

**LAW AND THE ADMINISTRATION
OF JUSTICE IN THE LEASED TERRITORY OF
WEIHAIWEI**

**Phd
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Abstract

The constitution of the British-leased territory of Weihaiwei (1898-1930) introduced a legal system which turned out to be too elaborate for the territory's needs; there was never a resident judge or barrister and most cases were heard and investigated by non-specialist government administrators. With the exception of civil disputes between Chinese, the courts were to apply English law and procedure. Most accused and litigants, however, had their cases heard in accordance with laws and procedures which were quite different from those used in England. Defendants in criminal cases were tried by lay magistrates without a lawyer; rights in civil cases were determined by Chinese law; and headmen supplemented the police in maintaining order in the villages. When it was discovered that the appeals system had not been used, a simpler procedure was introduced.

On the whole, the authorities prioritised the hearing of civil disputes, the involvement of headmen in law reform, mediation and law enforcement. In contrast, they were indifferent towards jury trials and lawyers, and reluctant to pursue reforms ahead of social change. Indeed, success in providing access to the courts for civil disputes inadvertently undermined traditional mediation. When it came to a social problem such as suicide, the authorities, though remarkably well informed about suicide amongst the Chinese, tackled only its aftermath.

Although new, the legal system which affected the territory's Chinese inhabitants was not entirely unfamiliar: by their position and functions, the magistrates resembled the Chinese district magistrate; Chinese law was often applied; some civil and criminal cases were tried by headmen; and village regulations were recognised. It was a legal system shaped not only by the conservatism of individual officials but also by factors such as Weihaiwei's unpromising start, its subsequent decline in strategic importance, demography, shortage of officials, and lack of socio-economic development.

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Abbreviations used in this work

<i>LDNC</i>	Johnston, R.F., <i>Lion and Dragon in Northern China</i> (London: John Murray, 1910)
<i>NCH</i>	<i>The North China Herald and Supreme Court and Consular Gazette</i>
<i>SLPNLS</i>	Private papers of James Haldane Stewart Lockhart, National Library of Scotland, Edinburgh
WOIC	Wei-hai-Wei Order in Council, 1901, as amended by the Wei-hai-Wei Order in Council, 1903
FJA	Foreign Jurisdiction Act, 1890
SSC	Secretary of State for the Colonies
SG	Secretary to the Government
CO	Colonial Office (papers)
FO	Foreign Office (papers)
H.B.M.	Her Britannic Majesty or His Britannic Majesty
H.M.	Her Majesty or His Majesty

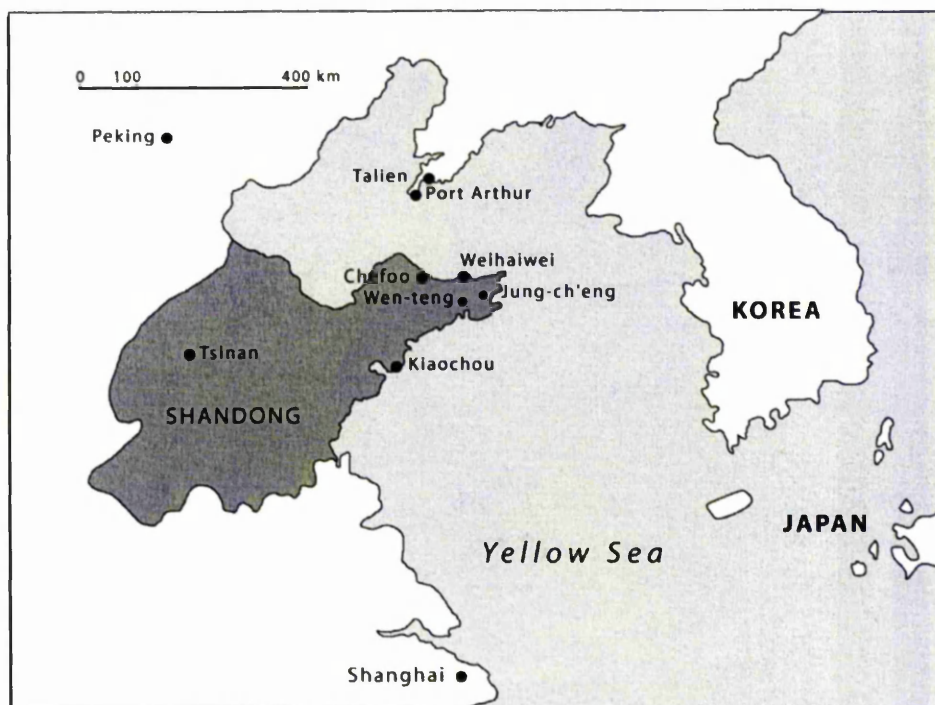
Note on romanisations used

Except in references and in quotations, all place names are given in accordance with the following principles. Village names are given using the Wade-Giles system which was in use during the period of the lease. A table of equivalents in both pinyin and Chinese characters is given below. Other place names are given using a spelling recognisable at the time, e.g. 'Shantung', 'Kwangchouwan', 'Tsinan', 'Talien' and 'Tientsin' ('Shandong', 'Guangzhouwan', 'Jinan', 'Dalian' and 'Tianjin' respectively in pinyin romanisation). The exception to this rule is 'Weihaiwei', which has been rendered in pinyin. The place referred to as Kiaochou (Jiaozhou in pinyin) is now more commonly referred to as Qingdao, whilst Port Arthur and Chefoo, were and are still known as Lüshun and Yantai respectively (Lushun and Yantai in pinyin). Chinese terms are given in pinyin.

Names of local villages in Weihaiwei and nearby places

Ao-Shang	Aoshang	敖上
Ch'iao-t'ou	Qiaotou	桥头
Chefoo	Yantai	烟台
Chiang-chia-kou	Jiangjiakou	江家口
Chien-li-kou	Qianlikou	前里口
Fan-chia-pu	Fanjiabu	范家埠
Feng-lin	Fenglin	凤林
Hai T'ou Yüan	Haitouyuan	海头院
Hai-chuang	Haizhuang	海庄
Hai-hsi-t'ou	Haixitou	海西头
Hou-li-kou	Houlikou	后里口
Hsia-chuang	Xiazhuang	下庄
Hsiao-yen-t'an	Xiaoyantuan	小盐滩
Hsi-lao-t'ai	Xilaotai	西涝台
Jung-ch'eng	Rongcheng	荣成
Ku-shan-hou	Gushanhou	崮山後
Lin-chia-yüan	Linjiayuan	林家院
Liu-chia-t'an	Liujiatuan	刘家滩
Liukung Island	Liugongdao	刘公岛
Lu-tao-k'ou	Ludaokou	麓道口
Mat'ou	Matou	码头
Meng-chia-chuang	Mengjiazhuang	孟家庄
Nan-chu-tao	Nanzhudao	南竹岛
P'o-yü-chia	Poyujia	泊于家
P'u-wan	Puwan	蒲湾
Pao-chia	Baojia	包家
Pao-hsin	Baoxin	报信
Pei-chiang-hsi	Beijiangxi	北港西
Pei-shang-kuang	Beishangkuang	北上乔
Shuang-ssü-k'uang	Shuangsikuang	双寺乔

Sun-chia-t'an	Sunjiatuan	孙家滩
Sun-chia-t'an	Sunjiatan	孙家滩
Sung-chia-t'an	Songjiatuan	宋家滩
Sung-lin-kuo-chia	Songlinguojia	松林郭家
T'un-hou-chia	Tunhoujia	屯侯家
Tengchou	Dengzhou	登州
Tien-shang	Dianshang	店上
Ts'ao-miao-tzu	Caomiaozi	草庙子
Tung-lao-t'ai	Donglaotai	东涝台
Wang-chia-k'uang	Wangjiakuang	王家介
Wei-hai-Wei	Weihaiwei	威海卫
Wen-ch'üan-t'ang	Wenquantang	温泉汤
Wen-teng	Wendeng	文登
Yang-t'ing	Yangting	羊亭
Yü-chia-chuang	Yujiazhuang	于家庄



Scale —————

0 1 2 3 4 5 miles

West side
Boundary of land grant



INTRODUCTION

Once dubbed the 'Cinderella of Empire',¹ the British-leased territory of Weihaiwei has attracted more than its share of scholarly attention. Its people and their culture, customs, beliefs and everyday life, as well as an overview of British rule of the territory, were the focus of Reginald F. Johnston's monograph published in 1910. The *Lion and Dragon in Northern China*,² written from the vantage point of the author's service in the territory's administration as district officer and magistrate, remains a source of primary data. Biographical interest in Johnston and his superior, James Stewart Lockhart, has also given rise to a number of works which have added considerable direct and background information to the stock of knowledge on the leased territory.³ The most substantial general historical work on Weihaiwei is Pamela Atwell's research monograph⁴ which covers the period from the commencement of the lease until the period after rendition. In this work, Atwell argued that Weihaiwei was run by 'British mandarins' - officials whose outlook led them to govern as though they were conservative Chinese officials steeped in Confucian tradition - who left reform to be pursued belatedly by the Chinese after the British had relinquished jurisdiction over the territory. Although Johnston's *Lion* devotes an entire chapter to civil litigation as an aspect of British rule, the subject of law and the administration of justice in the territory has, however, received scant attention.

¹ 'A Cinderella of Empire', *NCH*, vol. LXXXV, no. 2106, 20 Dec 1907, p. 701.

² R.F. Johnston, *Lion and Dragon in Northern China* (London: John Murray, 1910).

³ The main biographical works are Shiona Airlie, *Thistle and Bamboo* (Hong Kong: Oxford University Press, 1989); Shiona Airlie, *Reginald Johnston* (Edinburgh: NMS, 2001); Raymond Lamont-Brown, *Tutor to the Dragon Emperor* (Stroud, Gloucestershire: Sutton, 1999); Henry J. Lethbridge, 'Sir James Haldane Stewart Lockhart', *Journal of the Hong Kong Branch of the Royal Asiatic Society*, 1972, vol. 12, 55-88; R. Bickers, '“Coolie Work”', *Journal of the Royal Asiatic Society*, 1995, series III, vol. 5, 385-401; See also R. Soame Jenyns, 'Johnston, Sir Reginald Fleming 1874-1938', *Dictionary of National Biography* (Oxford: Oxford University Press, 1995); R. Bickers, 'Johnston, Sir Reginald Fleming (1874-1938)', *Oxford Dictionary of National Biography* (Oxford: Oxford University Press, 2004), [<http://www.oxforddnb.com/view/article/34212>, accessed 5 Dec 2005]; and S. Airlie, 'Lockhart, Sir James Haldane Stewart (1858-1937)', *Oxford Dictionary of National Biography* (Oxford: Oxford University Press, 2004) [<http://www.oxforddnb.com/view/article/63594>, accessed 5 Dec 2005]. See also S.M. Airlie, *An Ardent Collector* (Edinburgh, Merchant Company Education Board, 1982).

⁴ Pamela Atwell, *British Mandarins and Chinese Reformers* (Hong Kong: Oxford University Press, 1985).

Sources of data

The inattention to the subject of law and the absence of work by legal scholars is partly attributable to the absence of information from the courts of Weihaiwei in the primary records of the territory. The magistrates in Weihaiwei certainly heard many civil and criminal cases but court files, along with most of the Chinese archives of the government, were, in keeping with the practice of the Colonial Office, left in the territory upon rendition and appear not to have survived. The law reports of the *North China Herald and Supreme Court and Consular Gazette* ('the Herald' or 'the North China Herald') included a small number of cases from Weihaiwei's courts. In addition, a few cases are referred to in various minutes and despatches. The implications for legal research on Weihaiwei of this gap in sources are addressed later. The main sources used in the present study are as follows:

1. Despatches of the Colonial Office and other departments

The largest collection of relevant data is to be found in the records of the Colonial Office. Within these, despatches between the Commissioner of Weihaiwei and the Secretary of State for the Colonies⁵ provide much information, particularly on issues such as law-making in the territory, the policy of funding counsel for the defence and on the introduction of the jury. Records of the Foreign Office throw light on the question of how the status of Weihaiwei was determined, whilst War Office records, although not cited in this work, are useful for the military perspective on the value of Weihaiwei.

2. Records of the Weihaiwei Government

The Colonial Office records include a series of files from the office of the Commissioner of Weihaiwei.⁶ These contain local records of draft annual reports and files on perennial and particular subjects that were discussed amongst officials in Weihaiwei. This series is incomplete and contains only those files that were specially selected for removal to London upon rendition.⁷ It is fortunate that they were

⁵ These are in the series CO 521, Weihaiwei Original Correspondence.

⁶ These are in the series CO 873, Commissioner's Files for Weihaiwei.

⁷ Many of the government files were left behind in Weihaiwei. Proposals for the disposal of files were made by the Commissioner in 1923. Amongst the categories of files to be transferred to the Chinese

removed, since the rest of the government's local files have not, thus far, been found. The Commissioner's files thus form the most important of the sources of data on Weihaiwei and are used extensively in this work. As earlier mentioned and unfortunately for the legal scholar, court files, magistrates' 'Action Books',⁸ precedent books⁹ kept by individual magistrates or judges,¹⁰ and the files of district officers were not amongst the records brought back to London and have not, thus far, been traced. Article 48 of the Wei-hai-Wei Order in Council ('Wei-hai-Wei Order', 'Order in Council', or 'Order') required an annual report of the work of the courts to be submitted to the Secretary of State. It might have been hoped that these annual reports would contain detailed information. However, the annual reports submitted to the Secretary of State, though they often contained statistical summaries of the work of the courts, contained few particulars of the cases which passed through the courts.

3. *The North China Herald*

A small number of the cases heard in the courts of Weihaiwei were reported in the *North China Herald*. Most of these cases appear within the 'Law Reports' section of the weekly newspaper. Others are reported in the sections on Weihaiwei in the 'Outports' columns. These columns, from time to time, carried news from Weihaiwei. In all, thirty-two cases from the courts of Weihaiwei are reported. Fourteen of these were criminal cases heard in the territory's High Court. It might be thought that High Court cases would be more frequently reported. However, other sources indicate that not all such cases were reported. For instance, whilst all criminal cases involving a European defendant were reported, a fact no doubt connected with the readership of the newspaper, not all murder cases were. Reporting across the years was also uneven. In some years, more than a handful of cases was reported, whilst, in the years 1918-1923, not one case was reported. Aside from these unexplained irregularities, the quality of reporting also varied. Some reports were very cursory; others were more detailed. Despite these empirical deficiencies and in the absence of more complete

Government were records of all civil and criminal cases. See Blunt to SSC, 20 Apr 1923, CO 521/25 and the Secretary of State's approval.

⁸ WOIC, art. 52.

⁹ Walter, one of the magistrates, mentions that he kept such a book: Minute, 22 Jan 1910, CO 873/287.

¹⁰ Bourne, the Judge of the High Court, kept a 'Criminal Trials Note Book No. 1' which he mentioned in Report to H.H. Commissioner under Article 32 of the Order-In-Council 1901, 7 Sept 1912, CO 521/15.

sources, this collection of cases provides much important information which is not otherwise available.

4. Private papers

The private papers of James Lockhart, Commissioner of Weihaiwei from 1902 until his retirement in 1921, form an important source of data on legal policy and particular issues. The letters from Johnston to Lockhart are especially revealing. A number refer to questions of law and the work of his court - the Magistrates' Court of the South Division. It is from one such letter that we learn of the feelings harboured by both Lockhart and Johnston at the impending execution of a woman convicted of murder.¹¹ From another, we gain insight into the difficulties caused by land disputes. The Lockhart papers also reveal something of the conditions under which the Weihaiwei government carried out its many tasks. Had the private papers of Johnston also survived, we would have a further rich seam of data on Weihaiwei. Unfortunately, these papers were destroyed after Johnston's death.¹²

Principal aims, themes and structure of this work

The absence of a fuller collection of court judgments lessens considerably the feasibility of conducting an enquiry into issues which have been addressed in comparable contexts. It is, for instance, impossible to probe fully one of the questions asked in relation to the Straits Settlements, that of how far Chinese law and custom was modified, intentionally or inadvertently, by the common law courts.¹³ Similarly, it is not possible to examine the extent to which English law, *prima facie* applicable, was rejected by the courts on the basis that the local circumstances did not permit its application. Unlike other territories, we are unable to study in detail the reception of English law.

Yet, a study of the system of law in Weihaiwei is possible, albeit one different in emphasis to that which might have been carried out if all of the records of the territory were available. In particular, the available sources permit a reconstruction of law-making, the work of the magistrates, court procedure, and the relationship

¹¹ The trial of this woman and her co-defendant is discussed in ch. 5.

¹² The destruction of his private papers is told in Airlie (2001), 100.

¹³ See for instance Leong Wai Kum, 'Common Law and Chinese Marriage Customs in Singapore' in A.J. Harding, *The Common Law in Singapore and Malaysia* (Singapore: Butterworths, 1985), 175-194.

between the government and the governed through the territory's legal institutions and its law enforcement agencies. What emerges is a broader enquiry based on a range of primary sources in which more attention is paid to the context of the law - the administration and its resources, conditions in the territory and the territory's inhabitants - and the functioning of the law in practice. Such a reconstruction is the principal aim of this study.

The chapters that follow comprise three which discuss the foundational aspects of the territory's legal system, including the context for the lease of the territory and its circumstances during the lease, followed by four on particular aspects of the law, its administration or enforcement in the territory. Chapter 1 provides an overview of how the territory of Weihaiwei came to be leased by Great Britain and the way in which control over the territory was only gradually assumed. It also surveys the geo-political, demographic, social, administrative and economic contexts in which the territory's legal system and laws were inaugurated and, subsequently, put into practice. These contextual elements had an important influence upon the territory's legal system. Chapter 2 contains an exploration of the territory's constitutional instrument - the Wei-hai-Wei Order in Council, 1901. This Order provided the legal framework for the exercise of executive, legislative and administrative powers in the territory and contained many laws and provisions relevant to the local administration of justice. In considering the Order, chapter 2 attends to two concerns which received much attention during drafting, namely, the status of Weihaiwei, and the importance of local circumstances in finalising the arrangements for the territory. British foreign policy rather than legal argument determined that Weihaiwei was treated as Chinese territory over which the British exercised jurisdiction. The rest of the Order in Council provided the territory with laws and a hierarchy of courts for the administration of justice. The courts and the sources of law in Weihaiwei are examined further in chapter 3. The Order in Council provided a structure of courts which, even in the last decade of British administration, remained in advance of the needs of the territory. The combination of the absence of commercial development, the almost negligible number of European residents, and the power to delegate cases to the Magistrates' Courts meant that the High Court of Weihaiwei heard few cases and that the magistrates alone, in the minds of most of the inhabitants of the territory, represented the system of civil and criminal justice. One source of law in the territory was 'Chinese law and custom'. Such law was often applied by the magistrates, particularly in civil disputes. Although the Order provided

that the courts were to follow the procedure of their English counterparts, the procedure of the courts of Weihaiwei was, in fact, modified in accordance with the circumstances attending trials in the territory. Chapter 4 addresses the question of how law and order was maintained in the territory through an examination of the police force and the use of village headmen. Although the police force, very small during the first few years, was gradually expanded, the general shortage of government staff and the consequent heterogeneity of the duties of the police inspectors meant that the presence of the police was never overwhelming. In place of police, the government continued to rely on village and district headmen. Not only was this system of co-opting village authority inexpensive, it had the added appeal of being, or at least the government perceived it to be, an indigenous institution. This chapter is followed by one which explores the mechanisms and institutions used to try and punish offenders. Most trials were before a magistrate whose role was, by necessity, more that of an investigating magistrate. Unsurprisingly, the authorities in the territory were indifferent to the question of jury trials and legal counsel. The jury was introduced to the territory, in 1905 at the instigation of the Crown Advocate, but its use appears to have been rare. A fund to cover the costs of defence counsel for those charged with capital offences emerged after the territory's legal system had received adverse publicity following the trial of a Chinese man and woman for murder in 1912. Chapter 6 looks at the experience of dealing with civil disputes. Despite stretched resources, much attention was given to the resolution of disputes. The civil litigation processes were such that many ordinary inhabitants of the territory took their cases to court. The authorities in Weihaiwei, whilst encouraging the use of mediation, nonetheless placed importance on access to the magistrate for the purposes of civil litigation. The commitment to civil litigation appears to be linked with the use of Chinese law and custom and the interest of individual magistrates in such law. Hearing civil disputes was also a way of ensuring that the territory remained peaceful and enabled the government to keep in touch with the villages. The final chapter comprises a study of the law and policy responses of the authorities to the perceived social problem of suicide. The administration lamented the waste of life, particularly that of young women. Local officials displayed a depth of knowledge and understanding of suicide in the Chinese context but, paradoxically, the government's response to the problem was conservative.

This reconstruction of the legal system of Weihaiwei reveals the priorities of the government and its magistrates. The civil disputes between the Chinese

inhabitants of the territory, many of them petty, were one, as were the use of local headmen, minimal interference in the daily life of the village and allowing customs to evolve rather than effecting change through law reform. The territory's police force underwent gradual expansion but its strength was never used intrusively or oppressively. The near absence of a European community meant that the government could and did concentrate its efforts on the Chinese community without having to heed other conflicting demands. In law-making and enforcement, the authorities concentrated on dealing with the Chinese in ways they thought most suited to the local circumstances. It is also clear that the introduction to the territory of trial by jury, the presence of counsel, and adversarial procedure - regarded by some to be the cornerstones of 'British' justice - were not priorities.

What is also observable from looking at law and the administration of justice in Weihaiwei is that the legal system experienced by the Chinese in the territory was not the one a perusal of the Order in Council would suggest. In some ways, it was not too dissimilar from aspects of the legal processes they would have experienced under the Chinese authorities. Yet, the Order in Council contained no formal intention of continuing the pre-existing legal system nor, as would have been more likely, any acceptable part of it. It allowed for the application of Chinese law and custom in civil disputes but, in other disputes and in court procedure, English laws and procedures were introduced without particular allowance for the fact that the law was to be applied to Chinese nationals in a territory which remained a part of China.

In thinking of the contrasts between that which was introduced and that which was experienced, the schema used by Robert Seidman in studying the reception of English law in colonial Africa provides a helpful analytical structure.¹⁴ It is one which compares a legal system's 'outputs' with its 'inputs'. Between the two is a 'conversion process'. This structure was used by Seidman to assess the extent to which it was accurate to say, as others had done, that the law received in colonial Africa was 'basically' English.¹⁵ He concluded that the English law received in Africa was limited and narrow in form. Although a similar enquiry into the reception of English law in Weihaiwei is constrained by the limited legal records, Seidman's

¹⁴ Robert B. Seidman, 'The Reception of English Law in Colonial Africa Revisited', *Eastern Africa Law Review*, 1969, vol. 2, 47-85.

¹⁵ Seidman was referring to remarks made in H.F. Morris and James S. Read, *Uganda: The Development of its Laws and Constitution* (London: Stevens, 1966), 237; and Anthony Allott, *Essays in African Law* (London: Butterworth, 1960), 7.

triptych is nevertheless of some use. It encourages the viewing of the system of law in Weihaiwei as a product of a process which converted a legal system that was a break from the pre-existing system to one which was less unfamiliar to the people of Weihaiwei. It sharpens our observation of the transformation undergone by the law. To what extent was the legal system of Weihaiwei, as experienced by the territory's inhabitants (the 'outputs'), a product of the Order (the 'inputs') as it was transformed by the Colonial Office, the local authorities in Weihaiwei, and other possible pressures and influences (the 'conversion process')? What general or particular, external or internal, global or local, factors may have been responsible for the contours of the system of law in Weihaiwei? Was there a single overriding factor to account for its conversion? Such questions, important as they are, underlie but do not occupy the centre of this work. In discussing the general administration of the territory, Pamela Atwell found the lack of funds and the admiration for the old China of two of the territory's longest serving officials - Lockhart and Johnston - difficult to ignore.¹⁶ So too were these important in shaping the law and the administration of justice in Weihaiwei. There were other factors: the geo-political considerations of the day which accounted for the decision of the British Government to treat Weihaiwei as Chinese territory and which discouraged expenditure on it; the uncertainty over the duration of the lease; the administration's close proximity to the people of the territory; and the pragmatic approach in which measures were taken with local conditions kept firmly in view. These several factors and influences are explored in the next chapter.

