western regions. Jurisdictional practices were shaped by local concerns, such as the frontier environment and the movement of the local populace. It was also shaped by the consideration of regional British India migration and the movement of fugitives across territorial borders. Chapter five showed how local police strikes and British Indian nationalism were tied to regional developments in India and networks of extraterritorial communication. It also demonstrated how a global event – the First World War – tied into these regional and local concerns to facilitate extraterritorial legal changes. The process of amending these laws was also often transnational. Chapters three and five showed how the British Indian, Burmese, local British consuls, HMSC judges in Shanghai, the Ambassador at Beijing, and the Foreign Office were all involved in the law-making and amending process. Overall, this thesis greatly enhances legal studies research which is only just becoming aware of global perspectives on the development of law. Building upon Pär Cassel's work on extraterritoriality through the lens of the triangular relationship of Japan, China and western powers,² the thesis suggests that it is necessary to take regional and global perspectives in order to understand certain key aspects of extraterritoriality. By the same token, to understand colonial law and its operation in Hong Kong, India and Burma, especially in the borderlands, it is imperative to understand extraterritoriality and how it facilitated transnational jurisdiction.

Addressing the second question about the function of consular jurisdiction, the thesis has explored the function of British jurisdiction through the exercise of criminal law. Criminal jurisdiction was integral to jurisdiction in China and part of transnational British governance. In Shanghai, everyday summary jurisdiction

² P. Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (New York, 2012).

over British subjects formed the majority of cases from the very earliest period. In the nineteenth century, one of the primary functions of the courts was to maintain law and order over sailors, augmenting shipboard discipline. This was imperative given the high numbers of sojourning sailors in the port, and the assumed characteristics of sailors relating to their social class and criminality. In the twentieth century, the courts and law functioned to suppress new assumed challenges to law and order in the forms of British Indian subjects, their police strikes and political offences.

Through examining the Shanghai court statistics, it also becomes clear that crime scenes, the courts, and even the gaols were sites where the local, regional and global met. There were local Chinese subjects, regional migrants, such as British Indian subjects, and others from the broader British Empire, including those connected to seafaring, those in search of work, leisure or refuge. Their presence was interconnected with broader world economic, social and political developments and events. Often, those under the jurisdiction of the British authorities were not even British nationals, but were deemed British by association to a British ship. In such a way, the people caught up in the crime scenes, the British courts and gaols were a range of people – in terms of occupation and social background- from across the world.

Through examining the functions of the courts, it is also clear that criminal cases often reflected unequal social hierarchies. Court cases show the prevalence of episodes of everyday violence towards Chinese subjects. In the summary and high court they were often overlooked or excused. This draws parallels to the research of Elizabeth Kolsky and Martin Wiener demonstrating the centrality of violence to everyday encounters and the shortcomings of criminal jurisdiction in racial violence cases.³ Although it was not a primary concern for the legal authorities, the courts punished vagrants, especially in places where it undermined British prestige based on notions of race, class and gender. As such, ideas about race, class, gender and criminality in treaty port China shaped the

³ E. Kolsky, *Colonial Justice in British India: White violence and the Rule of Law* (Cambridge, 2010); M. Wiener, *An Empire on Trial: Race, Murder, and Justice under British Rule, 1870-1935* (Cambridge, 2009).

exercise of criminal law. This is seen most clearly in the way in which British Indian subjects were disproportionately represented as defendants in criminal court cases in the twentieth century. Their crimes of physical and sexual violence may reflect the discourses of criminality attached to British Indian subjects more than high levels of crime within a small community. Exploring court cases therefore tells us more about the perceptions of law and disorder of British legal officials. There were many who were never punished, such as well-to-do subjects and white men accused of rape or same-sex offences. The courts as a punitive institution reflected the social and political ideas and concerns of those in legal authority.

The thesis is also significant for suggesting how we can conceptualise British legal governance in China in comparative perspective, especially with colonial India. In many respects consular jurisdiction differed from colonial contexts. Chapter two showed how extraterritoriality was legitimatised through bilateral treaties, and was dependant on metropolitan law and overarching metropolitan administration. In other ways, it was understood and operated in a similar way to colonial settings. Chapters two, three and five explored how law operated within the same framework as colonial jurisdiction, for example in relation to overlapping concurrent jurisdiction and through the application of the Foreign Jurisdiction Acts and Fugitive Offenders Act, 1881. Similarities in the exercise of jurisdiction are also evident in the function of the courts to punish labour strikes and Indian nationalism. The use of emergency legal and penal powers in the twentieth century in China drew parallels with that of India. This was because Shanghai and other port cities, had similar demographic issues – principally large numbers of sailors and transient populations – and faced similar issues of transnational ‘criminality’ in the form of strikes and political offences by Indian nationals. As shown in racial violence cases, judges and juries understood the exercise of criminal law in a similar way to other colonial contexts, as it was embedded in political and social concerns, especially those of race, class and gender. By showing these aspects of law and criminal jurisdiction this thesis does not engage in the semiotics of semicolonialism. Instead it suggests that legal governance and law in China had some idiosyncrasies but that certain commonalities, such as British subject demographics, port city life,

transnational political crimes and shared ideas about race, class, gender and criminality amongst legal officials made extraterritorial legal governance similar to colonial contexts.