¹⁶ This is a theme of her monograph on Weihaiwei: see Atwell (1985).

CHAPTER 1

WEIHAIWEI: FROM RELUCTANT ACQUISITION TO LONG TWILIGHT

The leasing of the territory

A Foreign Office memorandum summarising the key events in the history of Weihaiwei described how, in 1898 and in circumstances not of its choosing, Great Britain had, 'somewhat reluctantly',¹ acquired the lease of the territory. During the 19th century, Britain's interests in China lay in the extension of her trade there. When she had attained a position of dominance among other foreign powers in her commercial relations with China, the maintenance of this position and China's political integrity became her two main aims.² The latter aim was vitally important if Britain was to enjoy the treaty rights it had earlier wrested from China. By the end of the 19th century, the situation had altered to such an extent as to require a change in attitude towards these aims and the way in which they were to be achieved. Japan had occupied Weihaiwei in 1895 after its victory in the Sino-Japanese War. By 1898, China had almost repaid its large war debt to Japan and Japanese forces were preparing to leave Weihaiwei. The repayment of the debt had been financed by loans from Germany, Russia and France in the so-called 'Triple Intervention'. In return for the loans, Russia acquired rights in the Liaotung peninsula,³ whilst France obtained rights in Kwangchowwan. Germany, the third of the powers, had long harboured an ambition to find a foothold in China. By the end of the 19th century, Germany's commercial presence in China exceeded that of France and Russia, and its nationals there made up the second largest group of Europeans. By the time a suitable port for Germany had been identified, too much time had elapsed since the Triple Intervention for its use as a ground for the demand of the port. However, the murder of two German missionaries on 1 November 1897, provided the excuse to seize Tsingtao.

¹ 1929, Memorandum on the Rendition of Weihaiwei [undated and closed until 1980], FO 676/311.

² For a cogent discussion of the pressures which shaped British policy in China towards the end of the 19th century see L.K. Young, *British Policy in China, 1895-1902* (Oxford: Clarendon Press, 1970), 2-15.

³ Russia was granted Port Arthur, Talien and the surrounding territory in the peninsula.

This seizure culminated in the lease of Kiaochou by China to Germany in March 1898.⁴ Perhaps conscious that neither France nor Russia had asked for outright cessions of territory as compensation for their part in the Triple Intervention, the German government pressed the Chinese instead for a 99-year lease of Kiaochou.

As this scramble for leases and other concessions unfolded, concern grew over the threat to Great Britain's pole trading position in China.⁵ The need to assert British interests more positively was perceived. However, although Great Britain was interested in securing a naval base or, at the very least, the right to occupy territory in the north of China, it did not desire actual territory and its accompanying administrative burdens. The British Government had sought to persuade Russia not to lease Port Arthur which, they argued, had no commercial use. In return, Great Britain would not seek a port in the area. Concerned with the threat posed by Russia, the Chinese Government itself had, at first, offered Weihaiwei to Britain. The British Prime Minister, The Marquess of Salisbury, and Sir Claude MacDonald, the British Minister at Peking,⁶ responded by seeking an undertaking from China not to alienate Weihaiwei upon the departure of the Japanese. Aside from this possibility, there was also the possibility that Germany, already in possession of Shantung as a sphere of influence, would occupy Weihaiwei. Great Britain also hoped Russia would not fortify Port Arthur and that this port and Talien would be kept open to foreign trade. By March 1898, it appeared almost certain that Port Arthur would be fortified and closed. Negotiations with China over Weihaiwei ensued but, by this time, China was unwilling to lease its last remaining naval port. It offered instead to make Weihaiwei a treaty port with special facilities for British ships.⁷ The British, by now fearing the partition of China, replied that they needed a naval base to offset the presence of Russia in Port Arthur.⁸ In the event, pressure had to be brought to bear on China

⁴ The treaty for the lease of Kiaochou was signed on 6 March 1898.

⁵ For a discussion of how the growing competition faced by British interests led to the search for a 'positive policy', the matters taken into account when considering the lease of Weihaiwei and Cabinet discussions see Young, 65-76.

⁶ The full title of the post was Envoy Extraordinary and Minister Plenipotentiary to the Emperor of China and also to the King of Corea.

⁷ No. 5, MacDonald to Marquess of Salisbury, 16 Apr 1898, Extract, p. 2, Eastern No. 72, CO 882/6/4.

⁸ According to I.H. Nish, the Royal Navy played an insignificant role in the decision to lease Weihaiwei. See I.H. Nish, 'The Royal Navy and the Taking of Weihaiwei, 1898-1905', *The Mariner's Mirror*, 1968, vol. 54, 39-54. This article endorses the view apparent from the primary records that the decision to lease the territory was a political decision.

before an agreement was reached in early April.⁹ The formal convention leasing Weihaiwei - 'The Convention between Great Britain and China Respecting Wei-hai Wei' ('the Peking Convention') - was signed on 1 July 1898 and came into force on that date.¹⁰

Like Germany before it, Britain deliberately chose to lease the territory rather than seek more permanent tenure. By merely leasing Weihaiwei, the Foreign Office intended to show that Britain was not exceeding Germany or Russia in its demands on China, since both Germany and Russia held leaseholds. The leasing of the territory for 'so long as Port Arthur shall remain in the occupation of Russia' was also deliberate. Although Russia's lease of Port Arthur was for 25 years, the Foreign Office was concerned that Russia might try to convert it into a longer arrangement. In such an event, having to renegotiate the lease of Weihaiwei would be inconvenient.

Later, similar geo-political considerations persisted in spite of shifts in the regional balance of power. When Russian authorities departed from Port Arthur in 1905, Germany's continuing occupation of Kiaochow was the excuse given for the continuation of the Weihaiwei lease. In 1916, Germany having withdrawn from Kiaochow, Japan's presence there was invoked to justify retaining Weihaiwei.

The leased territory and its inhabitants

The leased territory, measuring 288 square miles, comprised the island of Liukung and the adjacent mainland area. Liukung was small - 7/8th of a mile at its widest, 2¼ miles long and with 5½ miles of coastline. The mainland portion of the territory consisted of a coastal strip measuring 10 miles wide and 30 miles long, starting north of the island and curving out to its south and southeast. Beyond this lay a neutral zone within which Chinese administration was not to be interfered with but which the British could use for defensive purposes.

Weihaiwei was not a pre-existing administrative unit. It comprised territory belonging to two adjacent counties or *xian*. The eastern third had been a part of Jung-

⁹ For further details see Pamela Atwell, *British Mandarins and Chinese Reformers* (Hong Kong: Oxford University Press, 1985), 10, and the source she cites. See also 8-10 for her discussion of China's attitude towards the lease and for her assessment of the conclusions drawn in E-tu Zen Sun, 'The Lease of Wei-hai Wei', *Pacific Historical Review*, 1950, vol. 19, 277-283.

¹⁰ Parliamentary Paper, Treaty Series, no. 14 (1898). Signed also in Chinese. Ratifications were exchanged in London on 5 October 1898. Although the treaty required ratification, it also provided expressly that the convention would come into force upon signature. The text of the Peking Convention is reproduced in the appendix to this work.

ch'eng *xian*, whilst the remaining two thirds had been a part of Wen-teng *xian*. These two counties were among ten counties belonging to the prefecture of Tengchou, which had a capital city bearing the same name. Tengchou was one of 107 prefectures in Shantung province, which had its provincial capital in Tsinan. The walled city of Weihai, which lay within Wen-teng *xian* and in which there was a Sub-Magistrate's office, was the subject of a special clause in the lease convention. Under this clause, it was agreed that 'Chinese officials shall continue to exercise jurisdiction except so far as may be inconsistent with naval and military requirements for the defence of the territory leased.' Between 1398 and 1735, the walled city of Weihai had formed the headquarters of a military district known as Weihaiwei but this district was later absorbed by the civil administration of Wen-teng *xian*.

	Males	Females	Total
Chinese	77,656	69,184	146,840
Europeans	160	55	215
Indians	3	Nil	3
Koreans	16	12	28
Japanese	25	22	47
Total	77,860	69,273	147,133

Figure 1. Population figures from the 1911 census¹¹

	Males	Females	Totals
Chinese	80,953	73,463	154,416
Europeans	124	53	177
Indians	59	Nil	59
Koreans	5	Nil	5
Japanese	5	1	6
Total	81,146	73,517	154,663

Figure 2. Population figures from the 1921 census¹²

No population figures for the territory at the inception of the lease were known. One rough estimate put the population at 100,000.¹³ In 1901, registers were distributed to 50 villages. Based on the returns, the population of the whole territory

¹¹ Lockhart to SSC, 15 Aug 1911, Report of Census of Weihaiwei 1911, CO 521/12.

¹² These figures are taken from the draft Census Report of 1921, CO873/649.

¹³ See for instance, Memorandum on Wei-hai Wei, by Colonel J.F. Lewis, 9 March 1900, enc. in No. 18, Eastern No. 72, CO 882/6/4 which also said that some had estimated the population to be as high as 300,000.

was estimated at 127,966.¹⁴ Statistics recorded by census in 1911 and 1921¹⁵ are shown in the tables above.

The territory had over 300, mostly single-surname, villages.¹⁶ Each had influential senior members and a headman. Village houses were built of adobe brick, enclosing a floor of beaten earth and containing a room with a *kang*.¹⁷ Most of the villages were dirty and laid out haphazardly but many of them possessed a temple, a village school and a permanent theatre stage. Villages were also over-crowded, a feature likely to have been conditioned by the topography of the leased area.¹⁸ A mountainous interior and a sandy coastline squeezed the inhabitants into the remaining 40% of land suitable for farming.

Aside from the small community of fishermen in the port of Mat'ou, most villagers were engaged in the farming of small plots of land. As the territory's soil was not the most fertile, cultivable land was made to produce as much as it could. Crops such as wheat, barley, peanuts, sweet potatoes, maize and beans were grown intensively in a system of multiple cropping on the same piece of land.¹⁹ Even hillsides were cultivated with scrub oak to feed worms used in the silk industry.

As can be seen from Figure 1, Figure 2 and Figure 3, the number of non-Chinese living in the territory accounted for a very small percentage of the population - less than 0.2% in 1911 and 1921. The Europeans amongst the non-Chinese population accounted for approximately 0.11% in 1921; 44 of the 177 were either schoolboys or infants. Also important when examining the administration of the territory is the fact that the majority of the Europeans - 103 of the 177 - lived on the

¹⁴ Dorward to SSC, 1 Apr 1901, CO521/2: The figure excludes military and naval personnel in the territory on the census date.

¹⁵ A draft of the 1921 Census Report may be found in CO 873/649.

¹⁶ According to one author, there were 330 villages: C.E. Bruce-Mitford, *The Territory of Wei-hai-Wei* (Shanghai: Kelly and Walsh, 1902). In the 1912 census, 218 surnames were recorded, with 17 surnames representing 75% of the population: see CO 521/12.

¹⁷ This is a cement structure which served as a bed and stove.

¹⁸ As the 1921 census report expressed it:

'A family of 12 persons, with a ploughing team of a cow and a small donkey and a couple of pigs can subsist on a farm of 15 mou, or 2.5 acres. This is the equivalent of a population density of 3072 persons, 256 donkeys and 512 pigs per square mile of cultivated land, or to put the illustration in a form more easily understood, a 40 acre farm would support 192 persons, 16 cows, 16 donkeys, and 32 pigs': Report of Census of Wei Hai Wei 1921, CO 873/649.

¹⁹ The multiple cropping was described thus: 'Wheat, ready for the sickle, beans, three parts grown, and cotton just planted. Or, wheat and sorghum, with beans sprouting': Report of Census of Wei Hai Wei 1921, CO 873/649.

island of Liukung. Most of the Europeans were connected with the government, the church or the various uniformed forces. Those connected with the church outnumbered merchants - there were two clergymen, nine nuns and six lay missionaries to the three merchants - who might otherwise have been an influential lobby.²⁰

	Male	Female	Total
British	44	28	72
German	2	2	4
French	1	1	2
Italian	1	3	4
Canadian	1	-	1
Belgian	1	2	3
Spanish	-	1	1
Hungarian	-	1	1
Korean	5	8	13
Total	55	46	101

Figure 3. Figures for the non-Chinese population at the end of 1927²¹

Assumption of control

On 24 May 1898, after the lease of the territory had been agreed but before the signing of the Peking Convention, a ceremony took place on an island west of Liukung island to mark the impending lease. Present at the ceremony were British naval officers and men as well as Chinese sailors and other officials. From that time until further arrangements were made, the interim authority over the area to be leased appears to have consisted of the two newly appointed British Commissioners - Captain King-Hall of HMS *Narcissus* and L.C. Hopkins, British Consul at Chefoo - and two Chinese Commissioners. In the following month, some 800 armed sailors, including a brass band, landed on the mainland at Mat'ou and marched through several of the villages within easy reach. The signing of the Peking Convention a few weeks later on 1 July, appears not to have been marked in the territory until 16 July.

²⁰ All of the population shown in Figure 3 with the exception of the British and the Germans, were in Weihaiwei in connection with the Roman Catholic Mission and Convent: Annual Report for 1927, CO 521/41.

²¹ Annual Report for 1927, CO 521/41.

On this day, there was a ceremony on the mainland during which the Chinese flag, lowered the day before, was replaced by the Union Jack.²² It is not clear why the Chinese flag remained until then; Pamela Atwell suggests that it was attributable to the policy of British officials to assume control of the territory gradually.²³

The authorities were certainly slow in bringing the lease to the attention of the local people. Neither the Chinese nor the British issued any proclamation informing the people of the change in authority or in the laws applicable in the leasehold.²⁴ A proclamation made by the Governor of Shantung in late July or early August 1898 stated that the territory had been leased for the mutual advantage of England and China. However, according to a newspaper report, the proclamation included a statement that the government of the people continued to be in the hands of 'the usual authorities.'²⁵ To the relief of the British side, this proclamation was not widely circulated.

One reason for the delay in taking over control of the territory was the agreement that, until the boundary of the leased territory had been marked, British authority should be exercised only on the island of Liukung. Marking out the boundary was of significance given the most general terms - 'a belt of land 10 English miles wide along the entire coast-line of the Bay of Wei-hai-wei' - in which the mainland part of the territory leased was defined in the Peking Convention.²⁶ Boundary demarcation was to produce a difficult episode in the lease of Weihaiwei. Three Boundary Commissioners had been appointed by the Tsung-Li Yamen, the Chinese office of foreign affairs, to carry out the work on behalf of the Chinese Government.²⁷ On their arrival in the territory, the Chinese Boundary Commissioners had met with village headmen without the permission of Colonel Dorward, the then Commissioner of Weihaiwei. Dorward's insistence on being included in any

²² *The Illustrated London News*, 16 July 1898, p. 96.

²³ Atwell, 17. She gives no support for this statement and none has been found in the records.

²⁴ *NCH*, vol. LXI, no. 1613, 4 July 1898, p. 17. The report in *The Illustrated London News*, 16 July 1898, p. 96 mentions that a 'proclamation of occupation' was read out by Captain King-Hall but no details were reported. See also Miscellaneous Records, enc. no. 2 in China Letter No. 230, King-Hall and Hopkins to Seymour, 'Proceedings of British Commissioners for taking over Wei-hai-wei', 2 June 1898, p. 7, Miscellaneous Records, Cabinet Papers 1/2/410.

²⁵ *NCH*, vol. LXI, no. 1619, 15 Aug 1898, p. 293.

²⁶ For the text of the Peking Convention see appendix to this work.

²⁷ Tsung-Li Yamen to MacDonald, 9 Feb 1900, enc. to No. 30, McDonald to Marquess of Salisbury, 11 Feb 1900, Eastern No. 72, CO 882/6/4.

discussions was ignored and secret meetings were held in which the headmen were told that the British intended to collect taxes in an area over which they had no jurisdiction. Dorward also reported that the Chinese Boundary Commissioners gave excuses for wishing to delay the demarcation of the boundary. Work did, in fact, begin on the appointed day but, a few days later, the villagers involved in the secret meetings made a show of strength and, for fear of trouble, the Chinese Commissioners recommended that the work be stopped. Dorward's offer of British protection was declined and the Governor of Shantung telegraphed him to insist that the demarcation work be stopped. Dorward replied that he would inspect the situation but refused to halt the work, partly due to his strong suspicion that the Chinese Boundary Commissioners had stirred up the trouble. Shortly afterwards and continuing on the following day, villagers attacked the British Boundary Commissioners. Men of the 1st Chinese Regiment,²⁸ who were nearby at the time, were sent to respond to the attackers. In the skirmishes, thirty Chinese were killed, whilst five men on the British side were injured.²⁹ After this incident, the Chinese Commissioners refused to continue their work and left the territory escorted by Chinese troops. Dorward then instructed the British Boundary Commissioners to go ahead with the work³⁰ and, by May 1900, boundary stones, 37 in all, bearing the words 'leased territory' had been put in place. By the end of that month, the Governor of Shantung had written to the Commissioner of Weihaiwei agreeing to the demarcation.³¹ Adjustments, where the boundary cut through three villages, were later sought by the British from the Chinese Government but not obtained.

As a result of the delay in determining the boundary, government by the British was, for some time, little felt in the larger part of the area leased. On Liukung, a British naval officer had set up a police force almost from the start of the lease. By the autumn of 1900, at the latest, a European police inspector, one Chinese sergeant

²⁸ The Regiment's proper title was the Chinese Regiment of Infantry, but it was also known as the Wei Hai Wei Regiment or the 1st Chinese Regiment. It never had battalions other than its first. For further information on the 1st Chinese Regiment, see Alan Harfield, *The British and Indian Armies on the China Coast 1785-1985* (Farnham: A. and J. Partnership, 1990).

²⁹ No. 36, MacDonald to Marquess of Salisbury, Telegram, 9 May 1900, referring to a telegram from Dorward: Eastern No. 72, CO 882/6/4. Other facts from another telegram from Dorward are referred to in No. 39, MacDonald to Marquess of Salisbury, 10 May 1900, Eastern No. 72, CO 882/6/4.

³⁰ His instructions were later approved by the War Office: Secretary of State for War to Dorward, telegram, 10 May 1900, No. 41, Eastern No. 72, CO 882/6/4.

³¹ Governor Yuan to Commissioner, 31 May, Shantung, 1900, Enc. C in Swettenham Report, Swettenham to SSC, 26 July 1900, CO 521/1, p. 717.

and eleven Chinese constables policed the island.³² Buildings belonging to the Chinese Government were requisitioned and put to various uses. In the previous year, the War Office and Admiralty had purchased all privately owned land and dwellings, but allowed the previous owners to continue living on the island as tenants of the government.³³ In early 1900, the Admiralty appointed Commander Gaunt, Royal Navy, as Cantonment Magistrate for the island to, inter alia, supervise the police force, deal with breaches of regulations, collect boat licence fees and other dues, and keep the island clean, improve the streets and so on.

On the mainland, in contrast, the town centre of Mat'ou, in which there were some small Chinese businesses, lagged behind in being policed and administered by the British. Troops of the 1st Chinese Regiment, quartered at Mat'ou since the regiment was raised in early 1899,³⁴ marched through the streets almost daily and assisted in keeping order. In mid-1899, a municipal council was established to bring sanitary improvements to the town. Hawkers and stall keepers were restricted to particular areas, an unsanitary slaughterhouse was closed down and the town's streets were cleared of some of the houses, widened and paved.³⁵ Such was the progress that, by the autumn of 1899, a visitor could remark with some pride at the 'signs of the speedy coming of that order and smart appearance that mark out the British possessions all the way East.'³⁶ This was in considerable contrast to what was observed by a missionary eight months earlier:

Ma-t'ou is not a pleasing village. Its situation is pleasant, but it is dirty, smelly, and disreputable. It has only one long, straggling street, without interest or beauty of any kind, inhabited mainly by sampan men.³⁷

Even so, in comparison with the urgency with which the Germans had established themselves in Kiaochou, Captain Wingate of the 1st Chinese Regiment, after visiting

³² No. 73, War Office to Treasury, 28 Nov 1900, enclosing Acting Military Commissioner (Prendergast, Colonel) to War Office, 20 Sep 1900, CO 882/6/4.

³³ The Peking Convention allowed the British authorities to purchase 'at a fair price' land for 'fortifications, public offices, or any official or public purposes'.

³⁴ Memorandum of Col. J.F. Lewis, dated 9 March 1900, written at the request of the Colonial Office, CO 521/1, p. 342.

³⁵ *NCH*, vol. LXIII, no. 1671, 14 Aug 1899, p. 326.

³⁶ 'Y', 'A Visit to Weihaiwei', *NCH*, vol. LXIII, no. 1675, 11 Sept 1899, p. 531.

³⁷ This quotation is taken from Atwell, 20, where the following source is cited: Reverend Roland Allen, 'Weihaiwei', *North China and Shantung Mission Quarterly Paper: Land of Sinim*, vol. 6, no. 4, Jan 1899, p. 66.

that place, said that 'Weihaiwei cuts but a sorry figure beside Kiaochow.'³⁸ In a letter written in January 1900, he reported that the Germans had begun constructing a drainage system, built numerous roads, laid the foundations for an extensive rail network, cleared away a Chinese village and re-housed its occupants in a model village elsewhere, and constructed a number of 'beautifully built villas', 'German looking Chateaux' and an imposing hotel to rival any in Shanghai. In Weihaiwei, aside from some road improvements on Liukung and the construction of two forts, nothing much had been done. Moreover, 'Everything is being done very much on the cheap', he observed.³⁹ By the time a report on the civil administration for the period 1899 to 1901 was written by the then Acting Commissioner of the territory, there was only slightly more to report - eighteen miles of road had been built, three miles of mule tracks had been improved and five miles of road into the interior were under construction.⁴⁰

Given the slow progress in establishing British rule, it is not surprising that Chinese officials continued to demand the payment of taxes from the people of the territory.⁴¹ As late as March 1900, Colonel J.F. Lewis, in a memorandum written at the request of the Colonial Office, reported that the Chinese authorities were 'probably still collecting taxes'.⁴² In December of that year, the British authorities collected the land tax for the first time. In preparation for this, regulations, drafted in consultation with the magistrates of Wen-teng and Jung-ch'eng and with officials appointed by the Governor of Shantung, were drawn up which allowed for the collection of tax in accordance with the tax-payer's place of residence, rather than where his land was situated. The tax on land outside the lease thus collected by the British authorities was then transferred to the Chinese authorities and vice versa as was also provided by the regulations.⁴³ These regulations were designed in large part to keep Chinese tax collectors out of the leased area.

³⁸ Extracts from a private letter from Captain A.W.S. Wingate, 1st Chinese Regiment to Captain E.W.M. Norrie, Wei-hai-wei, January 1900', CO 521/1.

³⁹ *Ibid.*

⁴⁰ A General Report on the Civil Administration of the Territory of Wei-hai-wei, 1899-1901, 31 March 1902, enc. to No. 96, G.T. Hare to Acting Commissioner Cowan, 15 Apr 1902, Eastern No. 75, CO 882/6/7.

⁴¹ See Dorward to MacDonald, 23 May 1900 and Barton to MacDonald, 18 March 1900, CO 873/4.

⁴² Memorandum of Weihaiwei, 9 March 1900, Colonel J.F. Lewis to Colonial Office, CO 521/1.

⁴³ No. 28, Commissioner Dorward to Chamberlain, 1 June 1901, Enc. 1, Eastern No. 75, Confidential Print, FO 882/6/7.

Law, order and the administration of justice prior to the Wei-hai-Wei Order in Council

The delay in taking control of the territory was accompanied by confusion over questions of jurisdiction and applicable law. At least two questions were not considered fully in the period between the signing of the Peking Convention and the drafting of the Wei-hai-Wei Order in Council: which court or courts had jurisdiction over criminal and civil cases and what law was to be applied in the cases over which jurisdiction was claimed by a British court or tribunal. It was only later that the fundamental question of whether the Chinese of the territory continued to be subject to the Chinese authorities was addressed. In practice, the cantonment magistrate dealt with crimes committed on the island; those suspected of crimes on the mainland part of the leased territory were turned over to the Chinese authorities after being arrested by the British authorities. The British authorities at first encouraged village headmen to deal with civil disputes as they had done, it was assumed, prior to the lease. Later, when the district officer heard civil disputes, he did so applying Chinese law and custom.⁴⁴

Had there been any discussion of the applicable law, no clear answer would have been found. There were settled principles on the extent to which indigenous laws and English law were applicable in a colony.⁴⁵ In these principles, the mode by which the territory was acquired, whether there were already laws in existence in the territory at the time of acquisition, and whether such laws - indigenous laws - were contrary to the laws of Christian countries were all determinative factors. The primary distinction was between ceded and conquered territories and colonies acquired through settlement. In ceded and conquered territories which already had their own laws, those laws, subject to some qualifications, remained in force until altered by the Crown. The main qualification to the continuation of indigenous laws was the abrogation *ipso facto* of laws which were 'based on religious or ethical principles inconsistent with European civilisation' - sometimes referred to as 'barbarous laws'.⁴⁶

⁴⁴ A General Report on the Civil Administration of the Territory of Wei-hai-wei, 1899-1901, 31 March 1902, enc. to No. 96, G.T. Hare to Acting Commissioner Cowan, 15 Apr 1902, Eastern No. 75, CO 882/6/7.

⁴⁵ For relevant authorities see Earl of Halsbury, *Laws of England*, vol. XXV (London: Butterworth, 1913), 565-573, relied on here for a summary of the main principles, together with Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens, 1966), 533 and 540-542.

⁴⁶ The abrogation *ipso facto* was subject to any agreement by the Crown to allow such laws to continue.

Until the enactment of other laws, the gap left by such abrogation was to be filled with 'natural equity'.⁴⁷ In the case of settled colonies, the settlers took with them so much of English law as was applicable to their situation and the circumstances of the infant colony. These laws governed until such time as the Crown exercised its prerogative powers to give to the settled colony a legislature.⁴⁸ These common law rules relating to colonies did not refer to protectorates or protected states, nor to leases akin to the Weihaiwei lease, the last category being unknown when the principles were stated. In the opinion of Roberts-Wray, the position in protectorates and other types of territories should be little different from that in territories acquired by cession or conquest.⁴⁹ It is certainly arguable that the principles developed for colonies, although usually articulated with reference to the modes by which a colony is acquired, give at least equal weight to the presence or absence of civilised laws under some form of organised government. This view of the principles would make the rules relating to colonies applicable to territories such as Weihaiwei. Being a territory in which there was a system of laws, those laws would, subject to the abrogation of unacceptable laws *ipso facto*, remain in force till abrogated. No act of abrogation appears to have been made prior to the passing of the Wei-hai-Wei Order in Council in 1901. However, some Chinese law and custom may have been replaced by magisterial orders or other *ad hoc* measures discussed below. The Foreign Jurisdiction Act, 1890,⁵⁰ confirmed the Crown's powers, having obtained jurisdiction in foreign territory by the means of treaty, capitulation, grant, usage, sufferance and other lawful means, to 'hold, exercise, and enjoy' jurisdiction 'in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory.' However, this would not have been of assistance whilst the question of whether Weihaiwei was, as a matter of municipal law, merely Chinese territory over which jurisdiction was to be exercised had yet to be addressed. As we shall see, this question was answered only during the later drafting stages of the Wei-hai-Wei Order in Council.⁵¹

⁴⁷ *Calvin's Case* (1608) 7 Co. Rep. 1a.

⁴⁸ The Crown's powers extend to the creation of a constitution for the settled colony but not to the making of ordinary laws for it: see discussion of this point in Roberts-Wray, 151.

⁴⁹ Roberts-Wray, 543.

⁵⁰ 53 & 54 Vict. c. 37.

⁵¹ This is discussed in ch. 2.

Without an Order in Council and without clear principle to follow, officers adopted measures as they saw fit. In the autumn of 1898, Vice-Admiral Seymour reported that, soon after taking possession of the territory and 'having received no instructions for [his] guidance in the matter', he placed Liukung under 'Naval (or Martial) Law'. Commander Gaunt, who, in February 1900, was appointed Cantonment Magistrate and who, later, became the Commissioner for the whole territory, dealt summarily with all offences against law and order. Seymour observed with relief that, given the makeshift nature of the arrangements in place, 'fortunately' no serious crimes had been committed.⁵² In respect of the mainland, the Vice-Admiral reported that the villagers there continued to be subject to the authority of their respective village headmen and that no changes in this regard were proposed. One reason for writing to the Secretary to the Admiralty was for advice as to what action to take in the case of offences committed by those who were neither British nor Chinese subjects, offences committed by British subjects and serious offences such as murder committed by the Chinese. The Law Officers advised that, unless a judge was appointed, the Officer in Command should administer and enforce the law. He should deal with all crimes committed by British subjects and subjects of countries other than China in accordance with naval law.⁵³ Such offenders should not be sent to the British or other Consuls in Chefoo. Further, the Officer Commanding should deal with crimes committed by the Chinese, 'having regard to their usages; but probably in most cases the headmen of the villages will be able to deal with Chinese crime'. Naval and military personnel in Weihaiwei should, however, remain subject to naval and military law.⁵⁴

This advice was given in the context of the administration of the island. On the mainland, two examples from the spring of 1899 indicate that the British authorities, probably because of the agreement to limit the exercise of their authority to Liukung until the territory's boundary had been marked, were still referring cases to the Chinese authorities. The first was an incident in which a number of deaths from

⁵² Seymour to Secretary of the Admiralty, 'Alacrity', 12 Dec 1898, FO 17/1664.

⁵³ The main sources of such law were the penal code found in the Naval Discipline Act (29 and 30 Vict. c. 109), as amended by the Naval Discipline Act, 1884 (47 and 48 Vict. c. 39) and the civil code of the navy contained in the relevant regulations and instructions established by Order in Council. The naval penal code not only covered breaches of naval discipline and duty specified in the Naval Discipline Act but also included offences against ordinary criminal law. That naval law did not, by and large, apply to civilians was only identified as a problem later. See the beginning of ch. 2.

⁵⁴ Report of the Law Officers (Richard Webster and Robert Finlay), 22 Feb 1899, FO 17/1664.

falling debris occurred when villagers looted a partially demolished building. British officials took action only through the Chinese officials in Weihai City. There, a Chinese Sub-Magistrate remained in office under the clause in the Peking Convention which provided that 'within the walled city of We-hai-wei, Chinese officials shall continue to exercise jurisdiction, except so far as may be inconsistent with naval and military requirements for the defence of the territory leased.' The headmen of the relevant villages were made to sign declarations against any repetition of such behaviour.⁵⁵ In the second example, brothels and opium dens had reopened for business despite an order to the contrary given by the Magistrate, Colonel Bower. After some inaction, the men of the 1st Chinese Regiment raided the premises but turned the shop owners over to the Sub-Magistrate of Weihai City. Such action did not escape remark in the *North China Herald*, whose correspondent was critical of the British authorities: 'Having broken British law they should surely be dealt with by the British executive. For since they have not broken Chinese law, how is a Chinese official to punish them?' There was also the question of 'squeeze'. 'Need H.B.M.'s Commissioner help Mr Wang [the Chinese magistrate] to make hay?',⁵⁶ he continued.

At the end of May 1899, Commander Gaunt wrote to Vice-Admiral E.H. Hopkins saying that it was 'imperative that further steps should be taken for the proper governing and maintenance of law and order upon the mainland of the leased territory.'⁵⁷ It appears, from this same communication, that Gaunt, as magistrate, himself found unsatisfactory the arrangement whereby criminal cases involving the Chinese were put in the hands of the Chinese Sub-Magistrate of Weihai City. The possibility of appointing Chinese to be magistrates answerable to the Commissioner was raised, as was the need for European mounted troops and a European resident magistrate on the mainland, should the territory attract European residents, as was then still expected. On 14 December 1899, the first District Officer and Magistrate for the entire mainland area of the territory - Sidney Barton - arrived in Weihaiwei.⁵⁸ Barton, a Consular Service official in China, toured the villages in his jurisdiction soon after taking up his post.⁵⁹ It was not until 1 April 1901, however, that a second

⁵⁵ *NCH*, vol. LXI, no. 1613, 4 July 1898, p. 17.

⁵⁶ *NCH*, vol. LXII, no. 1660, 29 May 1898, p. 962, at p. 964.

⁵⁷ Gaunt to Vice-Admiral E.H. Hopkins, 30 May 1899, FO 17/1664.

⁵⁸ Enc. to No. 20, Dorward's proposals for the Civil Administration of the Leased Territory, 7 Jan 1900, Eastern No. 72, CO 882/6/4.

official, an Assistant Commissioner, was appointed by the then Commissioner, Colonel Dorward.

Although some progress had been achieved in the administration of justice by the division of the mainland area into two magistracies - one under the Civil Magistrate, Sidney Barton, and the other under Colonel Bower,⁶⁰ no proclamation informing the people of how crimes were defined or what acts were punishable by the new authorities had been made. In such a situation, in the autumn of 1900, some villagers, rather than reporting the crimes to the British authorities, reported to the Magistrate of Wen-teng two deaths resulting from a scuffle occurring in the leased territory. The suspects were eventually turned over to the British by one of the province's three *daotai* (circuit heads) whose headquarters was in Chefoo. The villagers reportedly gave the leniency of British punishments as the reason for their actions. Three men were sentenced to death for their responsibility in the deaths and executed by firing squad. To send a message that the British were in control, a fine was imposed on the entire village.⁶¹

By 1901, the Assistant Commissioner, resident at Mat'ou, was regularly hearing both civil and criminal cases involving the Chinese, whilst the Commissioner dealt with cases on the island and any appeals from the decisions of the magistrates. During that same year, five new provisions concerning jurisdiction over criminal and civil cases were added to the regulations concerning the collection of tax mentioned earlier.⁶² These regulations provided for British and Chinese officials jointly to try serious crimes in which persons resident within or without the territory were concerned. Punishment was to be 'according to the law of [the convicts'] district'.⁶³ The new regulations included rules for the handing over of offenders from Weihaiwei who took refuge outside the territory and vice versa. Neither authority was to send runners across the border to make arrests. If Chinese officials arrested residents of the leased territory, British officials were to be notified immediately.⁶⁴ In civil disputes,

⁵⁹ 'The Situation at Weihaiwei', *NCH*, vol. LXIV, no. 1705, 11 Apr 1900, p. 649, at p. 650.

⁶⁰ *NCH*, vol. LXIV, no. 1697, 14 Feb 1900, p. 263. Colonel Bower's division had thirteen of the principal villages, whilst Barton's contained the rest of the villages.

⁶¹ *NCH*, vol. LXV, no. 1731, 10 Oct 1900, p. 763.

⁶² The whole set of regulations including the five new provisions are to be found in Dorward to SSC, 1 June 1901, CO 521/2.

⁶³ Regulation IX, Dorward to SSC, 1 June 1901, CO 521/2.

⁶⁴ Regulation X, Dorward to SSC, 1 June 1901, CO 521/2.

jurisdiction followed the 'defendant's district', an official from the plaintiff's place of residence being allowed to attend the proceedings. If such a cross-border case was appealed, it could be retried by both Chinese and British officials, though in accordance with the law of the 'defendant's district'.⁶⁵

As mentioned earlier, prior to these regulations, civil disputes were, at first, left in the hands of the village headmen and, later, heard by the magistrate. Many villagers appreciated the accessibility of the magistrate; they could seek his help directly and they were not charged any fees. Most of the cases brought were to do with land and houses, family inheritance, adoption, division of property and other Chinese customs and usages. For these, it was 'best to follow Chinese customs and usages as far as is reasonable and just - without paying too much attention to procedure and rules of evidence, with which the Chinese are unacquainted.'⁶⁶ Despite a large rise in the number of cases heard by the magistrate in 1901, no changes were suggested. It was said that court fees should not be charged 'as this would be sure to lead to irregularities, and the Chinese would dislike coming to Court, for fear of being squeezed.'⁶⁷

By the middle of 1901, some 50 Magisterial Orders had been made. These were mostly in connection with the house tax, licences for hotels and boarding houses, and monopolies for the selling of Chinese spirits, opium and other narcotics. The earliest such orders were made for the purpose of bringing order to the island of Liukung. One rule prohibited the sale of alcohol on the island except in the naval canteen.⁶⁸ Breaches were to be met with fines, though it would seem that this was not adhered to. In one reported instance, a Chinese man who had been expelled from the island for selling 'vile native spirits, with its usual accompaniments' was, later, expelled a second time. This time, 'the unhappy wretch left the island minus his pig-tail.'⁶⁹

⁶⁵ Regulation VIII, Dorward to SSC, 1 June 1901, CO 521/2. This aspect of these regulations appears to have ceased to be effective at least by the time the territory was transferred to the responsibility of the Colonial Office.

⁶⁶ A General Report on the Civil Administration of the Territory of Wei-hai-wei, 1899-1901, 31 March 1902, enc. to No. 96, G. T. Hare to Acting Commissioner Cowan, 15 Apr 1902, Eastern No. 75, CO 882/6/7.

⁶⁷ *Ibid.*

⁶⁸ *NCH*, vol. LX, no. 1609, 6 June 1898, p. 978.

⁶⁹ *Ibid.*, where there is, in addition, a contrasting report of the treatment of two non-British Europeans who established 'The Victoria Hotel' for similar purpose in rented premises on the island. These two were reported as having been told to leave the island. They repeated their attempts on the mainland and

A lease of uncertain duration

The lease of Weihaiwei was greeted with some excitement amongst the British trading community in China. There were some who saw in Weihaiwei an opportunity to develop a commercial port to rival those nearby. However, the territory's prospects for development were affected by two early decisions. First, the British Government assured Germany that neither the British Government nor its nationals would build a railway connecting Weihaiwei with the interior of the province. A formal declaration to this effect was offered and then amended in accordance with a suggestion made by the German government.⁷⁰ The lack of railway communications was thought by many to be a limitation on the territory's potential as a port for the shipment and landing of goods.

The second was the early abandonment of plans to fortify the harbour. Although Weihaiwei had been used by the Chinese as their second most important naval harbour, fortifying the port would have required expenditure of funds the Royal Navy could ill-afford so soon after the Boer war. The Navy decided, in February 1902, that Weihaiwei should, for its own purposes, be no more than a 'flying naval base'. For the duration of the lease, Royal Navy vessels used Weihaiwei mostly as a sanatorium.

Soon after this decision had been reached, the Colonial Office considered a proposal, put forward by G.T. Hare, to return to China all territory, save for Liukung and a small strip of land around Mat'ou.⁷¹ Hare had been Secretary for Chinese Affairs in the Federated Malay States since 1897 but, in 1901-1902, he served in Weihaiwei on special service and was, for a time, Acting British Commissioner of Weihaiwei. Behind his proposal lay the idea that only such territory as was necessary for the protection of British and other European interests should be retained. The proposed reduction in territory and jurisdiction would have left Weihaiwei akin to a treaty port in which the British would exercise extra-territorial jurisdiction over their

were then told to leave the territory. Even if emphasis is discounted from this report, it is very likely that the Europeans would not have been treated in a way calculated to either humiliate them or to deter others, since, in the case of the latter, there were probably few Europeans on the island with similar intentions at the time.

⁷⁰ No. 1, Balfour to Sir F. Lascelles (Ambassador at Berlin), Telegram, 2 Apr 1898; No. 2, Sir F. Lascelles to Marquess of Salisbury, Telegram, 4 Apr 1898, No. 4, Lascelles to Herr von Bülow, 10 Apr 1898, all in Eastern No. 72, CO 882/6/4.

⁷¹ Confidential Portions of a Report on the Civil Administration of Wei-hai-Wei by Mr G.T. Hare, 31 March 1902, Eastern No. 80, Confidential, CO 882/6/12, p. 388.

own nationals and have control over how the town was run. The Commissioner's role would be reduced to more or less that of a British Consul at a treaty port. Although jurisdiction over all nationalities on Liukung would be retained, the Chinese on the mainland would come under Chinese jurisdiction and, in the small strip of the mainland measuring three square miles retained by the British, the Commissioner would exercise municipal authority in conjunction with a Chinese magistrate. The Chinese magistrate would hear mixed cases in the presence of the Commissioner in the role of assessor. These suggestions were not adopted.

By 1904, the Colonial Office was considering yet another memorandum weighing the pros and cons of retaining Weihaiwei.⁷² The disadvantages included limited opportunities for trade and revenue, the lack of a clear commitment from the naval authorities to make Weihaiwei a significant base, the vulnerability of the territory if left unfortified, the lack of a rich hinterland to exploit even if a railway were built, and uncertainty over how long Weihaiwei would be administered by the British. The advantages were unconvincing. By this time, the grant-in-aid received from the Imperial Exchequer was relatively low. It was argued that, if this cost was still a concern, Weihaiwei could be administered by the government of Hong Kong, although it had earlier been thought that Weihaiwei was simply too far from Hong Kong for its administration to be a part of the Hong Kong administration. A second advantage was the quality of the harbour, said to be the best in North China but, in fact, insufficiently deep. There was also the use of the territory by the 1st Chinese Regiment and the fact that all land on the island of Liukung now belonged to the government of Weihaiwei. The advantage to the 1st Chinese Regiment was to disappear with the decision to disband the regiment. Stronger reasons for retaining the territory were the negative impact on British prestige of going back on the lease, the consequence of leaving Germany in sole possession of the whole of Shantung province, and Weihaiwei's value as a sanatorium. Charles P. Lucas, the author of this memorandum and, by this time, Assistant Under-Secretary of State with responsibility for the Eastern Colonies, appeared to stress this last advantage to the point of conceding its other so-called advantages:

The place has been ridiculed as a second or third rate watering-place. Suppose it was no more! Suppose it had no good harbour! Even then, from its conspicuous healthiness, its good sanitation and its sulphur springs, it would be worth keeping as a sanatorium for the many Englishmen in the Far East,

⁷² Confidential Memorandum, C.P. Lucas, 7 June 1904, Eastern No. 86, Weihaiwei, CO 882/6/17.

naval, military, civilians, merchants, missionaries. If we are going to make as much of our Empire as heretofore, why should it be a subject for ridicule that in the Far East we have a place which is thoroughly healthy for Englishmen?

He concluded that Weihaiwei should be retained and, if possible, a statement made to that effect.⁷³

Before the end of that year, the Foreign Office was in receipt of a report commissioned by Sir Ernest Satow, the British Minister at Peking, on the commercial prospects of the territory, were the lease to be revised to provide a duration of a definite term of years. J.W. Jamieson, then Commercial Attaché at Shanghai, painted a rather bleak picture of Weihaiwei's prospects. Assuming that the question of tenure could be resolved satisfactorily, he found that it would be difficult to divert to Weihaiwei the trade and industries which the nearby established ports had attracted to themselves. Competition between these ports had shown that the limited trade had done little more than increase the prosperity of Tsingtao at the expense of Chefoo. He asked,

Will the paling of one star add lustre to that of a new arrival, faintly striving to make itself visible? It is to be feared not, unless Wei-hai Wei can cover its hill slopes with mulberry trees, attract to itself the beans of Manchuria, or convince merchants in China that it would serve admirably as a duty-free godown.⁷⁴

The term of the lease itself, dependent as it was on Russia remaining in Port Arthur, also cast a pall of uncertainty and made it hard for the territory to attract investment. When Port Arthur had fallen to the Japanese, the China Association, a body representing British commercial interests in China, petitioned the Commissioner and Satow, urging the British Government to seek renewal of the lease of Weihaiwei.⁷⁵ Herbert Beer, headmaster of the Weihaiwei School, a boarding school for European boys established in 1903, also wrote to the Commissioner and to Satow, expressing similar concern.⁷⁶ In reply, they were told that rumours of the return of Weihaiwei to China should be 'entirely disregarded'⁷⁷ and that the ousting of the

⁷³ *Ibid.*

⁷⁴ Memorandum regarding the Future Prospects of the Leased Territory of Wei-hai Wei as a Commercial Centre, in relation to the German Dependency of Kiao-chau and the Province of Shantung in general, 9 Sept 1904, enc. to No. 1, Jamieson to Lansdowne, Secretary of State for Foreign Affairs, Confidential Print, FO 881/8284.

⁷⁵ China Association, 2 Jan 1905, referred to in Foreign Office to China Association, 11 Jan 1905, FO 228/2621.

⁷⁶ Beer to Lockhart, 4 March 1905; and Beer to Satow, 21 June 1905, FO 228/2621.

⁷⁷ Satow to Beer, 3 July 1905, FO 228/2621.

Russians from Port Arthur by the Japanese would neither affect the lease nor require its renewal.⁷⁸

In fact, there was far less certainty than these replies conveyed. Whilst it was convenient, during the war between Japan and Russia and with its outcome still unknown, to say that the lease of Weihaiwei was unaffected, other questions were anticipated. The Colonial Office suggested that a lease be sought either for so long as Germany held Kiaochou or for 99 years from the date of the original lease. The later alternative would match the 99-year leases of Kiaochou and the New Territories and would be sufficiently long to attract investment to the territory.⁷⁹ The Foreign Office put this suggestion to Satow⁸⁰ who replied pointing out that, since it was the dependence on the duration of Russia's stay in Port Arthur which had given rise to the current uncertainty, it was inadvisable to seek an amendment which would make the lease of Weihaiwei dependent on Germany's presence in Kiaochou. On the other hand, a lease to last 25 years from 1898 so as to fit in with the German lease would make it too obvious that Britain was seeking a counterpoise to Germany's presence in North China. Satow also advised delaying any overtures to the Chinese Government until the terms of the transfer to Japan of the Liaotung peninsula were known.⁸¹ Despite more rumours of retrocession circulating in both the European and Chinese presses in the middle of the following year,⁸² the British Government did nothing until October 1906 when the Chinese Minister in London asked Britain to return Weihaiwei to China, as China was anxious to develop its navy.⁸³ Sir Edward Grey, the Secretary of State for Foreign Affairs, replied that Britain had obligations to Japan which it had to honour. Besides, conditions in China were not 'normal', for Japan and

⁷⁸ Foreign Office to China Association, 11 Jan 1905, FO 228/2621. The Russo-Japanese War, 1904-5 formally ended with the signing of the Treaty of Portsmouth on 5 Sept 1905, under article 5 of which Russia transferred the lease of Port Arthur and Talienwan to Japan. China agreed to this transfer in the Sino-Japanese Treaty signed in Peking on 22 Dec 1905. In 1915, the lease was extended from its original 25-year term to a term of 99 years.

⁷⁹ Ommaney (Colonial Office), to the Under-Secretary of State, Foreign Office, 27 June 1905, FO 228/2621.

⁸⁰ Lansdowne to Satow, 13 July 1905. See also Campbell to Colonial Office, 2 June 1905; and Memorandum transmitting advice received from Satow to the Colonial Office, Affairs of China, Confidential, 2 June 1905, all in FO 228/2621.

⁸¹ Satow to Lansdowne, 5 Oct 1905, FO 228/2621.

⁸² See Commissioner Lockhart to Elgin (Principal SSC), 2 June 1906, FO 228/2621.

⁸³ This request is referred to in Grey to John Jordan, 6 Oct 1906, Telegram, FO 228/2621.