Finally the thesis has also addressed the challenges and demise of extraterritoriality through placing consular jurisdiction within the context of the political conditions of China and broader events in the twentieth century. Chapter five, and more prominently chapter six, trace a more nuanced narrative of the demise of British consular jurisdiction through the perspective of the court cases. Cases show how the Chinese authorities, Japanese imperialism and a warzone eroded the practicality of consular jurisdiction and the increasingly political sensitive nature of high profile Sino-British court cases. This resulted in both the narrowing of the scope of British jurisdiction and the eroding of the legitimacy of the discourses that underlay extraterritoriality. Consular jurisdiction also encountered increasing practical difficulties in the last decade of its existence. By 1943, after over a century of consular jurisdiction, extraterritoriality was finally abolished.

This thesis has laid the groundwork for understanding British consular jurisdiction in China, by bridging legal, global, East Asian and imperialism studies. Law and extraterritoriality as a part of British jurisdiction in a global perspective has a wide appeal and significance. A number of studies could follow from this work, not least how extraterritoriality figured in burgeoning international law. There is also the possibility of tracing aspects of law such as extradition, territoriality, nationality and legal space as it was understood within evolving metropolitan legislation. In the meanwhile, however, this thesis provides a basis for understanding key aspects of extraterritoriality, which has been under-explored in the existing scholarship. It has illustrated how extraterritoriality was central to the British presence in China in the nineteenth and twentieth centuries. The thesis therefore is excellently placed to be used as a platform for further research into this central aspect of the British presence in China, placed within comparative perspective to understand extraterritorial jurisdiction within broader regional, as well as global legal frameworks.

Appendix

Table 4.1: *Treaty ports 1866-68: numbers of registered subjects, with civil complaints and criminal complaint statistics.*

Consulate	Year	British subjects officially registered	Civil complaints	Criminal complaints
Amoy	1866	66	24	47
	1867	66	15	35
	1868	68	18	15
Canton*	1866	123	4	30
	1867	131	6	24
	1868	124	9	13
Chefoo	1866	30	5	20
	1867	31	5	18
	1868	35	9	16
Chinkiang	1866	19	0	2
	1867	16	--	--
	1868	12	--	--
Foochow**	1866	104	9	24
	1867	115	4	12
	1868	116	15	20
Hankow	1866	104	12	2
	1867	87	24	4
	1868	77	9	8
Kewkiang	1866	36	--	--
	1867	32	1	2
	1868	29	2	--
Newchwang	1866	30	21	10
	1867	21	5	14
	1868	20	5	11
Ningpo	1866	81	14	13
	1867	64	4	14
	1868	82	2	9
Shanghai	1866	849	529	685
	1867	685	454	720

	1868	624***	387	682
Swatow	1866	37	17	56
	1867	39	17	107
	1868	31	8	26
Tientsin	1866	65	15	6
	1867	74	7	12
	1868	58	5	13

* Includes vice-consulate Whampoa

** Includes Pagoda Anchorage

*** Municipal census records state: 1,410.

Source: BPP, HC: [10] Consular Establishments. Return of fees exacted at each consular establishment in Europe, Turkey in Asia, Egypt, China, Japan, and the United States during the ten years ending 31 December 1868

Translation 6.1: *The case of Murder of a Chinese subject: two police officers found not guilty*

1936.02.12 民國貳拾伍年

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被控殺害華人案

兩捕頭竟判無罪

嘉興路捕房西捕頭彼得與試用捕頭巨特、被控故意殺害華人馬德標一案, 昨晨由駐華英國法院開庭宣判、被告彼得與巨特均被提到庭、由首席法官莫肅氏將案情及迭次審訊之經過、向陪審員作極詳明之聲述、述畢、陪審員即退至室內、會商兩被告是否有罪、歷時凡四十二分鐘之久、陪審員復蒞法庭、認為兩被告無罪、首席法官莫肅氏乃宣判兩被告無罪。