Germany remained and Britain's withdrawal from Weihaiwei was 'inconvenient'.⁸⁴ The issue of Britain's withdrawal was temporarily resolved by an understanding that the question should be postponed until China was in possession of a 'fair naval strength'.⁸⁵

The uncertainty over the length of stay of the British administration of Weihaiwei continued to be felt in the territory. Even in mid-1907, the proprietors of Lavers and Clark, one of the first to invest in the territory, were writing to Sir John Jordan, then the British Minister at Peking, asking if China would compensate them for their investment after retrocession, given that they had been informed that the British Government would not.⁸⁶

When Germany withdrew from Kiaochou in 1915, the Foreign Office again sought the views of other Whitehall departments on the value of Weihaiwei. The War Office replied, emphasising the fact that this was the only British possession in the region and returning it would diminish British prestige. The Colonial Office thought it a question of foreign policy, since, from its point of view, there were no strong arguments for or against retention. In 1918, with the Peace Conference of the following year in sight, departmental views were again solicited. Johnston, the then Commissioner of Weihaiwei, suggested that the mainland portion of the territory should be returned. British prestige had not been advanced by the occupation of Weihaiwei, as it compared unfavourably with the progress made by the Germans in Kiaochou and the Japanese in Dairen.⁸⁷ Jordan took the view that Weihaiwei should be returned but only as part of a broader movement by all powers to give up their rights and concessions in China. He is quoted as saying that the leased territories were 'a legacy of imperialistic ambitions of Russia and Germany in the Far East and [the] proximate cause of the Boxer outbreak of 1900.'⁸⁸ The Admiralty informed the

⁸⁴ Grey (Foreign Office) to Sir John Jordan (Peking), Telegram, 23 Nov 1906; and Grey to Jordan, 21 Nov 1906, FO 228/2621.

⁸⁵ Chinese Legation (Wang Tahsieh) to Grey, 20 Dec 1906; Grey to Jordan, 3 Dec 1906; and Foreign Office to Wang Tahsieh, 4 Jan 1907; all in FO 228/2621.

⁸⁶ Lavers and Clark to Jordan, 5 July 1907, FO 228/2621.

⁸⁷ This is referred to in FO 371/6669, 3 March 1921, Memorandum on Wei-hai Wei by C.W. Campbell, app. IV to Confidential Memorandum, Foreign 'Leased Territories' and 'Spheres of Influence' in China, 10 Oct 1921. Under Japanese administration, the area formerly called Talien (in Russian, Dalny) was known as Dairen.

⁸⁸ Memorandum on Wei-hai Wei, by C.W. Campbell, 3 March 1921, app. IV to Confidential Memorandum, Foreign 'Leased Territories' and 'Spheres of Influence' in China, 10 Oct 1921, FO 371/6669.

Colonial Office that Weihaiwei was still useful from a naval point of view. One consideration taken into account was the precarious status of the New Territories of Hong Kong, the tenure of which also rested on a lease. It was felt that the government had to tread carefully so as not to jeopardise its position there. At the close of this round of internal discussion, the British Government was opposed to the question of the leased territories being raised and, as a consequence, the question of Weihaiwei was not raised at the Peace Conference.

Three years later, in anticipation of the Conference on Limitation of Armament (the 'Washington Conference')⁸⁹ and with Japan still in Shantung province, the British Government remained reluctant to give up Weihaiwei. Prior to the conference, the Colonial Office asked Sir Reginald Stubbs, the Governor of Hong Kong, to visit Weihaiwei and report on the territory. Stubbs, whose report kept the cost of the territory firmly in view, offered three alternatives: relinquish the mainland; give up the larger part of the mainland and retain only a strip of the mainland and Liukung island; or retain the entire area of the leased territory under a renegotiated fixed-term lease. Stubbs warned of the dangers to British prestige of allowing the administration of the territory 'to be left to drag on in a poverty-stricken and hand-to-mouth existence' but also warned that prospects for the further development of local industries were not great.⁹⁰ The overall view of the British Government, on the eve of the conference, was that Weihaiwei should be retained for so long as Japan remained at Tsingtao. However, after the start of the conference, Arthur Balfour, the head of the British delegation, sent telegrams to the Foreign Office urging that the rendition of Weihaiwei should be considered, particularly if France and Japan were to agree to relinquish their territories in China. By the end of January 1922, the British government was prepared to surrender Weihaiwei provided certain conditions were fulfilled. On 1 February, Balfour announced the rendition of the territory at the conference.⁹¹ Negotiations over rendition were lengthy but an agreement was ready

⁸⁹ Conference proceedings were published as *Proceedings of Conference on Limitation of Armament held at Washington, 12th Nov, 1921 - 6th Feb, 1922*, (Eng. and Fr.) and there is also a shorter account of the proceedings in Westel W. Willoughby, *China at the Conference* (Baltimore: Johns Hopkins Press, 1922). See also the same author's *Foreign Rights and Interests in China*, rev. and enlarged edn, 2 vols (Taipei: Ch'eng-wen, 1966).

⁹⁰ Memorandum by Stubbs, enc. to No. 1, Grindle to Foreign Office, 21 Nov 1921, FO 371/6645.

⁹¹ For more information on the communications between Balfour and the Foreign Office during the period of the Washington Conference see Memorandum on the Rendition of Weihaiwei, FO 676/311. Although by late January 1922, Balfour had persuaded the British Government that Weihaiwei should be surrendered if France and Japan also agreed to surrender their rights, he had, in fact, acted beyond

for signature in October 1924. Signature of the agreement, however, was delayed until 18 April 1930 by the political situation in China, with rendition taking effect on 30 October that same year.

Without more ambitious naval plans or commercial investment, it is not surprising that the territory experienced only modest economic and social development. Between lease and rendition, the number of market towns in the territory grew from four⁹² to nine⁹³ and, as more Chinese became involved in small businesses, the urban population increased. A network of roads was built, first for wheelbarrow and cart traffic, and then, eventually, for motorised vehicles during the last three years prior to rendition in 1930.⁹⁴ Telephone lines connected the island and Port Edward - the new name given to Mat'ou in 1902 - not long after the lease began but, even in the second decade of the lease, there was no telephone line connecting Port Edward with the interior of the territory. Small industries were later developed in which inhabitants were employed making lace, hairnets and silk. A company prospected for gold but the mine was unsuccessful and shut down in 1907. Likewise, plans to introduce tobacco as a crop did not materialise. Weihaiwei's low tax yields allowed the territory to be self-financing only during the last decade of the leasehold. A surplus was built up during the last six years of British administration but this was due largely to the continued parsimony of the administration.⁹⁵

The British administration was to interfere little with day-to-day life in the Chinese villages. As we shall see, education received inadequate public investment and the government was loath to stop customs such as foot-binding.⁹⁶ As the years went by, the growing police force no doubt made its presence felt in the villages. Even then, Weihaiwei had not developed economically and socially to the extent that it stood out as a fine example of what could be achieved by a British administration.

his instructions when he announced the rendition of Weihaiwei without securing a detailed agreement with China on the continued use of Liukung and the harbour by the Royal Navy.

⁹² The four markets were at Feng-lin, Ch'iao-t'ou, Ts'ao-miao-tzu and Yang-t'ing.

⁹³ The five added markets were at Ku-shan-hou, T'un-Hou-chia, P'o Yü-chia, Pei-chiang-hsi and Hsiao Yen-t'an; some of these were markets relocated from outside the boundary of Weihaiwei: Annual Report for 1928, Colonial Reports - Annual, no. 1446, FO 371/13899.

⁹⁴ Annual Report for 1928, Colonial Reports - Annual, no 1446, FO 371/13899.

⁹⁵ The territory's yearly revenue did not exceed \$105,934 (all sums given in Mexican dollars) during the ten years from 1901-1911, was \$176,450 in 1919-20 and peaked at \$433,774 in 1929-30. For revenue and expenditure tables for 1901 to 1930 see Atwell, 57, 103 and 167.

⁹⁶ Both of these are discussed briefly in ch. 7.

The opposite was true. When rendition was very definitely within sight, the parlous state of the territory's hospitals, roads and other infrastructure, resulting from years of cost cutting, was a source of embarrassment to some.⁹⁷

The territory's failure to attract European residents was a consequence of the uncertainty over the duration of the lease and other factors. However, although few Europeans made Weihaiwei their home in China, many visited the territory each summer. With its lesser humidity when compared to other places in China, Weihaiwei earned itself a reputation as a pleasing summer retreat.⁹⁸ Indeed, the press had spotted the potential of the territory as a tourist destination within a year of the lease:

whatever the ultimate prospects may be of the latest British acquisition becoming an important centre of trade, it is certain that at no distant period it is destined to become a popular sanatorium and summer health resort. Blessed with a delightful climate, lovely scenery and perfect sea bathing, it is bound to supplant Chefoo, where the close proximity of a foul Chinese city goes far to destroy its attractions for foreign visitors. In addition, there are good roads all about the settlement, and one fairly good road towards Chefoo, where for fully ten miles bicycling can be satisfactorily indulged in. Then there are excellent opportunities for playing polo, cricket, and lawn tennis, while Weihaiwei can boast a golf links that would delight the hearts of devotees of that attractive game.⁹⁹

Later issues of the newspaper suggested that Weihaiwei could be called 'Land of Everlasting Sun', owing to its good climate and should soon be a 'Brighton or perhaps an Oriental Naples',¹⁰⁰ it was a place which bid 'fair to become the Ostend and Biarritz of China.'¹⁰¹ Herbert Beer, later to be the proprietor and headmaster of Weihaiwei School, thought Port Edward and its bund resembled Llandudno more than any other British resort abroad.¹⁰² By 1902, the town was graced by a town hall, an hotel, a church, and a jetty. To some it was, at best, a 'Margate of the East.' The presence of the British fleet in the summer months undoubtedly enlivened the place. Visitors stayed in hotels on the island or the mainland or in bungalows in Narcissus or Half Moon bays, entertained to picnics by the Commissioner. Japanese sulphur

⁹⁷ See Atwell, 167, where she mentions Johnston's unease. She cites Johnston to Lampson, 15 Nov 1929, CO 521/56.

⁹⁸ For the advantages and disadvantages of Weihaiwei as a resort see Frances Wood, *No Dogs and Not Many Chinese* (London: John Murray, 1998), 109-110, citing Arnold Wright and H.A. Cartwright (eds), *Twentieth-century Impressions of Hong Kong, Shanghai and Other Treaty Ports of China* (London, Lloyd's Greater Britain Publishing Company, 1908), 773-774.

⁹⁹ 'The Future of Weihaiwei', *NCH*, vol. LXII, no. 1661, 5 June 1899, p. 1007.

¹⁰⁰ 'Weihaiwei and its Wants', *NCH*, vol. LXV, no. 1729, 26 Sept 1900, p. 677.

¹⁰¹ *NCH*, vol. LXVIII, no. 1799, 29 Jan 1902, p. 174.

¹⁰² Bruce-Mitford, 21ff.

bathhouses, constructed in 1903 and 1904 to the east of Weihai City to replace temporary structures built during the Japanese occupation, were an added attraction.¹⁰³ These continued in business for a number of years and, in 1933, were mentioned as one of the eight best features of Weihaiwei.¹⁰⁴ The territory, in fact, possessed another place - Wen-ch'üan-t'ang - in which there was a natural hot spring but similar facilities were not developed there. The economic importance to the territory of its summer visitors was so great that, when, in 1908, there were rumours of an outbreak of chicken pox in the territory, an anonymous correspondent wrote to the *Herald* immediately to counter the rumours in order to prevent any damage to the image of the territory.¹⁰⁵

British administration

Despite initial suggestions, based on similar experience in India, that separate administration of Liukung as a cantonment should be continued, both island and mainland came under the authority of the Commissioner of Weihaiwei whose office and residence were located in Port Edward. The Commissioner, given executive, legislative and judicial powers by the Wei-hai-Wei Order in Council in 1901, was first assisted by an Assistant Commissioner, then by a Secretary to the Government ('Government Secretary'). In 1906, a District Officer was added and, in 1916, the posts were reorganised to provide for a Senior and a Junior District Officer. Government in Weihaiwei was maintained at a small scale throughout the lease. A post such as that of District Officer had to be traded against the appointment of more police. For a short period of time, the territory had the services of a cadet, that is, one of an elite group of administrative grade civil servants of far eastern colonies or dependencies who spent the first three years of their appointment learning Chinese, but the Colonial Office withdrew the post on the grounds that the territory did not

¹⁰³ There were four classes of baths ranging from 1st class, single occupancy baths with hot water pumped in and out for each bather, to the native-only 4th class bath house which was built on the springs itself. The facilities included two other rooms and two sitting rooms for tea and relaxation: *The Hot Springs, Weihaiwei* ([n.p.]: [n.p.], c.1904).

¹⁰⁴ *Guide to Wei-hai-wei* ([n.p.]: Office of the Weihaiwei Commissioner, 1933). This was a tourist brochure probably published by the post-rendition authorities of Weihaiwei.

¹⁰⁵ 'The Health of Weihaiwei', letter from 'Your Weihaiwei Correspondent', 20 June, *NCH*, vol. LXXXVII, no. 2133, 27 June 1908, p. 815.

provide any prospects of promotion.¹⁰⁶ Arguments that the 'passed cadet' - one who had passed the language and other examinations - could continue his career in Hong Kong or elsewhere were ignored. Other officers of the Weihaiwei government resident in the territory included one or two Medical Officers and a Financial Assistant. For most of the period of the lease, there were between two and four European Police Inspectors. Non-resident officials included the Crown Advocate, who was the legal adviser to the government, and the High Court Judge, both ordinarily resident in Shanghai.

As in British administrations elsewhere, the consequence of a small establishment was that the duties of each post were more heterogeneous than might otherwise have been the case. For instance, the first Government Secretary was also appointed Magistrate and, as such, had, until a second magistrate was appointed, to try nearly all criminal and civil cases on both the mainland and the island. Aside from assisting the Commissioner in the preparation of draft legislation, the Government Secretary's time was very much taken up with the collection of revenue, particularly that from shipping and trade passing through the harbour. The Police Inspectors also had a number of duties. Alongside their law enforcement and prison duties, they were also responsible for the collection of rents from buildings owned by the government, sanitation and street lighting. When the District Officer was appointed in 1906, he was simultaneously appointed Magistrate for the South Division of the territory, newly divided into two administrative divisions - North and South. As District Officer-cum-Magistrate, the holder of the post supervised the police force and often took an active part in the investigation of crimes.

Of the two districts, the South Division was both larger and more rural than the North Division and contained 17 of the 26 districts of the territory. In 1910 or thereabouts, there were 231 villages in the former and only 84 in the latter.¹⁰⁷ The population of the South Division was estimated to be about two thirds of the total population of the territory. The District Officer, who lived and worked at Wen-ch'üan-t'ang, a distance of 13 miles from Port Edward, was the person to whom many ordinary villagers took their petitions, trivial and serious, and it is clear that the office

¹⁰⁶ For an article discussing the origins and impact of the Hong Kong cadet system see H.J. Lethbridge, 'Hong Kong Cadets, 1862-1941', *Journal of the Hong Kong Branch of the Royal Asiatic Society*, 1970, vol. 10, 36-56. Both Lockhart and Johnston had started out in the Hong Kong Government as cadet officers.

¹⁰⁷ *LDNC*, 129.

of the District Officer and Magistrate was significant in the relations between government and the governed. The contact between the magistrate and the people was all the more significant when it is considered that the High Court Judge did not reside in the territory. He visited it no more than once or twice a year and only for the purposes of hearing the most serious of cases. It was not thought necessary to have a resident judge¹⁰⁸ and, indeed, the Commissioner was empowered to sit as a judge.¹⁰⁹ Thus, the district officers and Commissioner combined their administrative tasks with their respective judicial roles.

The District Officer also supervised the village and district headmen. The British authorities relied on headmen from the inception of British control over the territory. More systematic use of headmen was probably begun in 1900, after the arrival of Barton and after he had compiled a register of villages in the territory. The names of village headmen, chosen by the villagers, were registered, as were 'the number of families, the sexes, the acreage of land cultivated, and the occupations of the villagers.'¹¹⁰ Once the registration process was complete, the authorities found it much easier to administer the territory and Hare, then Acting Commissioner, reported that there had been few difficulties in dealing with Chinese villagers; 'the headmen understand now that they must obey a summons from the District Magistrate, and produce any person living in the village they are responsible for.'¹¹¹ Tribunals of village elders were also mentioned as being a part of the village system and Hare's report implied that these tribunals dealt with petty crimes within the village.

In 1902, shortly after the arrival of the territory's first civilian Commissioner, the headman system was put on an official footing. The government gave headmen commissions of office and placed upon them the responsibility of reporting crimes and settling petty civil disputes. It was later reported that to qualify for the position of headman, the person had to own at least 10 *mu* (equivalent to 1.6 acres) of land and that the government preferred headmen were who literate over those who were not.¹¹² Headmen were also expected to be a link between the government and the villager

¹⁰⁸ The decision regarding the need to appoint a High Court Judge is discussed in ch. 3.

¹⁰⁹ WOIC, art. 12.

¹¹⁰ A General Report on the Civil Administration of the Territory of Wei-hai-wei, 1899-1901, 31 March 1902, enc. to No. 96, G.T. Hare to Acting Commissioner Cowan, 15 Apr 1902, Eastern No. 75, CO 882/6/7.

¹¹¹ *Ibid.*

¹¹² Report compiled by Moss, Jan 1915, CO 873/438.

and the government often used them as a sounding board for its plans, particularly when it came to the introduction of laws. An upper tier of local authority was added in 1905 when twenty-six District Headmen were appointed. Each district headman was responsible for between nine and fifteen villages. Their duties included supervising the collection of the land-tax; distributing government notices and proclamations to village headmen; distributing deed-forms to purchasers and vendors of property; keeping litigation in check; and keeping order in their districts.¹¹³ The government paid each district headman a small salary of five Mexican dollars¹¹⁴ per month which they were allowed to augment from a commission on the sale of deed-forms and through the receipt of gifts and invitations to feasts.¹¹⁵ A few times a year, the Commissioner assembled the district headmen for a meeting during which matters such as the introduction of new laws or other reforms would be informally discussed. In 1920, the government decided that the Commissioner would meet all district headmen at Port Edward twice a year. From the following year (1921) onwards, after the autumn meeting of district headmen, which coincided with H.M. the King's birthday, the Commissioner entertained them at a feast and theatre performance. The Colonial Office was informed that this was done so as to enhance British prestige, 'give face' to the district headmen and to 'popularise a somewhat thankless post.'¹¹⁶ Formal assemblies of village headmen were much rarer after the institution of district headmen. One such gathering of village headmen had previously occurred during Coronation Day celebrations in 1904. The gathered headmen were invited onboard a Royal Navy vessel anchored in the harbour.¹¹⁷

James Haldane Stewart Lockhart and Reginald Fleming Johnston

The size of the administration meant that individuals serving in the Weihaiwei government could, and did, influence the tenor of the administration to a greater degree than their counterparts in a larger administration. In this regard, two names

¹¹³ *LDNC*, 95.

¹¹⁴ The Mexican silver dollar, because of its high silver content, was a currency widely used on the China coast in the 19th and early 20th centuries. The rate of pay was the same in 1923: Blunt to SSC, 2 Nov 1923, CO 521/27.

¹¹⁵ *LDNC*, 95.

¹¹⁶ Blunt to SSC, 2 Nov 1923, CO 521/25.

¹¹⁷ Annual Report for 1904, CO 873/163.

stand out; James Haldane Stewart Lockhart and Reginald F. Johnston,¹¹⁸ two Scotsmen and friends, left their mark on the territory more palpably than any other Weihaiwei government officer.

Lockhart, who was some twenty years older than Johnston, had served in the Hong Kong Government between November 1879, when he was appointed a cadet, and his appointment to Weihaiwei in the spring of 1902. The appointment to the government of Weihaiwei was a post he wanted, having told the Colonial Office, in the August of the previous year, that he wished to be posted to a place outside Hong Kong but still within China. Since much of what had been achieved by his military and naval predecessors were ad hoc measures, Lockhart had much to do when he arrived in the territory. He had the territory's administration to establish, the question of policing to address, laws to draft, and village headmen to recognise formally. Lockhart was Weihaiwei's longest serving official, relinquishing his post only upon his retirement in 1921. For most of the years between 1904 and 1916, Lockhart had, in the territory's administration, the company of a kindred spirit in Reginald Johnston. Johnston was, for a short time, Government Secretary at the government offices in Port Edward before being appointed District Officer and Magistrate of the South Division in 1906, a position he held until 1916. Later still, he was Senior District Officer before becoming Commissioner of Weihaiwei in the three years prior to rendition. Lockhart and Johnston had known each other since the beginning of Johnston's cadetship in Hong Kong. They had both served in the New Territories administration not long after the lease of the area. They shared an admiration for Chinese civilisation and regretted the demise of the China of old. Both were fluent, first in Cantonese, then Mandarin. Their knowledge of the Chinese language and China earned them the respect of their peers and of sinologists. Both were to consider academic positions although only Johnston went on to become a Professor of Chinese, a post he held at what was then the School of Oriental Studies in London for six years after the rendition of Weihaiwei.¹¹⁹

Both Lockhart and Johnston had much to do with law and the administration of justice in the territory. As Commissioner, Lockhart had legislative powers and, from time to time, sat as High Court Judge. Johnston heard and investigated civil and

¹¹⁸ For biographical works on both men see Introduction, n. 3. The former's surname is 'Stewart Lockhart', but for convenience, only 'Lockhart' is used in this work.

criminal cases in his capacity as Magistrate and District Officer or Senior District Officer. In their approach to law and order, a lack of legal training and a close proximity to the day-to-day incidents of life in the territory combined to give both men a tendency towards pragmatism rather than legal principle. Lockhart's drafting deficiencies, which ranged from minor errors of form to substantive mistakes, were often criticised in the Colonial Office.¹²⁰ Both men shared a general predisposition towards seeing, in the circumstances of the territory, more reasons to depart from English law than others might have. This was, no doubt, enhanced by their genuine interest in Chinese culture and their preference for the past over the contemporary. They sought to uphold traditional social structures, effecting repairs where decay was evident and reinforcing tradition through official encouragement. An example of this was the headman system which both Lockhart and Johnston were keen to revitalise. Lockhart's enthusiasm for the system led him to award medals to headmen who had performed their duties most meritoriously, an action which, he was told by the Colonial Office, infringed the rule that all decorations should emanate from the sovereign.¹²¹ Another example of the government encouraging traditional practices was the official congratulations sent to women to honour them for their chaste widowhood.¹²² Neither Johnston nor Lockhart was sufficiently opposed to the practice of foot-binding to support wholeheartedly the territory's Anti-Foot-Binding Society. The government's approach to education, the progress of women and suicide provide yet more examples of tradition favoured over change.¹²³

In dealing with the territory's inhabitants, both men were sympathetic towards the Chinese. Although both Lockhart and Johnston saw that corruption and bribery were always a possibility, both were quick to defend the Chinese inhabitants of the territory and express faith in them. Johnston, in particular, was usually ready to defend them against complaints from the small number of European residents. Complaints made about the behaviour of the Chinese were treated with something

¹¹⁹ Johnston's career as an academic is explored in R. Bickers, '“Coolie Work”', *Journal of the Royal Asiatic Society*, 1995, series III, vol. 5, 385-401.

¹²⁰ These are discussed in ch. 3.

¹²¹ Having made Lockhart aware of the possible infringement, the Colonial Office probably turned a blind eye to his continued practice of awarding such medals: Commissioner to Earl Elgin, 11 Dec 1906 and Draft Despatch to Commissioner, 18 Feb 1907, CO 521/9; Comm to Lord Elgin, 9 Apr 1907 and Lucas to Hopwood, 15 May 1907, CO 521/10.

¹²² An example of this is given in ch. 7, 'Attempts at understanding suicide in China'.

¹²³ See ch. 7.



approaching contempt, particularly if the complainants were missionaries.¹²⁴ He was not sympathetic to their cause, and, in 1911, using the pen name of Lin Shao-Yang, he published a book he referred to as 'The Blast', in which he criticised missionaries and their methods.¹²⁵ In later life, some called him a Buddhist crank;¹²⁶ his religious inclinations lay far from Christianity.

Despite each, from time to time, feeling overlooked for promotion, both men governed with enthusiasm and a keen interest in Weihaiwei. Johnston's book on the territory - *Lion and Dragon in Northern China*¹²⁷ - is a testament to his interest and knowledge of the area, its people and their ways. Lockhart encouraged Johnston to write this book, assuring him of a supply of information based on his own knowledge and experience of the territory.¹²⁸ *Lion* thus reflects the interest of both men. This interest in Chinese law and custom, and in the settlement of petty quarrels seen in chapter 6, was particularly clear in the case of Johnston but, judging from the frequency with which he wrote to Lockhart about the disputes he was dealing with, this interest was probably also shared by Lockhart.

Johnston was not alone in his scholarly leanings. Lockhart took on a number of writing projects and published a number of books and articles in his lifetime on a variety of subjects.¹²⁹ Mutual discussion of their respective writing projects alleviated the duller months of the year when Lockhart's wife was in England. For instance, they wrote to each other for information on local folklore,¹³⁰ and the arrival of a collection of books purchased by Johnston was mentioned in letters, Johnston urging Lockhart to pay him and his books a visit.¹³¹

¹²⁴ Johnston's contempt for missionaries did not prevent him from accepting their hospitality when travelling. He once wrote to Lockhart saying that he was a guest of missionaries for the night, adding 'I have not told them I am a Buddhist' - Johnston to Lockhart, 12 Feb 1906, Wanhsien, *SLPNLS*, vol. 9(a).

¹²⁵ Lin Shao-Yang, *A Chinese Appeal to Christendom Concerning Christian Missions* (London: Watts, 1911).

¹²⁶ See Shiona Airlie, *Reginald Johnston* (Edinburgh: NMS, 2001), 7.

¹²⁷ R.F. Johnston, *Lion and Dragon in Northern China* (London: John Murray, 1910).

¹²⁸ Airlie (2001), 43.

¹²⁹ See Lethbridge (1972). A noteworthy published work of Lockhart's is J.H. Stewart Lockhart, 'The Marriage Ceremonies of the Manchus', *Folk Law*, 1980, vol. 1, pt 4, 480-492.

¹³⁰ Johnston to Lockhart, 8 Sept 1915, *SLPNLS*, vol. 10.

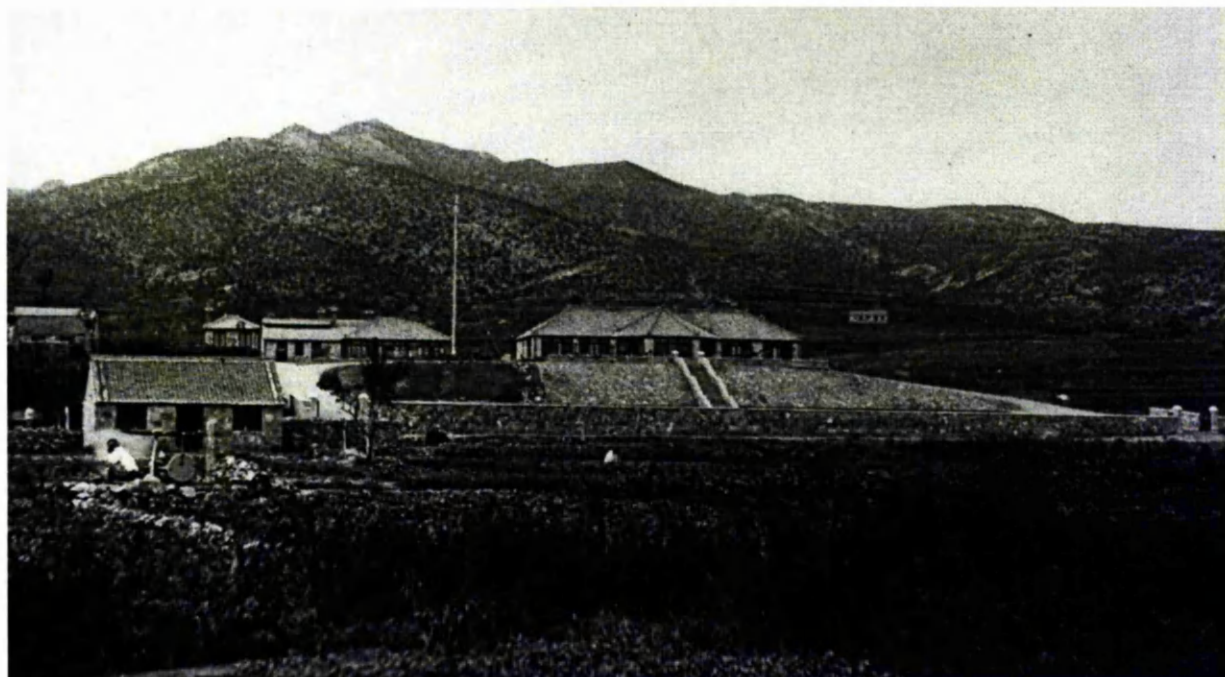
¹³¹ Johnston to Lockhart, Friday, 1910, *SLPNLS*, vol. 9.

In this chapter, we have seen how the leasing of Weihaiwei was motivated by contemporary regional geo-politics. Weihaiwei was a reluctant acquisition made not for a positive purpose but to counterbalance the influence of Russia and Germany in the north of China. The territory's lack of importance ensured that control over it was assumed without urgency, an Order in Council for the territory being passed only in 1901. The interim period was characterised by some confusion over jurisdiction and the applicable law under ad hoc measures for dealing with offenders and civil disputes. The Wei-hai-Wei Order in Council was to clarify much but its introduction was delayed until responsibility for the territory had passed, first, from the Admiralty to the War Office and then, finally, to the Colonial Office on 1 January 1901. The territory was also dogged by uncertainty as to how long British administration would continue. This situation persisted for some two decades until the announcement in 1922 that the territory would be returned to Chinese jurisdiction ushered in a prolonged twilight of British administration. Against this backdrop, there was little public or private investment in the territory. With that deficiency came the failure to attract a sizeable European population and the lack of any significant social or economic transformation of the territory. A consequence of the absence of more Europeans or other foreign communities in the territory was that the government directed its policy on law and order towards the indigenous Chinese without the need to balance this against the conflicting needs of others.

By coincidence and circumstance, some characteristics of those early months remained true for much of the period of the lease. The reluctance to increase expenditure in the territory meant that the administration remained small. This had several important consequences for the arrangements for law and the administration of justice. With few officers, the government had to co-opt local structures of authority whilst maintaining close ties with the villages making up the territory, particular in the farther-flung areas. Village headmen became the conduits between villager and government and an important element of the government's policies for the maintenance of order. The parsimony also limited the number of police in the territory's police force and, with few police, the government erred on the side of conservatism when it came to law reform. Changes to the law were usually made only after full consultation with headmen. Reforms that would antagonise the Chinese inhabitants of the territory were avoided. In general, it was consent which characterised the exercise of authority through the law.

The small number of officials serving in Weihaiwei also made it possible for individuals, particularly if they served in the territory for any length of time, to influence the territory's laws and procedures and determine the tenor of British rule in general and law enforcement in particular. Lockhart and Johnston were together responsible for most of the policies and practices in law which impinged on the lives of the inhabitants of Weihaiwei. The traditionalist tendencies of both men with regard to China reinforced the conservatism counselled by the need to govern by consent.

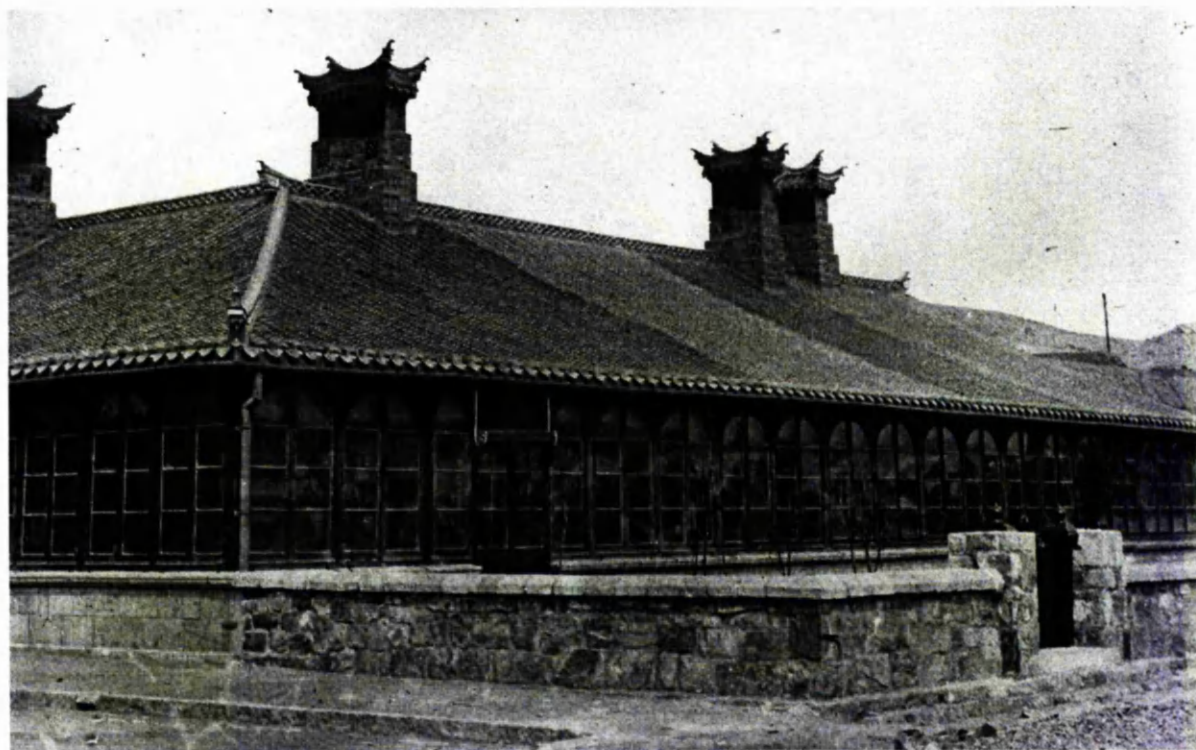
It would seem that the context in which Weihaiwei was leased, the lack of ambition for the territory, the parsimony with which it was administered, the pragmatism induced by the limited number of officers of government, magistrates and police, as well as the conservatism of individual scholar-administrators, all played a role in shaping the contours of the legal system of Weihaiwei. As we shall see, geopolitics and a desire to administer the territory inexpensively were two significant considerations during the drafting of the territory's constitutional instrument.



1. Government House, Port Edward, c. 1902.



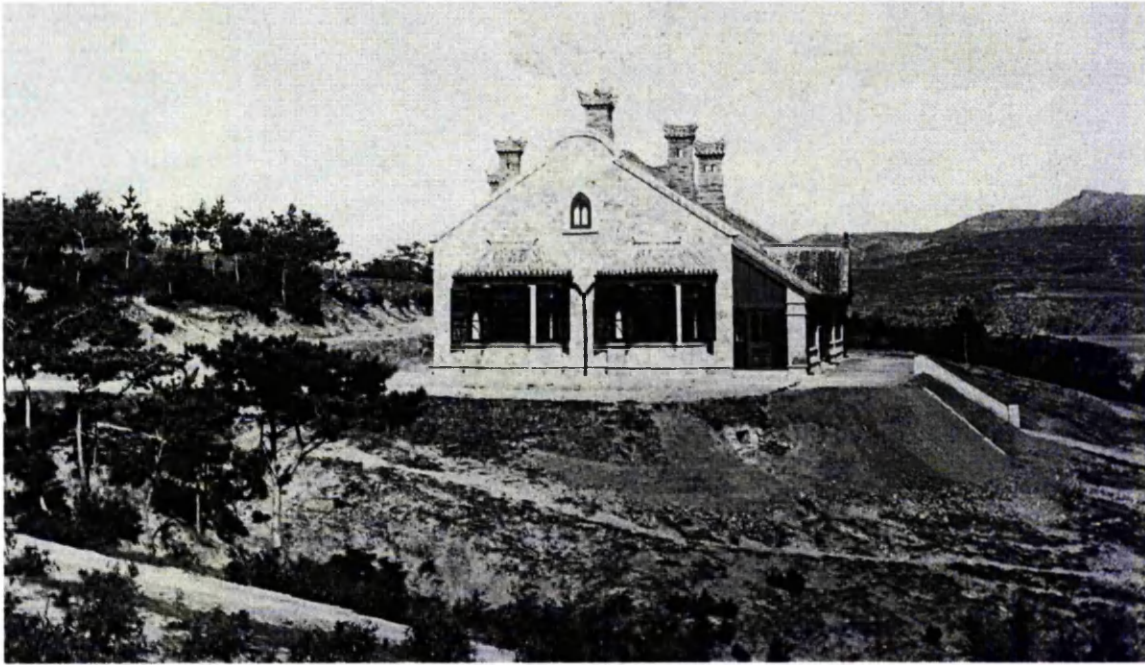
2. Government Offices, Port Edward.



3. Quarters of the Secretary to the Government, c. 1902.



4. District Office and Magistrates' Court, Wen-ch'üan-t'ang.



5. Office of the District Officer.



6. Reginald Johnston 'tenting it', as he often did for the purposes of investigating disputes.



7. James Stewart Lockhart with District Headmen (front row).



8. Official gathering of Village Headmen.

CHAPTER 2

TOWARDS AN ORDER IN COUNCIL FOR WEIHAIWEI

In early 1899, the Government considered the use of naval law, administered by naval courts-martial, as a system of law for Weihaiwei.¹ The main sources of such law were the penal code found in the Naval Discipline Act² and the civil code of the navy contained in the relevant regulations and instructions established by Order in Council. The naval penal code covered not only breaches of naval discipline and duty specified in the Naval Discipline Act but also offences against ordinary criminal law. However, naval law was not, by and large, applicable to civilians and this idea was soon abandoned.³ It then became clear that Weihaiwei would need to be governed under an Order in Council. Two concerns were prominent during the process of drafting the order. One was the specific question of whether the Order should be passed pursuant to the Foreign Jurisdiction Act, 1890⁴ ('FJA'). As we shall see, this question, which was one of law, was side-stepped as a result of contemporary Foreign Office policy. The other concern was the arrangements for the administration of Weihaiwei. What arrangements would best suit the conditions of the territory? With this question in mind, the Colonial Office commissioned a report on the territory, the recommendations of which enabled it to finalise the provisions of the Wei-hai-Wei Order in Council and to make a number of decisions on various aspects of the territory's administration. This chapter begins with a survey of this report and its recommendations before turning to the question of jurisdiction in Weihaiwei.

¹ See W.E.D., Foreign Office, 11 March 1899, Jurisdiction at Wei-hai Wei, Confidential Print, Printed for the use of the Foreign Office, 20 May 1899, FO 881/7149.

² 29 and 30 Vict. c. 109, as amended by the Naval Discipline Act, 1884 (47 and 48 Vict. c. 39).

³ The idea of naval law had been inspired by the example of Ascension Island, a place in which there were reportedly no civilians. For a list of persons subject to naval law see Earl of Halsbury, *The Laws of England*, vol. XXV (London: Butterworth, 1913), 9ff. Although civilian passengers on board Her Majesty's ships were subject to naval law it is clear from this list that naval law would not have been suitable for a civilian population.

⁴ 53 & 54 Vict. c. 37.

The Swettenham Report⁵

The Colonial Office asked Sir Frank Swettenham, then Resident General of the Federated Malay States, to visit the territory. With the question of jurisdiction receiving attention separately, Swettenham was asked to make wide-ranging recommendations for the governance of the territory. He was asked, *inter alia*, to consider how far the existing machinery of Chinese local government, village organisation and headmen could be used and what means there were for the creation of a police force.⁶ Sir Frank arrived in Weihaiwei on 17 June 1900 and was joined by G.T. Hare, also of the Straits Settlements and later Acting Assistant Commissioner of Weihaiwei. Soon after reaching Weihaiwei, however, Swettenham contracted malaria and had to be confined to a ship in the harbour. It was Hare, an officer regarded as possessing 'excellent knowledge of Chinese dialects' who visited the enclave to make enquiries.⁷ Swettenham left Weihaiwei for Tientsin on 2 June, passing through the territory briefly on 9 June because the Boxer rebellion had necessitated a change in his itinerary. After his mission he travelled across America by rail before sailing to England, compiling his report on the way.⁸ Of his many recommendations, a number that were relevant to law and the administration of justice are examined in this chapter. We turn first to the recommendation on the use of existing Chinese local government, village organisation and headmen.

⁵ Report on Weihaiwei and its Future Administration, Swettenham to Colonial Office, 26 July 1900, CO 521/1.

⁶ Chamberlain to Straits Settlements, 16 March 1900, CO 521/1, p. 350. He was also asked specifically to recommend the possible sources of revenue in the territory and the best method of formally taking over administration so as to minimise friction with the Chinese authorities and to avoid the resistance of the inhabitants of the territory.

⁷ Hare had held various positions in the Straits Settlements and at the time of his visit to the territory to assist Swettenham, he was Secretary of Chinese Affairs in the Federated Malay States. He had begun his colonial service career as a cadet in 1884 and passed his cadetship in Chinese in 1888. In so far as most of his experience was in Penang, he would probably have been more familiar with the Fujian and Cantonese dialects than with Mandarin. His published works, for which see the bibliography at the end of this work, further suggest that his knowledge of the Chinese language and Chinese people was superior to that of Swettenham, who, aside from his interests evidenced from his published work, had passed the final examinations in Malay. See n. 12 for a biography of Swettenham. It was Hare, it may be remembered, who later proposed the scaling back of British involvement in the territory, including relinquishing territory and exercising rights akin to those exercised in a treaty port. See ch. 1.

⁸ Swettenham's itinerary and his report on the future administration of Weihaiwei is reported in Swettenham to SSC, 26 July 1900, CO 521/1, p. 641 and printed copy at p. 717.

1. Village organisation

Swettenham thought that the existing village organisation should, to a large extent, be maintained. Where, previously, village headmen had been answerable to the Chinese magistrate they should now be made accountable to a British magistrate. Headmen - or 'elders' as Swettenham also called them - should be given a written letter of authority, stating briefly the duties and powers of the holder, chopped with the Commissioner's seal and signature. These elders were also to be given the task of collecting taxes. Swettenham's recommendations are more easily understood after an excursus into the nature of Chinese local government and village organisation.

Administrative structure and legal process during the late Qing

Although we do not know much about the extent to which formal imperial authority in the late Qing was felt in the villages which became a part of Weihaiwei, we can be informed by studies of late Qing administrative institutions and arrangements for rural control. It should be noted from the outset that punishment and justice in China was not the work of a separate hierarchy of specialised tribunals in which specialist legal personnel were employed. Although there was some specialisation, this was to be found within the hierarchy of the Qing bureaucracy. This bureaucracy had the Emperor at its apex below which, in the capital, was a grand secretariat, a grand council and six boards. Alongside the six boards were another three boards or offices. Beneath these central bodies, and with some variation, the structure was as follows. China was divided into eighteen provinces. Provinces were, for some purposes, a collection of circuits (*dao*). Each province had a number of prefectures (*fu*), and prefectures were made up of several districts or counties (*xian*). Government was represented by the provincial, circuit, prefectural and county governments, headed respectively, by a governor-general or governor, prefect and magistrate. At the provincial level, the administration also had a provincial treasurer and a provincial judge. In the case of Weihaiwei, the eastern third of the territory lay in Jung-ch'eng district whilst the western two thirds lay in Wen-teng district. Both districts belonged to Tengchou prefecture, in Shantung province. The records show that, during the lease and particularly in its early years, the Commissioner of Weihaiwei communicated with the Governor of Shantung province. Little is recorded of any communications with the head of Tengchou prefecture but British officials had fairly regular contact with the magistrates of Jung-ch'eng and Wen-teng, sometimes consulting them on questions of Chinese law.

Situated at the district or county level, magistrates, usually referred to as the *xian* magistrate, were the Chinese officials at the basic level and who were popularly called 'local officials' (*difangguan*) or the *fumuguan* i.e. the father and mother official. Each magistrate would have had an office of subordinate officials and a staff of clerks, runners and so on with which the overburdened magistrate was expected to carry out his multifarious tasks. Approximate figures for 1819 show that the average population of a county was 250,000. District magistrates would probably have had deputies or sub-magistrates to carry out their orders in some of the larger towns in the country. The Chinese official who was stationed in Weihai City, the walled city which remained under Chinese jurisdiction throughout the period of the lease, was a sub-magistrate.

As already mentioned, the institutions of the Qing which dealt with criminal and civil cases were part and parcel of its administrative system. The District Magistrate was also the official with responsibility for law and order. Apart from petty crimes and minor civil disputes, all cases began at the district magistracy. From there, cases moved up and often also down along a well-defined route in the administrative hierarchy, described above, of county-prefecture-province-capital. A system of 'obligatory review', dependent upon the hierarchy of punishments and the administrative hierarchy, existed for criminal cases. All but the most trivial cases progressed in this way. The more severe the punishment imposed, the further along the route the case would go. All capital cases were eventually heard by the officials from the Board of Punishments, Censorate and the Court of Revision. Some cases reached the Emperor. Another feature of the system was that the highest level reached by a case was not necessarily the level at which the case was concluded. Cases were frequently remitted downwards for further review or for the punishment to be carried out where the case originated. Aside from the system of obligatory review, there was also a system of appeals which culminated with a petition to the Emperor himself. That the system of obligatory review emphasised good administration rather than the rights of the individual should be noted but this is not to say that the Qing state was uninterested in injustice and oppression suffered by the individual. Indeed, in the political theory of the time, cosmic harmony was affected by bad or wrong applications of the law as well as injustice and oppression to the individual. Either could lead to the downfall of a dynasty. It is therefore not surprising that the Qing legal process had a system of reviewing decisions taken by officials and a system for appealing against injustice.

Rural control

Below the district magistrate and sub-magistrates, the structures of authority are less easily traced. It would appear that separate systems of rural control and revenue collection existed, with agents appointed by the magistrate within a lower or sub-administrative division of rural China. The structure for policing adopted by the Qing at the inception of the dynasty was built upon the system introduced in the Ming. It had as its smallest unit the household (*hu*), ten of which made a *pai*, ten *pai* forming a *jia* and every ten *jia* constituting a *bao*. This was the *baojia* system. Each unit in this structure had a head. Thus there were *pai*, *jia* and *bao* heads. If not chosen by the magistrate but selected by the units they were to head, they would at least have been confirmed by the magistrate. In theory, at least, these divisions were superimposed upon the natural divisions in the countryside which had been shaped by geographic and economic factors. In practice, however, the *baojia* divisions were difficult to implement and, in many cases, deviated from the decimal pattern to coincide more with the natural divisions of village, rural markets and towns. This occurred despite the fact that the system had been designed with a deliberate disregard of the natural divisions in order to check any growth of rural power.⁹

The *baojia* system was meant to work through the registration of households. Each household was given a placard on which the names of the adult males and other persons belonging to it were to be recorded. Comings and goings from the household were likewise to be recorded. Although there were thus aspects of registration and census in the system, in fact its primary aspect was rural surveillance. Upon every person lay the responsibility to report to his *baojia* head the presence of criminals and offences coming to his attention. The *baojia* head was then responsible for reporting the matter to his superior, the district magistrate. By the middle of the 18th century, the similar parallel revenue system (*lijia*) had collapsed, leaving the *baojia* system to shoulder the additional responsibilities for collecting revenue. To remedy this situation, *difang* (or *dibao*), whose duty it was to arrest criminals, appeared as yet another agent of the government.