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FO 656/2	“Journal of the Crown Advocate” (1926-1930)
FO 656/3	“Journal of the Crown Advocate” (1934-1938)
FO 656/52	“To and from (Shanghai) consulate” (1879)
FO 656/53	“To and from Foreign Office” (1879-1888)
FO 656/56	“To and from (Shanghai) consulate” (1880)
FO 656/59	“To and from (Shanghai) consulate” (1881-1883)
FO 656/63	“To and from Swatow” (1881-1894)
FO 656/65	“To and from British officials” (1881-1910)
FO 656/66	“To and From Newchwang” (1881-1911)
FO 656/67	“Appointments of crown advocates” (1882-1884)
FO 656/68	“Various court cases” (1884-1886)
FO 656/69	“Various court cases” (1884-1891)
FO 656/70	“Various court cases” (1884-1891)
FO 656/83	“To and from Shanghai consulate” (1892-1900)
FO 656/92	“To and from Peking” (1898-1903)
FO 656/93	“To and from various consulates” (1899-1900)
FO 656/101	“To and from British officials” (1903-1912)
FO 656/105	“From Peking” (1905)
FO 656/106	“To Peking” (1905-1906)
FO 656/109	“From Peking” (1906)
FO 656/125	“From Peking” (1911)
FO 656/126	“Mixed Court correspondence sent” (1911-1912)
FO 656/127	“To Peking” (1912)
FO 656/128	“From Peking” (1912)
FO 656/129	“From Peking” (1913)
FO 656/130	“To Peking” (1913)
FO 656/139	“From Peking” (1916)
FO 656/142	“To Peking” (1917)
FO 656/143	“From Peking” (1917)
FO 656/144	“To Peking” (1918)

FO 656/145	“From Peking” (1918)
FO 656/147	“To and from Harbin (1918-1926)
FO 656/148	“To and from Changsha” (1918-1932)
FO 656/149	“To and from Yunnanfu” (1918-1932)
FO 656/150	“To and from Foochow” (1918-1932)
FO 656/156	“To and from Chunking” (1919-1932)
FO 656/157	“To and from Tsingtao” (1919-1932)
FO 656/158	“To Peking” (1919-1932)
FO 656/159	“From Peking” (1919- 1932)
FO 656/164	“Mixed Court correspondence” (1921)
FO 656/165	“To Peking” (1921)
FO 656/166	“From Peking” (1921)
FO 656/167	“To and from Canton” (1921-1926)
FO 656/179	“To Peking” (1925)
FO 656/180	“From Peking” (1925)
FO 656/181	“To and from Tientsin” (1925-1926)
FO 656/235	“General correspondence” (1871-1897)
FO 656/254	“General correspondence” (1911)
FO 656/255	“General correspondence” (1911-1912)
FO 656/256	“General correspondence” (1911-1912)
FO 656/257	“General correspondence” (1911-1912)
FO 656/258	“General correspondence” (1912-1914)
FO 656/259	“General correspondence” (1912-1914)
FO 656/260	“General correspondence” (1912-1915)
FO 656/261	“General correspondence” (1914-1915)
FO 656/262	“Yunnan opium case” (1916)
FO 656/263	“General correspondence” (1916)
FO 656/264	“General correspondence” (1917-1918)
<i>FO 1092</i>	<i>Shanghai Courts, China. Judges’ and Magistrates’ notebooks</i>
FO 1092/2	“Admiralty cases, No. 2” (1872-1877)
FO 1092/30	“Civil cases: Chief Justice’s notebooks, No. 7” (1879-1880)

FO 1092/43	“Civil cases: Chief Justice’s notebooks, No. 19” (1903-1905)
FO 1092/93	“Civil cases: Assistant Judges’ notebooks, No. 13” (1899-1902)
FO 1092/101	“Civil cases: Assistant Judges’ notebooks, No. 21” (1911)
FO 1092/130	“Civil cases: Law Secretariat, No. 5” (1892-1894)
FO 1092/133	“[Mixed Court] British civil and special police cases” (1906-1907)
FO 1092/134	“[Mixed Court] British civil cases” (1907-1908)
FO 1092/168	“Criminal cases: Law Secretariat, No. 2” (1871-1972)
FO 1092/192	“Criminal cases: Assistant judges’ notebooks” (1891-1899)
FO 1092/210	“Criminal cases: Police Magistrates’ notebooks, No. 54” (1908)
FO 1092/217	“Criminal cases: Police Magistrates’ notebooks, No. 61” (1911)
FO 1092/231	“Criminal cases: Police Magistrates’ notebooks, No. 75” (1923)
FO 1092/251	“Criminal cases: Police Magistrates’ notebooks, No. 95” [municipal and traffic offences] (1938-1941)
FO 1092/300	“Applications for probate administration” (1865-1880)
FO 1092/328	“Criminal cases: Circuit Judges’ notebooks” (1901-1904)
FO 1092/335	“Supreme Court: civil cases. Assistant Judges’ notebook” (1930-1936)
FO 1092/338	“Supreme Court: criminal cases, judges’ notebooks, No. 1” (1865-1870)
FO1092/356	“Supreme Court: criminal cases, judges’ notebooks, No. 19” (1920-1923)
FO 1092/360	“Supreme Court: criminal cases, judges’ notebooks No. 24” (1935)
<i>FO 369</i>	<i>Consular Department: General Correspondence (1906-1966)</i>
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- FO 670 Ningpo Consulate: General Correspondence (1843-1933)*
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