Later, when the *baojia* system declined, the *difang* or *dibao* became more and more synonymous with policing and tax collecting and, in some places, became the only heads of the *baojia* system. Chinese officials mentioned *difang* as being heads of

⁹ Hsiao Kung-chuan, *Rural China* (Seattle: University of Washington Press, 1960) makes this argument in a number of places e.g. at 29.

baojia. The following, cited by Hsiao Kung-chuan from an official source, shows how the duties of the *difang* had become so comprehensive as to suggest the eclipsing of other agents:

The service performed by the ti-fang is most important. Each of the chou or hsien is divided into a number of ti-fang [wards] and each ti-fang [agent] is in charge of a number of villages. He shares the responsibility for tax payments, disputes over land and homesteads, cases of litigation, occurrences of robbery and theft, and investigation of murder cases. Wherever there is any [government] service or undertaking, he is responsible for prompting the supply of the necessary implements and materials, and for supervising the drafted corvee laborers.

It is thus not surprising that Sybille Van der Sprenkel, echoing earlier Western observers, put the *dibao* at the top of a pyramid consisting of none other than the decimal *baojia* system.¹⁰ By the second half of the 19th century, the system had all but gone. Its nomenclature, however, remained, making it difficult to ascertain, from the use of the terms *dibao* and *difang*, the precise position of the post holders.

The geographic focus of this work is of course the 300 or so square miles in Jung-ch'eng and Wen-teng districts which became a part of the leased territory. On the eve of the lease of Weihaiwei how much remained of the *baojia* structure and the *difang* or *dibao*? Swettenham, in his report explained how ten 'families' formed one *jia* and ten such *jia* formed one *bao*. *Li* and *bao* appear to have been alternative terms for the same thing.¹¹ Three separate authorities were mentioned. There were *dibao* or *difang* appointed by the magistrate for each village or group of villages, village headmen and village elders. According to Swettenham, this last group sometimes constituted a 'council of elders'. The first group i.e. *dibao* or *difang* were referred to by Swettenham as 'watchmen' or 'village constables'. Their duties included informing village elders of the district magistrate's instructions and collecting taxes. Swettenham's report also suggests that *dibao* or *difang* were reliant on village elders for success in their tasks. Village headmen had numerous duties including assisting the *dibao* or *difang* with the collection of taxes and other tasks, supervising village fairs, maintaining and repairing temples, being responsible for wells, organising crop watching and the theatre performances which were very popular in the territory. Village headmen also mediated disputes and may have dealt with crimes considered

¹⁰ Sybille Van der Sprenkel, *Legal Institutions in Manchu China* (London: Athlone Press, 1962), 47.

¹¹ See Enc. G, Report on Weihaiwei and its Future Administration, Swettenham to SSC, 26 July 1900, CO 521/1.

too petty to report to the magistrate. The magistrate could also demand their co-operation if village resources were needed for official purposes.

It is not entirely clear from Swettenham's account that village headmen and village elders were distinct. For the most part, village elders, who could be dismissed by the magistrate, are described separately from village headmen, who had certain responsibilities towards the magistrate. However, in making his recommendation that existing arrangements be allowed to continue, only the *dibao/difang* and village elders are mentioned. Annual government reports from 1902 onwards offer little help in clarifying the situation. These only mention headmen rather than elders but this can be explained by the fact that, by this time, the government had co-opted village headmen as their agents. The earliest report on the administration of the territory, compiled by G.T. Hare, implies that headmen and village elders were one and the same, though there must have been influential and respected older individuals in the villages who were nonetheless not headmen. He states simply that '[i]n none of the villages within the Wei-hai-wei area are there any official representatives, or ti pao, of the local Chinese Magistrates.' Of course, he may have been referring to the situation under British rule; it would have been odd if *difang* answerable to the Chinese magistrates had been allowed to continue their duties in the territory. However, the report goes on to explain that '[i]n this part of Shantung the tribunals of village elders have practically no connecting link with the district authorities and are entirely self-governed.' This suggests that Hare was making a broader point about the autonomy of the villages in Weihaiwei. Johnston's account in *Lion*, published eight years later also makes no historical reference to the presence of *dibao* or *difang*. The reliability of the Swettenham report is in any case open to question given the briefness of the visit, Swettenham's confinement to his bed and his lack of relevant experience with similar communities. Swettenham was picked for the task because of his supposed 'familiarity with the general system of Colonial administration' and 'his experience in dealing with the Chinese', the latter gained as a result of his appointments in the Straits Settlements and in the Malay states. Although he was no doubt familiar with the 'general system of Colonial administration', it is less clear that he had much experience in dealing with the Chinese. At the time of his visit to Weihaiwei, his main experience of the Chinese came from the time he spent in Larut, a tin mining town in the Malay state of Perak. There, he had worked to appease the demands of Chinese

miners, after which he remained for a month to ensure that the peace between factions of miners was kept.¹² His experience of negotiating with the Malays was greater and indeed his published works attest to a primary interest in Malay language and culture.¹³

It would appear that, contrary to Swettenham's report, *dibao* or *difang* were not known in Weihaiwei. Villages possessed headmen and village elders, who between them carried out a variety of tasks and though not officially agents of the Chinese district magistrate, would have been the persons from whom the Chinese magistrate expected co-operation.

The rest of Swettenham's recommendations relevant to this study can be stated briefly.

2. Modifications to The China and Japan Order in Council, 1865

The most fundamental recommendation, from the point of view of the constitutional arrangements for the governance of Weihaiwei, was Swettenham's proposal that, with some modifications, the China and Japan Order in Council, 1865 ('the China Order'), should be extended to the territory.¹⁴ First passed in 1865, it had been subject to correction, amendment and partial repeal at least five times by the time Swettenham wrote his report.¹⁵ The China Order was an elaborate instrument, almost as elaborate as the Ottoman Dominions Order in Council, 1875, which was considered to contain 'a complete law' for the exercise of jurisdiction under the FJA, supplying as it did, a comprehensive system of civil and criminal jurisdiction in more than 300 articles. The China and Ottoman Orders were two of about a dozen orders in council, mostly shorter in length and more restrictive in substance, issued pursuant to the FJA.¹⁶ Like the Ottoman Dominions Order, the China Order dealt thoroughly with the court

¹² For more on Sir Frank Swettenham see the biography by H.S. Barlow, *Swettenham* (Kuala Lumpur: Southdene, 1995).

¹³ Works authored by Swettenham are listed in the bibliography at the end of this work.

¹⁴ Report on Weihaiwei and its Future Administration, Swettenham to SSC, 26 July 1900, CO 521/1.

¹⁵ The China and Corea Order in Council, 1904, repealed the 1865 Order and nine other China Orders in Council.

¹⁶ These were the Orders for Siam; Morocco; Muscat; Madagascar; China, Japan and Corea (first passed in 1865 as the China and Japan Order in Council); Ottoman Dominions (including Tripoli and Egypt); Zanzibar, The Western Pacific, West Africa; South Africa; and Cyprus. The degree of variation between orders in council was a function of the flexibility of the Foreign Jurisdiction Act, which, although passed mainly with the protection of British subjects abroad in mind, could and was used for far wider exercise of nearly all government functions in a foreign territory.

system, jurisdiction of the courts, and criminal and civil procedure, including, inter alia, the special procedures for bankruptcy, admiralty, matrimonial, probate and administration and other causes. In appended schedules, both orders had detailed rules of court, court fees and a large number of court forms. The hierarchy of courts prescribed by the China Order consisted of H.B.M.'s Supreme Court of China, which ordinarily sat in Shanghai, at its apex. Below this court lay the Provincial Court for each consular district, presided over by the Consul-General, Consuls or Vice-Consuls. Appeals from any Provincial Court lay to the Supreme Court in Shanghai and from there to the Privy Council. As to the applicable law, with some exceptions, English law prevailed.¹⁷

3. A Supreme Court of Weihaiwei

Swettenham recommended that Weihaiwei should have a Supreme Court. In the light of his proposal to extend to Weihaiwei the China Order, this court was to be treated on a footing similar to that of a provincial consular court, reporting to H.B.M.'s Supreme Court in Shanghai.¹⁸ To avoid too many cases being sent to Shanghai, Swettenham proposed enlargement of the jurisdiction of the Weihaiwei Supreme Court to \$2000 in mixed civil cases and \$1500 in cases between Europeans. Criminal jurisdiction extended to sentences of imprisonment of up to 24 months and fines not exceeding \$4000, in the case of the Chinese, and imprisonment of up to 12 months and fines not exceeding \$1000, in the case of Europeans. As a provincial court, the Weihaiwei Supreme Court would have to report all civil and criminal cases to the Supreme Court in Shanghai at regular intervals. On the personnel of the court, Swettenham's report contemplated the appointment of non-Europeans as magistrates, observing that it would be impossible, at least for some time, to appoint sufficient numbers of European magistrates.

4. Trial procedure

In Chinese-only cases, Swettenham suggested a ban on counsel for at least the first five or ten years of the administration. The courts could be assisted by assessors or a

¹⁷ WOIC, art. 19.

¹⁸ Enc. D, Required Modifications of Order in Council for the Government of Her Majesty's subjects in China, 1865, Report on Weihaiwei and its Future Administration, Swettenham to SSC, 26 July 1900, CO 521/1. In this enclosure, Swettenham refers also to the 1881 and 1887 China Orders in Council.

jury but these matters should, it was suggested, be left to the discretion of the Commissioner.

5. Chinese village courts

Although jurisdiction lay in the Supreme Court, Swettenham suggested that the executive of the territory - the Commissioner - should be empowered to delegate to other officers jurisdiction in all cases where only 'persons of Chinese birth' were concerned. In this regard, Swettenham also suggested that the Commissioner should be empowered to constitute 'Chinese village Courts' to deal with petty debts and trivial offences. These tribunals, assumed to have existed at the time of Swettenham's report, would continue to hear civil cases as they had previously done.

6. Indian or Straits Settlements Penal Codes and local customary law

In a departure from the China Order, Swettenham suggested that the Indian or Straits Settlements Penal Code be adopted for the Chinese population, whilst crimes committed by Europeans and civil disputes involving a non-Chinese should, as in the China Order, be determined in accordance with English law. Local customary law should be applied in all civil and criminal cases involving only Chinese persons. In criminal cases, this would mean the ousting of the aforementioned penal codes but Swettenham appears to have overlooked this possible inconsistency.

7. Policing

On policing, Swettenham proposed that some 200 men of the 1st Chinese Regiment be detailed to undertake a policing role, under a Superintendent of Police. As we saw in chapter 1, the 1st Chinese Regiment, which had been raised in the territory in 1899, was already headquartered in Mat'ou and had been useful in quelling the trouble which had arisen during the demarcation of the boundary of Weihaiwei. This regiment had received praise for its service in Tientsin during the Boxer rebellion.

8. Separate administration of Liukung

Citing the difficulties of communication between the island and the mainland, Swettenham echoed the views of others that Liukung should be administered separately under a cantonment magistrate responsible for the entire administration of the island.

9. A Commissioner for Weihaiwei

Swettenham proposed that Weihaiwei should have a Commissioner and in his view, the territory's needs were best met by

an experienced civil officer who understands the Chinese language and people ... The Commissioner, if a military officer, will know nothing of Chinese, and probably very little of administration. ... What is really wanted is an able, experienced civilian, who understands the Chinese people and language, who knows his work thoroughly, and can put the administration of the territory on a sound footing, so that his successors will not be embarrassed by his mistakes.¹⁹

10. The walled city of Weihai

Within the leased territory of Weihaiwei lay the walled city of Weihai. It was an area covering about a square mile in which there was a sub-magistrate's *yamen* (the headquarters of the official, usually housing his office and residence), a temple, some private dwellings, a few streets and a population of over a thousand Chinese.²⁰ The Peking Convention contained the following clause:

It is also agreed that within the Walled City of Wei-hai-wei Chinese officials shall continue to exercise jurisdiction except so far as may be inconsistent with naval and military requirements for the defence of the territory leased.

Swettenham recommended that the walled city, like the territory surrounding it, should be brought under British jurisdiction. He referred to it as a 'squalid Chinese town, the refuge of bad characters' and 'the centre of sedition.' Its brothels and other entertainment had already seduced some men of the Chinese Regiment.

The walled city clause in the Peking Convention was similar to the clause with respect to the Kowloon walled city contained in the convention for the lease of the New Territories, except that, in the latter, it was 'the Chinese officials now stationed there' who were referred to.²¹ It was the phrase 'now stationed there' which provided the grounds, in the face of an uprising against the British in the newly leased area, for expelling the Chinese officials, troops and Chinese residents from Kowloon City in 1899. Kowloon City was then declared in the New Territories Order in Council of December 1899 to be 'part and parcel of Her Majesty's Colony of Hong Kong, in like

¹⁹ Report on Weihaiwei and its Future Administration, para 26, Swettenham to SSC, 26 July 1900, CO 521/1.

²⁰ See population figure of 3500 and notes on differing estimates discussed in Atwell, *British Mandarins and Chinese Reformers* (Hong Kong: Oxford University Press, 1985), 20.

²¹ John V.A. MacMurray (ed.), *Treaties and Agreements With and Concerning China, 1894-1919, Vol 1: Manchu Period (1894-1911)* (New York: Oxford University Press, 1921), 130-131.

manner and for all intents and purposes as if it had originally formed part of the said Colony.²² Norman Miners, in his comparative study of the two walled cities, has shown how the Chinese language version of both conventions referred to the 'Chinese officials now stationed there' and further, that neither convention stated which version - the Chinese or the English - was to prevail.²³ There was thus a similar ground on which to bring to an end Chinese jurisdiction in Weihai City when a change in the Chinese officials stationed there occurred. Furthermore, in the case of the Kowloon City clause, the exception of inconsistency with the 'military requirements for the defence of Hong Kong' had been interpreted very broadly by the British.²⁴ In Weihaiwei, the complaints by the military officers of the deleterious effect of the walled city on their men could well have been the basis for the argument that the 'defence' exception was fulfilled and that Chinese jurisdiction should be ended. Dorward's report that the boundary disturbances had been organised from the walled city could similarly have been used to eject the Chinese officials.

Despite Swettenham's recommendation and the support of others, Chinese officials continued to exercise jurisdiction within the walled city of Weihai until rendition. The Colonial Office urged the Foreign Office to take steps to bring Chinese jurisdiction to an end but the Foreign Office made it clear that they were not prepared to act without the agreement of the Chinese Government.²⁵ The British Minister in Peking was instructed to raise the question when the time was ripe.²⁶

In the meantime, the practice of the British authorities contributing an additional salary to the sub-magistrate of the Walled City was instituted, a practice which gave them a measure of control over the area.²⁷ The question of Chinese

²² In *Re Wong Hon* [1959] HKLR 601, the Full Court of the Supreme Court of Hong Kong declared this Order in Council to be an 'act of state', with the consequence that the courts could not question the order's validity.

²³ N.J. Miners, 'A Tale of Two Walled Cities: Kowloon and Weihaiwei', *Hong Kong Law Journal*, 1982, 179-202.

²⁴ See Miners' comment that the British authorities took the clause to include 'practically anything that might be considered inconvenient by the military authorities', Miners (1982), 183.

²⁵ No. 61, Colonial Office (Lucas) to Foreign Office, 9 Oct 1900; No. 65, Foreign Office to Colonial Office, 22 Oct 1900; and No. 71, Foreign Office (Bertie) to CO, 21 Nov 1900; all in Eastern No. 72, CO 882/6/4.

²⁶ No. 42, Foreign Office (Villiers) to Colonial Office, 17 Aug 1901, Eastern No. 75, Confidential, CO 882/6/7.

²⁷ This practice is reported to have begun when Lockhart arrived to take up his post as Commissioner of the territory, see Commissioner to Chamberlain, 1 Sept 1902, Eastern No. 75, CO 882/6/7. The practice had in fact begun in 1899 under Lockhart's predecessor, Colonel Dorward: No. 40, Commissioner Sir A.F. Dorward to Mr. Chamberlain, 16 July 1901, CO 882/6.

jurisdiction in Weihai City appears to have been forgotten after Lockhart, reporting as Commissioner in 1902, advised that no change to the existing arrangements was necessary.²⁸ The years which followed saw co-operation between the Weihai City sub-magistrate and the district officers of Weihaiwei between whom there was an agreement that Chinese officials traversing the British leased areas had to report to the British authorities.

A number of the other recommendations made by Swettenham were also rejected. Liukung island was not administered separately and the China Order in Council was not extended to Weihaiwei. Weihaiwei was instead given its own Order in Council. The territory was also given its own High Court, independent of the court structure under the China Order. Neither the Indian Penal Code nor the Straits Settlements Penal Code was adopted, though Chinese law and custom became one of the sources of law in the territory. On the rights of audience of counsel, there was no prohibition of counsel and a few defendants were represented in court. We have already seen that Weihai City continued to be under Chinese jurisdiction; the Wei-hai-Wei Order in Council incorporated, with some variation, the walled city clause in the Peking Convention. The question of the deployment of men from the 1st Chinese Regiment to carry out policing duties was hotly opposed by some but men discharged as the regiment was disbanded were employed to enlarge the police force.²⁹ Swettenham's strong preference for a civilian to be appointed as Commissioner was shared by the Colonial Office and made real with the appointment of Lockhart in 1902. The recommendations of Swettenham which were incorporated into the Wei-hai-Wei Order in Council are discussed in more detail below.

The question of jurisdiction

At the same time as instructing Swettenham to concentrate, in his report, on questions of administration, the Colonial Office alluded to the prevailing view of the government on the status of the territory and its inhabitants. Swettenham was told that Weihaiwei was considered analogous to Cyprus, territory outside H.M.'s dominions in which jurisdiction was exercised under the Foreign Jurisdiction Act, 1890. The drafter of the Order in Council, Albert Gray, had by then begun drafting the

²⁸ Commissioner to Chamberlain, 1 Sept 1902, Eastern No 75, CO 882/6/7.

²⁹ See ch. 4.

Weihaiwei Order using the Cyprus Order in Council, 1878 ('the Cyprus Order'), as a template. The prior question of whether the FJA should be invoked drew a divided response amongst the government departments involved. The FJA would not have been relevant if Weihaiwei was part of H.M.'s dominions but, if it were to remain Chinese territory, it was the practice to pass a constitutional instrument, in this case an Order in Council, pursuant to the FJA.

United Kingdom constitutional law recognised the Crown's prerogative to acquire dominion or title over territory through the modes of settlement, cession, conquest and annexation or a combination of any two of these. Territory thus acquired became a part of H.M.'s dominions.³⁰ The Crown could exercise jurisdiction over such territory without reference to any Act of Parliament. The Law Officers and the Colonial Office took the view that Weihaiwei was a part of H.M.'s dominions by virtue of *cession* achieved through the Peking Convention. This conclusion was based partly on the clauses in the convention which gave Great Britain 'sole jurisdiction' over the territory. The benchmark set in the case of the New Territories, which was the subject of a 99-year lease convention in which the words 'sole jurisdiction' similarly appeared, had the appearance of a more cogent reason.³¹ In the Colonial Office, Lucas, the Under-Secretary of State, wrote that a lease contingent upon the occupation of Port Arthur by the Russians was at least as good as a lease for 99 years:

We have the great advantage of guidance from this latter case. As it was there ruled that the leased territory could be treated as an enlargement of Her Majesty's Dominions and that the leased soil became British soil, so we can now treat Weihaiwei as in all respects a British colony, for I take it that lawyers will not feel bound to treat a lease "for so long ..." as less effective than a lease for 99 years.³²

The Colonial Office thus pushed for the treatment of Weihaiwei as a colony.

Aside from recognising the Crown's prerogative to add territory to H.M.'s dominions, United Kingdom municipal law also recognised the Crown's prerogative to acquire jurisdiction in relation to a territory without obtaining title to that territory.

³⁰ Throughout this work, I have used the definition of H.M.'s dominions used in Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens, 1966), 23. We need not concern ourselves with the peripheries of this term which may be problematic. It is used here in the sense which excludes places in which the Crown possesses only jurisdiction. The use of this term by the government departments and the Law Officers in the discussions regarding the status of Weihaiwei certainly apprehended this aspect of it.

³¹ Leased under the Convention for the Extension of the Hongkong Territory, 1898, signed in Beijing on 9 June 1898, just weeks before the convention leasing Weihaiwei was signed on 1 July 1898. At the time, the New Territories was also referred to as 'the Kowloon extension'.

³² Lucas, Minute, 12 March 1900, CO 521/1.

The preamble to the FJA recognised the long established methods through which the Crown could acquire jurisdiction, namely, 'treaty, capitulation, grant, usage, sufferance and other lawful means.' As a matter of practice established by the time of the lease of Weihaiwei, such jurisdiction was usually exercised under the FJA.

Thus, if the view of the Colonial Office was accepted, it would have been inappropriate for the Order in Council to refer to the FJA. This view, shared by the Law Officers, did not prevail. The Foreign Office insisted that Weihaiwei should remain Chinese territory. It later explained why:

Weihaiwei is held by Great Britain on the same terms as Port Arthur is held by Russia, on the understanding that it will be handed back to China if and when Russia gives up Port Arthur. In these circumstances the incorporation of the territory of Weihaiwei in the British Dominions would create a precedent which would probably be followed by other Persons who have leased territory from China.³³

As mentioned in chapter 1, the choice of a lease of Weihaiwei, rather than a cession, was deliberate and based on geo-political reasons. Treating Weihaiwei as Chinese territory had at least the merit of consistency with those reasons. Before looking at any light which might have been thrown by municipal and international law on whether the leased territory of Weihaiwei was capable of being British territory rather than Chinese territory, we should note that the question we have been examining would, as a matter of municipal law, only have been of significance in the period before the Wei-hai-Wei Order in Council had been passed. Once it had been passed, had jurisdiction been asserted on the basis that Weihaiwei was incorporated into H.M.'s dominions, this jurisdiction would not, as a matter of municipal law, have been justiciable on the basis of the doctrine of act of state.³⁴ In the period when the status of Weihaiwei in municipal law was still being decided, the terms of the Peking Convention and the principles of international law would have been relevant, though as we have seen, it was possible to side-step the legal question entirely.

Municipal law perspectives

In municipal law, the question of the extent of the powers acquired by the Crown is usually answered by looking at the treaty or agreement in question, in this case the terms of the Peking Convention. In the case of Weihaiwei, municipal law would have

³³ Colonial Office to Law Officers, 5 Jan 1900, CO 521/2.

³⁴ *Japanese Imperial Government v. P. & O. Co* [1895] A.C. 644, at 658; *R. v. Crewe, ex parte Sekgome* [1910] 2 K. B. 576, at 607 and 626 and *Sobhuza II v. Miller* [1926] A.C. 518.

recognised that jurisdiction in Weihaiwei did not extend beyond the area leased under the convention. However, once jurisdiction is asserted by the Crown in the exercise of its prerogative powers, the validity of such jurisdiction is usually treated by the courts as a non-justiciable matter.

Furthermore, there were no general constraints on the extent to which the Crown could exercise jurisdiction in foreign territory. It had originally been thought that the Crown's powers of jurisdiction in foreign territory were limited to British subjects and to the nationals of a foreign state which had consented to a submission of its nationals to British jurisdiction. Gradually, the law adopted the attitude of German and French law and, certainly by the time of the lease of Weihaiwei, allowed more extensive jurisdiction to be claimed, including jurisdiction over persons of any nationality, in accordance with the need for effective control or administration of a protectorate.³⁵

International law perspectives

In determining whether the British Government could properly have treated Weihaiwei as British territory, the Colonial Office and the Law Officers would not have had the assistance of a definite answer from the principles of international law. The international lease was not an established concept at the time and the terms of the Peking Convention did not provide clear guidance.

Leases as a novel category

International law recognised ways in which a state could acquire territory. It had long recognised the acquisition of territory by a state through gift, prescription, accretion or cession. The lease, however, was little known. The main difficulty lay in the dearth of principles on the concept of the lease. At the end of the 19th century, international law had had little experience of leases of territory resembling the Weihaiwei lease. There had been leases, but these, although international, were not 'political'³⁶ and were more in the nature of private leases, albeit between two states rather than private

³⁵ Roberts-Wray, 114. An alternative ground for the claim of jurisdiction over Chinese nationals might have been the submission of China of its nationals resorting to Weihaiwei, a submission which could have been made through the lease convention. Likewise jurisdiction over other foreign nationals claimed would also have had to rest on submission by the powers to whom these foreign nationals belonged.

³⁶ This label was later used by Lauterpacht: See H. Lauterpacht, *Private Law Sources and Analogies of International Law* (London: Longmans, 1927). Others have used the label 'public' to indicate the same.

individuals or corporations.³⁷ By comparison, cession of territory was well established. This concept dominated attempts to understand the rights between states when territory had been the subject of 'sale' or 'pledge' agreements, so much so that it was usually assumed that these arrangements resulted in a cession of territory. Pre-20th century treatises were thus, not surprisingly, silent on leased territories.³⁸

Early 20th century texts such as Oppenheim's treatise, published in 1905, mentioned the leases of Chinese territory - the German lease of Kiaochow, the British leases of Weihaiwei and the New Territories, and the lease of Port Arthur to Russia - in the context of a discussion of whether more than one State may exercise sovereignty over a territory. Weihaiwei was cited as an example of an apparent, but not real, exercise of sovereignty by two states. The leases of Chinese territory and the administration of Cyprus between 1878-1914 were thus considered by Oppenheim to be 'practically, although not theoretically, cessions of pieces of territory.'³⁹ Most commentators, likewise, adopted the theory of the 'disguised cession'.⁴⁰ This was partly a result of a theory of sovereignty in which sovereignty was thought to be, by definition, absolute. Though a state could part with territory and its sovereignty over it, sovereignty over a territory was assumed to be neither reducible nor divisible.⁴¹ To

³⁷ Possible 19th century exceptions were the leases of strips of land on the mainland of Africa by the Sultan of Zanzibar to the British East Africa Company (in 1887, 1888 and 1890), to Italy (1892) and to the German East Africa Company (1888). See M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (New York: Longmans, Green, 1926), 237-239, at which these leases are considered to have conveyed the 'internal' sovereignty of the territory to the lessee state, the lessor state retaining 'external' sovereignty.

³⁸ William Edward Hall, *A Treatise on International Law*, 3rd edn (Oxford: Clarendon Press, 1890) is an example.

³⁹ L. Oppenheim, *International Law* (London: Longmans, 1905), vol. 1, 220-221.

⁴⁰ Writing after all Chinese leases, barring the New Territories, had been restored to China, Brierly remarked that excepting the Chinese ones, leases were 'no more than a diplomatic device for rendering a permanent loss of territory more palatable to the dispossessed state by avoiding any mention of annexation and holding out the hope of eventual recovery.' - J.L. Brierly, *The Law of the Nations*, 6th edn, Sir Humphrey Waldock (ed.), (Oxford: Clarendon Press, 1963), 189.

⁴¹ The concept of sovereignty has of course undergone much change. Although it was once understood as the untrammelled authority of a state, independent from other states, today it is defined by some in purely residual terms. Take for instance, the definition of sovereignty as 'a collective or umbrella term, denoting the rights which, at a given time, a state is accorded by international law, and the duties imposed upon it by that same law. These specific ... rights and duties constitute "sovereignty"; they do not "flow from" it.' : Bardo Fassbender, 'Sovereignty and Constitutionalism in International Law' in Neil Walker (ed.), *Sovereignty in Transition* (Oxford: Hart, 2003), 115-143, at 129. This is an elaboration of Kelsen's view in H. Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organization', 53 *Yale Law Journal*, 1944, vol. 53, 207-440, at 208, quoted by Fassbender, at 129. Sovereignty in law or legal sovereignty is distinguishable from sovereignty as a political ideal. For a helpful elucidation of the two concepts and the contrasting approaches of China and Britain to the concept of sovereignty in the context of the legal status of Hong Kong see Anthony

divide sovereignty between two states was to diminish the sovereignty of each so that it made no sense to regard either as sovereign. This is why Oppenheim was at pains to point out that all four so-called instances of divided sovereignty were not real examples.

At the end of the 1920s, with events by then showing that the leases of Chinese territory had not been treated as the lessee states' to dispose of freely, Lauterpacht dismissed the 'disguised cession' theory. China, he argued, in leasing territory, retained sovereignty but parted 'with the exercise of her sovereign rights for a limited number of years.'⁴² Other authors also acknowledged that these leases could not be treated as 'equivalent to cession' even if the 'internal sovereignty' passed under the lease.⁴³ Treatises written a few decades later, came to regard sovereignty over territory as, exceptionally, divisible. This division was described in terms of a split between the plenary powers of a state ('effective' sovereignty) and rights of sovereignty in reversion ('titular' or 'residual' sovereignty),⁴⁴ between *de jure* and *de facto* sovereignty, or between external and internal sovereignty. Thus the sovereignty which remained with the lessor state was not necessarily confined to its rights in reversion.⁴⁵ In the case of Cyprus between 1878 and 1914, it was said that the sovereignty which remained with Turkey, although nominal, was 'not necessarily devoid of practical consequences.'⁴⁶ In the case of the Chinese leases, China was considered to have retained 'residual sovereignty', a point underscored by, but not confined to, the grantor state's reversionary rights.⁴⁷

Despite the acceptance of the divisibility of sovereignty, the international lease still lacked conceptual content. As Brownlie observed in 1966,

the heading, it must be emphasised, is more a concession to usage than the product of legal analysis. The use of the term is excusable, but it cannot be regarded as more than a superficial guide as to the nature of the interest

Dicks, 'Treaty, Grant, Usage or Sufferance? Some Legal Aspects of the Status of Hong Kong', *The China Quarterly*, 1983, vol. 95, 427-455, at 429-434.

⁴² Lauterpacht, 185. This is particularly apt a description of the lease of Kiaochou. See discussion in text below.

⁴³ Lindley, 243.

⁴⁴ See D.P. O'Connell, *International Law*, 2nd edn, (London: Stevens, 1970), vol.1, ch. 10 for an exceptionally full discussion of divided sovereignty.

⁴⁵ Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law*, 9th edn, vol. I (London: Longman, 1992), 565ff.

⁴⁶ *Ibid.*, 567.

⁴⁷ *Ibid.*, 567-9. See also the similar conclusion in Dicks, 448.

concerned: each case depends on its particular facts and especially on the precise terms of the grant.⁴⁸

As mentioned above, the Law Officers' opinion that Weihaiwei was a cession for a term of years was based on the analogy of the New Territories. As we have seen, the open-ended nature of the Weihaiwei lease was spuriously considered by some in the Colonial Office to make Weihaiwei a stronger case for cession than the New Territories. The obvious countervailing argument is that an open-ended term provides less certainty than a definite number of years. It is also arguable that the Weihaiwei lease is not accurately characterised as being 'open-ended.' It was a lease which would expire on the fulfilment of an identifiable condition. These and other arguments were absent from the discussions. However, this emphasis on the duration of the lease is a distraction from the main uncertainty in the Peking Convention – that of the rights transferred to the lessee state. In comparing the Weihaiwei lease with that of the New Territories, key differences between the two conventions were also ignored. The New Territories was leased to provide for the 'extension' of territory over which Great Britain was sovereign: Weihaiwei, in contrast, was not an enlargement of a previously ceded area. Whilst the New Territories was leased 'for the proper defence and protection of the Colony', Weihaiwei was leased 'to provide Great Britain with a suitable naval harbour in North China and for the better protection of British commerce in the neighbouring seas.' It would have been possible to argue that cession, in the case of the New Territories, rested on particular circumstances which were absent in the case of Weihaiwei. Nonetheless, Roberts-Wray, whilst acknowledging the extra strengths in the case of the New Territories, was of the view that 'if the existence of a lease is the essential ground for regarding Hong Kong as part of Her Majesty's dominions' then Weihaiwei should have the same status.⁴⁹ As we have seen, since the lease was bereft of content at international law, this conclusion goes too far. Such a conclusion, however, would not have been unreasonable had it been made at the time the status of Weihaiwei was being determined by the British Government. To sum up the discussion thus far, although the argument based on the analogy of the New Territories lease contained weaknesses, the position advocated by the Law Officers and the Colonial Office of cession for a term of years, was not wholly unsupportable at international law.

⁴⁸ Ian Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1966), at 104. The same view is expressed in the 6th edn, 110-11.

⁴⁹ Roberts-Wray, 27.

The terms of the Peking Convention

If the concept of a lease did not import a particular set of obligations, its terms could determine the question of whether Weihaiwei was ceded. The subject of treaty interpretation is, of course, a large one and the intention here is no more than to look at some obvious questions.

By the end of the 19th century, there was a body of rules, mostly common sense principles traceable to Roman law, on the interpretation of treaties.⁵⁰ The present law is contained in the Vienna Convention on the Law of Treaties which, to the extent that it codifies previous law, is relevant to treaties concluded before its coming into force.⁵¹ As with the customary law it codified, the provisions of the Vienna Convention are residual, in that they will apply in the absence of a treaty's own provisions, parties' agreement and a different intention otherwise established. Where the parties disagree, the applicable principles were as follows: reasonable interpretation should be preferred over literal interpretation; words must be given their usual everyday meaning unless expressly used in a technical or other sense; stipulations should be interpreted assuming that the parties intended something reasonable and adequate for the purpose of the treaty and not inconsistent with generally recognised principles of International Law and with treaty obligations owed to third states.⁵² Very clear words are required for an act as significant as the transfer of sovereignty. Previous treaties between the same parties and those between one of the parties and a third party may be used to reduce ambiguities. The real intentions of the parties disclosed prior to signing the treaty may also, in certain circumstances, be looked at, as may, if relevant, the subsequent practice of the parties with regard to the treaty.

Had the British Government put forward the view that the Peking Convention ceded Weihaiwei to the British Crown, albeit contingent upon the presence of Russia in Port Arthur, it is doubtful that China would have shared this interpretation. Given China's reluctance to lease Weihaiwei, it would be difficult to establish that, when the lease was signed, China intended a cession of territory, even if only temporarily. It should also be remembered that, in asserting the idea of a 'cession for a term of years', the Law Officers and the Colonial Office were stretching the law beyond its

⁵⁰ For a summary of principles see Hall (1890), 334-342 or Oppenheim (1905), 559ff.

⁵¹ Vienna Convention on the Law of Treaties, art. 4.

⁵² Oppenheim (1905), 560-561.

known boundaries. That the Law Officers considered the New Territories to be a cession for a term of years was an attempt to hide a political choice of absorbing it into the colony of Hong Kong behind a partially recognisable concept of international law. In extending this assertion to Weihaiwei, they appear not to have taken into consideration the fact that 'cession for a term of years' had been unilaterally created for the New Territories rather than founded on a principle of international law.

Another impediment to the 'cession' argument lay in the words of the convention, in particular, the phrase 'sole jurisdiction'. Although 'sole' implies the exclusion of the jurisdiction of others, including, quite possibly, the jurisdiction of the grantor, the word 'jurisdiction' has never meant the same thing as alienating the territory over which that jurisdiction is granted. Extra-territorial jurisdiction is of course an excellent example of the exercise of jurisdiction by one state over the territory of another. It is very doubtful that any argument that Weihaiwei had been ceded for a term of years could be based on the words used in the convention. Although 'sole' implies exclusivity, nothing in the phrase itself suggests a transfer of all rights subject only to the duration of the lease. The overarching rule of *in dubio mitius* would require very clear words for such a transfer.

A number of wider factors lent no further assistance to the 'cession' argument. Great Britain's general policy of maintaining China's territorial integrity and China's policy towards western powers both supported a narrower, not wider, interpretation of the convention. The former would have been known to the Chinese Government, though China might have observed that Britain was, by the time of the Peking Convention, less committed to that policy.

Other leases to which at least one of the states was a party should be looked at. The New Territories lease has already been discussed. The circumstances under which Germany came to lease Kiaochow in 1898 are mentioned in chapter 1. Both sides of the bay were described in the lease convention as being 'ceded to Germany on lease, provisionally for ninety-nine years'. However, there was also an express statement that China 'will abstain from exercising rights of sovereignty in the ceded territory during the term of the lease.' These statements provide reasonable grounds for the analysis made by Lauterpacht that this lease involved a transfer of territory for the duration of the lease, during which time Chinese sovereignty was suspended in favour

of German sovereignty over the territory.⁵³ As we saw above, international law came to accept that, exceptionally, sovereignty over a territory could be divided. Under German municipal law, the territory was treated as German territory, albeit in the class of territories to which the German constitution did not apply. Apart from indicating that there were others who were prepared to accept the novel category of cession for a term of years, it is doubtful if any support could be drawn from the lease of Kiaochow for the 'cession' argument in relation to Weihaiwei since the wording of the two conventions is so different.

Other conventions and agreements are similarly couched in such different terms that it is difficult to extrapolate arguments for or against the transfer of sovereignty in the case of the Peking Convention. In June 1878, a convention was signed to 'assign' the island of Cyprus 'to be occupied and administered by England.' An article added later 'vested in Her Majesty the Queen ... full powers for making laws and Conventions for the government of the island in Her Majesty's name ... and for the regulation of its commercial and Consular relations and affairs free from the Porte's control.' The land on the mainland of Africa leased by the Sultan of Zanzibar to the British East Africa Company and its precursor, the British East African Association, in 1887-1890, transferred to the lessor full powers of administration which were to be exercised in the Sultan's name and under his flag.⁵⁴

It may be suggested that the particular clauses and expressions used in these treaties are not material and that, taken together, they form a recognisable pattern or system of treaties. The background to the acquisition of leases, as opposed to outright cessions of territory, by Russia, France, Germany and Great Britain, in the period after the Sino-Japanese War, provide reason for treating these leases as a system of treaties.⁵⁵ However, the basic premise behind the use of the lease was to allow China to save face and, after the first of the treaties, to ensure that each acquisition did not appear to be more extensive than the first. It should be remembered that the 'disguised cession' view of the lease remained strong for some time after these leases were

⁵³ See text at n. 42.

⁵⁴ For a full comparison of similar agreements reference ought also to be made to the other leases of Chinese territory mentioned in ch. 1 (Port Arthur and Kiangchowwan); the leases of territory by the Sultan of Zanzibar to the German East Africa Company and to Italy, discussed in Lindley, see n. 37 above; and the agreement for the perpetual lease of a tract of land south of the Namwan river referred to in Dicks, at 448, n. 80.

⁵⁵ *The Wimbledon*, P.C.I.J., Ser. A, no. 1, 30 (1923); *Rights of U. S. Nationals in Morocco*, I.C.J. Rep. 1952, 189.

entered into and gave way to a different view only with the development in understanding over the divisibility of sovereignty and the actual events which had occurred, not least the agreements reached at the Washington Conference.

In summary, the Foreign Office stance on Weihaiwei, although not based on legal considerations, better reflected the status of the territory in international law. Although the position taken by the Law Officers and the Colonial Office, on the basis of international law and the opinions of treatise writers, was defensible, none of the terms of the Peking Convention provided support for it.

For the sake of completeness, there remain three questions to touch on briefly. None of these questions is relevant to the issue of jurisdiction as faced at the time the Order in Council was drafted. First, there is the question of the validity of the Peking Convention. The leases of Chinese territory, along with the treaties which gave states extra-territorial jurisdiction in China, are still generally referred to as the product of the 19th century 'unequal' treaties associated with a weakened Qing dynasty. Successive Chinese governments since those treaties were concluded have not taken a uniform approach. The nationalist government of China considered the treaties to be valid. Later, the Chinese communist government repeatedly denied the validity of the New Territories lease, by then the only remaining lease, on the basis of the alleged doctrine of unequal treaty.⁵⁶ The Qing view of these treaties has not been the subject of thorough investigation but, given its very different approach to international law and its unique understanding of China's relations with foreign states,⁵⁷ the Peking Convention would probably have been considered valid but only to the extent that it did not amount to an outright cession of the territory.

During the 20th century, states such as Russia and China argued that such treaties were either null, subject to annulment or, at the very least, open to revision under an alleged doctrine of unequal treaty at international law. There was some disagreement as to whether the doctrine was a substantive or a procedural doctrine.⁵⁸

⁵⁶ Hungdah Chiu, 'Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties' in Jerome Alan Cohen (ed.), *China's Practice of International Law* (Cambridge, Mass.: Harvard University Press, 1972) and Wesley-Smith (1998), 299-301.

⁵⁷ See Luke T. Lee, *China and International Agreements* (Leiden: Rule of Law Press, 1969), ch. 3 ('Concept of Treaties in Traditional China'). The classic work on China's attitude towards other states is John King Fairbank (ed.), *The Chinese World Order* (Cambridge, Mass.: Harvard University Press, 1968).

⁵⁸ See Werner Morvay, 'Unequal Treaties' in *Encyclopedia of Public International Law*, published under the auspices of the Max Planck Institute for Comparative Public Law and International Law under the direction of Rudolf Bernhardt, vol. 7 (Amsterdam: North-Holland, 1984), 514-517.

The alleged doctrine was not accepted in international law at the time of the Peking Convention nor decades later when the international law of treaties was codified in 1969 through the Vienna Convention on the Law of Treaties.⁵⁹ In international law, the validity of a treaty is conditional upon the mutual consent of the parties. Atwell's account of the negotiations between Britain and China over Weihaiwei suggests that the former put pressure on the latter to sign the lease by threatening military action.⁶⁰ Pressure, force and intimidation, however, carried little weight in international law because the lack of consent as a vitiating factor was (and remains) a narrow doctrine, narrower even than its counterpart in private law. For one, the lack of consent applied only to the representative of the contracting states.⁶¹ If the doctrine were wider, few treaties would have been valid, given that many treaties were concluded between victor and defeated states after a war. Such was clearly not the law.⁶² An imbalance in the obligations of the two states under the treaty rather than in the relative bargaining strengths of the states was likewise ignored by international law. The law was prepared to intervene only exceptionally, such as when the treaty imposed immoral obligations.⁶³ In short, there was no room, in the principles of international law at the time, for the concept of the unequal treaty.⁶⁴

Second, there is the question of the status of Weihaiwei after Russia withdrew from Port Arthur. The Weihaiwei lease was never formally varied. However, it may be considered to have been varied by the exchanges between China and Britain when the issue was raised in 1905 and 1906. The terms of this variation were that the lease of Weihaiwei would continue until such time as China was in possession of 'fair naval strength'. This new condition took the place of Russia's withdrawal. Under United Kingdom constitutional law, however, the withdrawal of Russia would have made no appreciable difference. The Crown's continued exercise of jurisdiction would still

⁵⁹ In the 16th and 17th centuries inequality was acknowledged by the law, but did not cause a treaty to be void or invalid. For an overview of the development of the doctrine of unequal treaty, see Chiu, 239-242.

⁶⁰ Atwell, 10.

⁶¹ See Oppenheim, 525.

⁶² See Hall (1890), 326 where he concludes that 'the doctrine is one which gives a legal sanction to an infinite number of agreements one of the parties to each of which has no real freedom of will.'

⁶³ See Oppenheim, 527.

⁶⁴ See Lucius Caflish, 'Unequal Treaties', *German Yearbook of International Law*, vol. 35 (Berlin: Duncker & Humblot, 1992), 52-80 where in review and analysis of the alleged doctrine during the 20th century concluded that at best, the 'unequal' treaty is a 'political weapon to obtain abrogation or review of conventional instruments'.

have rested on one of the means recognised in the preamble to the FJA;⁶⁵ the Wei-hai-Wei Order in Council, passed in 1901, would thus have remained valid.

Finally, had we been looking at the question of the status of Weihaiwei some time after the lease had begun, Britain and China's policy and practice relating to it would be relevant as evidence of their respective attitudes towards the question.⁶⁶ For instance, it might be relevant to note that, unlike the policy in the New Territories, some long leases of land were granted by the government of Weihaiwei without any reference to the contingent terms of British tenure as stated in the lease convention. In the New Territories, although Crown leases for land therein were issued in contravention of the non-expropriation clause in the convention, such leases were to expire, with the lease of the New Territories itself, at midnight 30 June 1997. The issue of leases of land extending beyond the term of the lease of Weihaiwei seems never to have been questioned during most of the lease. It was only when rendition looked certain and European landowners asked for compensation that the Foreign Office enquired into the matter.⁶⁷

The Wei-hai-Wei Order in Council

The British Government, having resolved to treat Weihaiwei as foreign territory and having received Swettenham's report, passed the Wei-hai-Wei Order in Council on 24 July 1901.⁶⁸ It incorporated some of Swettenham's recommendations and was passed pursuant to the Foreign Jurisdiction Act, 1890. As we saw above, the Order was initially drafted using the text of the Cyprus Order. This Order provided the Island of Cyprus with a High Commissioner, an Executive Council and a Legislative Council. Emergencies excepted, it gave the high commissioner the power to make law on the advice of the legislative council. Only three articles dealt with the administration of justice, and these did so tangentially. Article 21 empowered the high commissioner to 'constitute and appoint all judges, justices of the peace, and other necessary officers.'

⁶⁵ See below.

⁶⁶ This would include the extent to which the British government assumed mining or cabotage rights.

⁶⁷ Memorandum on the Rendition of Weihaiwei, Closed until 1980, FO 676/311.

⁶⁸ Laid before Parliament on 4 Aug 1901 as required under s. 11 of the Foreign Jurisdiction Act, 1890. The many months between the leasing of Weihaiwei and the passing of the Order is to be contrasted with the speed with which the New Territories was provided with an Order in Council. This Order in Council was dated 20 Oct 1898, the lease of the New Territories having become effective on 1 July that same year.

The next two articles addressed the high commissioner's powers to pardon convicts, either conditionally or unconditionally, and to remit or suspend the payment of fines, etc. The Cyprus Order made no mention of courts, the sources of law or the procedure to be used in court. It was a relatively short instrument of twenty eight articles, nearly half of which related to the legislative council, its powers, membership, quorum and other related matters.

Major departures from the Cyprus Order were made to arrive at the much longer Wei-hai-Wei Order with the result that the latter bore little resemblance to the former. Albert Gray, the draftsman, explained, 'It is obvious that the constitution given to Cyprus by the Order in Council ... is framed on a scale exceeding the present needs of Wei-hai Wei.' One significant difference was the lack of a legislature or executive council in Weihaiwei. There being no legislative council, the provisions in the Cyprus Order on the membership and powers of the legislative council were redundant and thus omitted. Instead, the Commissioner of Weihaiwei was given legislative and executive powers. The executive powers of the Commissioner included powers to make grants and dispositions of land in H.M.'s name and the power to pardon or commute the sentences of offenders and remit fines.⁶⁹ Unlike the Cyprus Order, the Wei-hai-Wei Order contained detailed provisions on the courts and court procedure. These were inserted by the drafter with the specific goal of providing the courts of the territory with 'a procedure to work upon from the first.'⁷⁰

Swettenham's proposal for a provincial court in Weihaiwei was not adopted. Weihaiwei was given a court system independent of H.B.M.'s Supreme Court in China. It was to have a High Court from which appeals lay to the Supreme Court in Hong Kong, final appeals lying to the Privy Council. Below the High Court, the Commissioner was given powers to appoint magistrates.⁷¹ Whether village courts over which village elders presided were continued or established as suggested by Swettenham is discussed in the next chapter. Swettenham's advice on prohibiting counsel from appearing in the courts of the territory was not adopted nor was his suggestion on the incorporation of the Indian or Straits Settlements Penal Code into

⁶⁹ WOIC, arts. 6 and 7.

⁷⁰ Gray to Foreign Office, Confidential Print, Affairs on China, received 19 Sept 1899, FO 17/1664, pp. 103-104.

⁷¹ The power to appoint magistrates was originally given to the SSC under art.14(1). This was amended by the Wei-Hai-Wei Order in Council, 1903, which introduced a new paragraph to art. 14 allowing the Commissioner to appoint magistrates provisionally.

the laws of Weihaiwei. The Order provided for the continuing reception of English criminal and civil laws and, to a lesser extent, Chinese law and custom. As we saw above, Swettenham's suggestion that jurisdiction should be exercised within the walled city was not adopted. Article 11 of the Order provided that

Anything in this Order to the contrary notwithstanding, all natives resident within the walled city of Wei-hai-Wei shall continue to be under the jurisdiction of Chinese officials except so far as such jurisdiction may be inconsistent with the naval and military requirements of His Majesty, or with the peace, order, and good government of the said territories.

This clause was an enlargement of the walled city clause in the lease convention. That clause provided for the continuation of the exercise of jurisdiction by Chinese officials, 'except so far as may be inconsistent with naval and military requirements for the defence of the territory leased.' The enlargement of jurisdiction was threefold. First, the defence limitation in the convention was omitted in the Order; second, the words 'the peace, order, and good government', absent in the convention, extended the justification for intervention beyond the 'naval and military requirements' mentioned therein. Third, article 11 refers to the jurisdiction of the Chinese officials over 'natives resident within the walled city', a restriction which does not appear in the Peking Convention.⁷² This enlargement of the jurisdiction of the Crown beyond the terms of the Peking Convention would probably have been protected from challenge in a court by the act of state doctrine.

In drafting the Wei-hai-Wei Order in Council, there were two main concerns. First, there was the concern to make the Order reflect the geo-political situation which had motivated the British to lease the territory. Second, there was the need to ensure that the provisions of the Order were suitable for the conditions of the territory at the time, yet sufficiently flexible to cope with possible development of the territory. The former was achieved through the treatment of Weihaiwei as Chinese territory over which the Crown exercised jurisdiction. Of the latter, the modest needs of the territory were emphasised. It was hoped that the legal system introduced by the Order would work and that the administration of the territory would not be costly. In the next chapter the

⁷² This last extension would have justified the two instances of British interference in the walled city. These are discussed in Miners (1982), 192ff.

system of courts and laws of the territory under the Order and in practice are looked at in more detail.

CHAPTER 3

COURTS AND LAWS

The Wei-hai-Wei Order in Council was drafted at a time when the needs of the territory were modest and the territory's future development uncertain. An instrument had to be drafted which was sufficiently flexible to accommodate both the immediate needs of the territory and its prospects in the longer term. Thus the drafter of the Order deliberately included sufficient procedural rules with which the courts could begin their work and a structure of courts which would endure. In many respects, the Order provided a system of courts and laws which proved too elaborate for the territory. Few cases proceeded beyond the lowest rung in the hierarchy of courts. Few cases were begun in the High Court and few decisions, if any, were appealed. The territory never had a resident High Court Judge, nor did any barristers establish themselves in the territory. When it came to sources of law, Lockhart, at least, was of the view that simple executive orders would suffice.

Rules of court and a comparatively small number of ordinances were passed to supplement the Order's provisions but the Order's provisions for the courts and laws of the territory did, in fact, survive with only some changes being introduced by ordinance. That the Order required few changes and the introduction of a relatively small number of ordinances is attributable not only to its inherent flexibility and to its rules of procedure but also to two other factors. One was the lack of commercial development in the territory and the consequent failure to attract a sizeable European population. The other were the deviations from the Order carried out in practice. Not all of these were strictly speaking deviations, as some were adaptations to meet the needs of the territory as permitted under article 19. We turn first to the courts, before looking at the various sources of law.

Courts of law in Weihaiwei

The hierarchy of courts established by the Order comprised a High Court and Magistrates' Courts.¹ Both had original jurisdiction but only the former had appellate

¹ WOIC, arts 12 and 14. It may be remembered that Swettenham had suggested that Weihaiwei should have a Supreme Court. The probable explanation for the fact that Weihaiwei was given a High Court is the habit, though there was no necessity for it in law, of reserving the term Supreme Court for the court established in a colony, leaving protectorates and mandated or trust territories to have High Courts.

jurisdiction.² Some decisions of the High Court could be appealed to the Supreme Court of Hong Kong and from there to the Privy Council. The inhabitants of the territory, though they may not have had a full understanding of the powers and jurisdiction of these courts, were not ignorant of the powers of the Commissioner or the High Court Judge, particularly when they felt dissatisfied with the decision of a magistrate.³ Nonetheless, for the vast majority of those coming into contact with the court system of the territory, the Magistrates' Court was the only court in this hierarchy which they encountered. This is reflected in the greater attention paid to the work of the magistrates below.

The High Court

The Wei-hai-Wei Order in Council provided for the establishment of a High Court of Weihaiwei⁴ in which 'all jurisdiction, criminal and civil, over all persons and in all cases respectively being and arising within the territories' was vested.⁵ All persons included the Chinese nationals of the territory, except for 'all natives' - defined in the Order as non-British subjects of 'Chinese birth or parentage'⁶ resident within the walled city of Wei-hai-wei' who continued to be under the jurisdiction of Chinese officials.⁷

The Order allowed for the appointment of a Judge of the High Court, but also allowed the Commissioner to sit as High Court Judge, both before such appointment had been made as well as afterwards.⁸ The clause allowing the Commissioner to sit as High Court Judge was included when the Colonial Office made it clear, during the drafting of the Order, that they did not see fit to provide the territory with a judge, at

² WOIC, art. 14.

³ See the successive petitions made by some disappointed litigants discussed in ch. 6.

⁴ WOIC, art. 12.

⁵ WOIC, art. 16. The exercise of jurisdiction over all persons, British and non-British subjects is consistent with the FJA, s. 1. This section explains the prerogative which enables Her Majesty to 'hold, exercise, and enjoy' jurisdiction within a foreign country to the same extent as if that jurisdiction had been obtained by cession or conquest of territory. Jurisdiction in territory acquired by these means included jurisdiction over British and non-British subjects. Arguments to the contrary were put to rest in *R. v. Crewe, ex parte Sekgome* [1910] 2 K. B. 576.

⁶ WOIC, art. 2.

⁷ WOIC, art. 11. For a discussion of the differences between this article and the walled city clause in the Peking Convention, see ch. 2.

⁸ WOIC, arts 12 and 13. To cover for the judge's illness or absence from the territory, the Commissioner was also empowered to temporarily appoint, in such circumstances, an acting judge: art. 13.

least not immediately.⁹ Article 13 of the Order provided that the person appointed High Court Judge had to be a member of the Bar of England, Scotland or Ireland. No such qualification was required of the Commissioner sitting as judge or of the magistrates who dealt with almost all criminal and civil cases reaching the courts of the territory.

Early in 1903, Lockhart had written to the Colonial Office suggesting that it was necessary to appoint a judge.¹⁰ He had for some time been uneasy about the conflicting roles of judge and commissioner, especially in view of the commissioner's power to grant pardons in capital cases.¹¹ He also expressed anxiety that a case of some technical difficulty might arise which required legal expertise. In a reply from the Colonial Office, Alexander Fiddian, assistant private secretary to the Secretary of State for the Colonies, brushed aside the suggestion that the arrangements should be altered; the coincidence of 'Judge and Fount of Mercy' in the Commissioner was not unique to Weihaiwei. An arrangement whereby the Chief Justice of the Supreme Court in Shanghai would visit Weihaiwei to hear cases was also dismissed as impracticable. An earlier suggestion had been to appoint a judge from Hong Kong but this had been abandoned on the grounds of expense. On difficult points of law, Fiddian reminded Lockhart that, under the Order,¹² he had the power to reserve for the Supreme Court of Hong Kong any question of law arising from a criminal trial.¹³ Fiddian was later to express the view that 'Weihaiwei cannot afford the luxury of a legal establishment of its own.'¹⁴ At the same time, he acknowledged that it 'would be awkward if the Commissioner went wrong (as he seems likely to do) over an "international" case.'¹⁵ After some delay caused by the issue of finance, a judge was finally appointed in 1904. F.S.A. Bourne, whose principal appointment was as Assistant Judge of the Supreme Court for China and Corea, was appointed Judge of the High Court of Weihaiwei. Through discussions with H.S. Wilkinson, the Chief

⁹ See Albert Gray (drafter) to the Under-Secretary of State, Colonial Office, received on 26 Dec 1900 and related correspondence, CO 521/1.

¹⁰ Lockhart to SSC, 22 Jan 1903, CO 521/4.

¹¹ Lockhart had earlier expressed his views in a private letter: Lockhart to Lucas, 6 Nov 1902 (private), CO 521/4. For the Commissioner's powers see WOIC, arts 6 and 23.

¹² WOIC, art. 35.

¹³ Fiddian to Lockhart (private), 19 Dec 1902, CO521/4.

¹⁴ Fiddian to Risley and Johnson, Minute, 10 March 1903, CO 521/4.

¹⁵ *Ibid.*

Justice of the same court in Shanghai, it was agreed that Weihaiwei would be treated, for practical purposes, as if it were a province on the judge's circuit of consular courts in North China. In line with the practice of judges going on circuit from that court, it was also suggested that no specific dates be set down for the visits to Weihaiwei - the judge making trips only when necessary.¹⁶ Trips to the leased territory, as it turned out, were usually necessary only once or twice a year. In total, the High Court of Weihaiwei had three judges. Soon after Bourne's retirement in 1916, H.P. Wilkinson, formerly the Crown Advocate for Weihaiwei, was appointed as Judge.¹⁷ He was in turn succeeded in 1925 by Peter Grain, at the time Assistant Judge of the Supreme Court of China, who served on the Weihaiwei bench until rendition of the territory.

Owing to the small number of Europeans,¹⁸ whose cases would probably have been heard in the High Court, and to the infrequency of serious crimes in the territory, the High Court saw only a small number of cases in its nearly thirty years, some of which were heard by the Commissioner.¹⁹ The single most important factor accounting for the small number of cases heard in the High Court was the use of article 18 of the Order.

Magistrates' Courts

Article 18 of the Order allowed the jurisdiction of the High Court, in respect of a particular district, to be exercised by a magistrate appointed for that district,²⁰ the High Court retaining concurrent jurisdiction in every such district. Apart from the period between 1906 and 1916 when the territory was divided into two administrative and magisterial districts, the whole of the territory formed a single district. It was article 18 which, combined with the high volume of minor civil disputes, caused the magistrates of Weihaiwei to be overworked. Although the Order empowered the High

¹⁶ Colonial Office to Lockhart, 19 Feb 1904, CO 521/7.

¹⁷ See Hiram Parkes Wilkinson, *The Family in Classical China* (Shanghai: Kelly & Walsh, 1926), authored by this judge.

¹⁸ See Figures 1-3 in ch. 1.

¹⁹ Incomplete statistics indicate that from 1906 to 1926, the High Court heard 28 original cases. It is only from about 1925 that the High Court saw more cases, some of these being cases from the Magistrates under applications under the Rehearings Ordinance, 1913.

²⁰ The Order was amended in 1903 to add three new sub-articles to art. 14. These new sub-articles allowed the Commissioner to appoint Magistrates provisionally, subject to the Secretary of State's confirmation or disallowance. Pending confirmation or disallowance the appointed magistrate could take office: WOIC, 1901, Amendment Order, 1903, Godfrey E.P. Hertslet and Edward Parker, *Hertslet's China Treaties*, 3rd edn (London: HMSO, 1908), vol. II.

Court to order any case pending before a magistrate to be removed to the High Court,²¹ this power was rarely, if ever, exercised. In practice, the High Court did not have routine oversight of cases so that it might order a case to be removed to itself. This, together with the fact of few appeals, allowed the magistrates considerable autonomy in their day-to-day work.

Magistrates' powers were of course subject to restrictions. They could not try cases of treason, murder, rape, forgery or perjury, while other serious offences punishable with penal servitude for seven years and upwards could only be tried by a magistrate at the direction, in writing, of the High Court.²² The High Court could so direct if it was of the opinion that the sentencing powers of the magistrate would be adequate for the particular case. The practice in Weihaiwei allowed the magistrate to hold preliminary hearings into cases that were beyond his jurisdiction before the case was tried in the High Court. An example of this is a prosecution for attempted murder tried in the High Court in 1927 which took place after an earlier 'preliminary trial' before the magistrate.²³

The sentencing powers of magistrates were limited to imprisonment with or without hard labour not exceeding twelve months and fines not greater than \$400.²⁴ These limits applied even when the magistrate was exercising the jurisdiction of the High Court delegated to it under article 18. This was the subject of correspondence with the Crown Advocate in Shanghai after one of the magistrates tried, convicted and sentenced a defendant to 18 months imprisonment for an assault under the Offences Against the Person Ordinance.²⁵ The Crown Advocate was asked if the magistrate's actions were in accordance with the Order. The view pressed upon him was that, since magistrates in Weihaiwei exercise the delegated jurisdiction of the High Court, magistrates should be entitled to pass any length of sentence, subject to the maximum for the offence, in this case two years imprisonment. From the information in the minutes, it would seem that, if not for the urgency involved in this case, the magistrate would have adjourned the proceedings for the case to be dealt with by the High Court.

²¹ WOIC, art. 18(1). See also s. 2 of the Rehearings Ordinance, 1913, by which a Magistrate was to report to the Commissioner or Judge any civil case pending which appeared to him to be one which should be tried by the Commissioner or Judge: CO 841/1.

²² WOIC, art. 21(3).

²³ Annual Report for 1926, CO 521/37.

²⁴ WOIC, art. 21(2).

²⁵ Ord. 8 of 1905, CO 841/1.

H.P. Wilkinson, the then Crown Advocate, replied with the suggestion that the prisoner should be released for good behaviour after serving the first 12 months of his sentence. In his view, article 21(2) limited the length of imprisonment which could be imposed by the sentencing magistrate.²⁶

Magistrates and their work

At any one time during the period of the lease, there were, at most, two magistrates serving concurrently. There was, at first, one magistrate whose work was restricted to the island and the area around Port Edward. A second magistracy was opened in the interior in 1906. Although it was initially thought that Chinese naval men who had been trained by the British could be appointed to as many as six magistracies,²⁷ this proposal was never taken seriously and nothing in the Order addressed it directly. Nonetheless, the Order reserved the possibility of appointing non-European British subjects as magistrates for the hearing of cases in which both parties were natives. Non-native cases had to be tried by a European British subject.²⁸ In fact, no non-Europeans were ever appointed as magistrate.

By 1902, the office of what was then the territory's sole magistrate had a staff of a chief clerk and interpreter, two Chinese writers, three runners and four detectives.²⁹ This was a small establishment given the magistrate's numerous duties. These included those of superintendent of the police, collector of revenue and registrar, as well as other miscellaneous tasks.³⁰ This broad range of duties offers an appreciation of the place of judicial activities within the office of the Magistrate.

The collection of revenue was generally done, at least until the subdivision of the territory into two administrative and judicial divisions, at Port Edward. Six main types of revenue were collected: - Chinese land tax; taxes on monopolies in the sale of native wine and opium and the government abattoir; junk dues; fines of court; rents from land and houses on both mainland and island; various licences; and a house tax. One of the magistrates was also the registrar of births, deaths and marriages.

²⁶ H.P. Wilkinson, 29 June 1915, CO 873/445.

²⁷ Commissioner Gaunt to Vice-Admiral E.H. Hopkins, 30 May 1899, FO 17/1664.

²⁸ WOIC, art. 18(2).

²⁹ Report of the SG, Annual Reports for 1902, CO 873/97.

³⁰ *Ibid.*

However, as registration was never extended to the native population,³¹ this function will not have consumed much of his time. The magistrates supervised the system of registration of land transfers between natives but registration was not, in general, popular.³² In any case, village and district headmen assisted the magistrates in this task.³³ One of the magistrates would also have had to carry out the functions of a coroner, a position which may have been burdensome owing to the many incidents of suicide.³⁴

Other tasks of the magistrates included the legislative - assisting the Commissioner in the drafting of ordinances and also overseeing the posting up of notices, proclamations etc. Shortly after the arrival of Lockhart as the territory's first civilian Commissioner, government notice boards for the posting of proclamations, notices, etc. were erected in all villages.³⁵ While they were novel, at least, the notice boards appeared to have been effective in transmitting information to the villagers.³⁶

In criminal cases, the magistrates, with the help of the police inspectors, investigated crimes and raided opium dens and other places of ill repute.³⁷ As late as 1916, Johnston led a raid of premises suspected of being used by 'professional' gamblers. Forty-one gamblers from the territory and adjacent areas as well as places as far away as Chefoo were arrested.³⁸

In 1906, the additional post of District Officer and Magistrate resident in the interior of the territory was introduced to Weihaiwei, Johnston becoming the first

³¹ Very few marriages were registered in Weihaiwei; the first registrations occurred in 1904: Report of the SG for 1904 - app. to the Annual Report sent to the Colonial Office, CO 873/163.

³² See further discussion of land registration in ch. 6.

³³ Report of the SG for the year 1903, app. I to Annual Report for 1903, Lockhart to SSC, 18 Apr 1904, CO 521/6.

³⁴ See ch. 7.

³⁵ Prior to that, only the larger villages had been supplied with notice boards. There was no Chinese press in Weihaiwei until the introduction of the *Weihai Wu Bao* in 1927. See Johnston to Lockhart, 18 Dec 1927, Weihaiwei, *SLPNLS*, vol. 10A, (b).

³⁶ In his Annual Report for 1902, Walter, the Government Secretary, reported an amusing anecdote from a performance by a Chinese conjuror at the Magistrate's house a few days after a notice prohibiting the use of creaking wheelbarrows had been posted in the territory: 'During the course of his seance, the wizard gave some very lifelike imitations of various phenomena in daily life including the sound made by the Chinese wheelbarrow. Before giving this imitation the man of legerdemain put on a face that baffles description and solemnly announced in Chinese "Fine of one dollar". The roar of laughter which greeted this announcement from the crowd that were flattening their noses at the Magisterial windows showed how thoroughly the people enjoyed the apt illusion': Annual Reports for 1902, Report of the SG, CO 873/97.

³⁷ See ch. 4.

³⁸ Johnston to Lockhart, 13 Apr 1916, *SLPNLS*, vol. 10.

holder of the post. The district officer's headquarters and residence were for a short time located in the village of Fan-chia-pu before being relocated to the village of Wen-ch'üan-t'ang, about 11 miles from Port Edward. The territory was soon divided into two administrative divisions and all villages were grouped into one of 26 districts. Of these, 17 to the south became Johnston's responsibility. The remaining nine, which included the island of Liukung, came under Robert Walter who was, at the time, Government Secretary. The division in which Johnston served as Magistrate was the more populous,³⁹ and its magisterial workload was always heavier than the other division's. At the end of May 1912, to correct the imbalance, three districts of the South magistracy, which included some thirty villages and the important and litigious market town of Yang-t'ing, were transferred to the other magistracy.

In 1916, the arrangements were again altered to change the titles of the administrative posts held concurrently by the two magistrates. Thereafter the Magistrate of the South Division, now the Senior District Officer, heard all civil cases whilst the other magistrate, now the Junior District Officer, heard all criminal cases. This change appears to have been a direct result of tension between the two magistrates at the time and an imbalance in the number of cases heard in the two courts.⁴⁰ Letters written by Johnston to Lockhart during this period emphasised his own heavy caseload, particularly of civil disputes. Public holidays were likely to be ignored in his court and each working day was long, with only a short break for lunch. At the end of March 1916, Johnston wrote that in the first quarter of that year he had already heard 141 cases and that petition fees for March alone were almost \$200,⁴¹ a figure he confirmed at \$234 on 1 April.⁴² In both these letters, he compared this figure with the substantially smaller amounts of petition fees collected during his absences from the territory.⁴³

Another change in 1916, was the closure, for reasons of economy, of the magistrates' court at Wen-ch'üan-t'ang, removing the Senior District Officer and his

³⁹ See ch. 1.

⁴⁰ Johnston to Lockhart, 27 and 29 March 1916, *SLPNLS*, vol. 10.

⁴¹ Johnston to Lockhart, 29 March 1916, *SLPNLS*, vol. 10.

⁴² Johnston to Lockhart, 1 Apr 1916, *SLPNLS*, vol. 10.

⁴³ Fees for a recent three month period of leave were \$39: Johnston to Lockhart, 29 March 1916 and 1 Apr 1916, *SLPNLS*, vol. 10.

court to Port Edward. This court was reopened in 1923 for a couple of months.⁴⁴ It is unclear if the court was ever reopened more permanently.

Village tribunals

Tribunals other than those mentioned in the Order and other means by which petty criminal cases and civil disputes may have been disposed of should also be considered. Before the Order in Council was passed, Swettenham had recommended that 'village tribunals' should continue to hear nearly all cases, civil and criminal, involving the Chinese.⁴⁵ He explained that these tribunals, constituted by the village 'Council of Elders', would be necessary since it would be impossible to provide sufficient European magistrates to deal with all cases. A European district magistrate would then oversee the village tribunals and act as the appeal court for cases decided there. Swettenham had reported that each village had a 'Council of Elders' which, he recommended, should be maintained - the government should select or affirm one elder for each village and grant him written authority, signed and sealed by the Commissioner. This recommendation found no expression in the Order. Aside from the High Court and the Magistrates' Courts, no other tribunals were mentioned. Although the proviso to article 19 allowed Chinese law and custom to be applied, the Order neither established native or customary courts nor preserved indigenous or pre-existing tribunals for the hearing of cases to which Chinese law and custom applied.

Nevertheless, in practice, Swettenham's suggestion appears to have been heeded, at least in part. Both minor civil disputes and petty criminal offences were dealt with within the village. As we saw earlier, the government adopted Swettenham's recommendation that village headmen should be recognised formally. It confirmed a headman for each village and later introduced a higher tier of district headman.⁴⁶ On headmen was placed the oft-mentioned responsibility for settling petty civil cases between villagers. How successful headmen were in their role as mediators of civil disputes is discussed in chapter 6.⁴⁷ For petty offences, village processes were never so clearly and officially acknowledged by the government although it knew of the existence of village regulations and the fines to be exacted for breaches thereof.

⁴⁴ Annual General Report for 1923, Russell Brown to SSC, 14 March 1924, CO 521/26.

⁴⁵ See ch. 2 for an outline of the main proposals made by Sir Frank Swettenham.

⁴⁶ See ch. 1.

⁴⁷ See also the more general discussion on the effectiveness of headmen in ch. 4.

Headmen sometimes voluntarily sought the government's seal of approval on village regulations which had been drafted within the village.⁴⁸ Headmen also occasionally applied to the government for permission to deal with specific offences such as gambling.⁴⁹ Thus, village enforcement existed with the tacit, if not express, agreement of the government.⁵⁰ Questions such as the jurisdictional line between the village headman's authority and the magistrates' authority were never properly confronted, at least not in any record which has survived.

What is sufficiently clear is that it would be inaccurate to describe headmen or elders as a first rung tribunal or a court of first instance for an identifiable list of crimes or civil disputes. Many litigants appreciated and exploited the direct access to the magistrate and were not precluded from approaching him without having first taken the matter to the relevant headman. It would also be inaccurate to describe the Magistrates' Court as a court of appeal for cases already tried in the village. The magistrate, on occasion, suggested mediation under the auspices of the village headman and sent the parties back to the village. The dividing jurisdictional line between the two tribunals was thus informal and fluid.

Procedure

Fairly detailed provisions regarding the conduct of cases, both civil and criminal, were included in the Wei-hai-Wei Order.⁵¹ These provisions were more detailed than in other Orders in Council. The drafter explained that this was to enable the territory's courts to begin work without the need, in the short term at least, for supplementary rules of court to be passed.⁵² Rules of court were later made, mainly to introduce petition fees and then, to increase them.⁵³ The procedures in the Order were to be supplemented by the procedure and practice of the courts of justice and justices of the

⁴⁸ *LDNC*, 161.

⁴⁹ This is referred to in Moss to Commissioner, 27 Sept 1913, CO 873/376.

⁵⁰ No ordinance was passed to establish or recognise the jurisdiction of village tribunals in Weihaiwei. It may be questioned whether the Commissioner would have had the power to pass such an ordinance. In the absence of case law suggesting otherwise and express authority in the Order, once an Order establishes a court structure, it is doubtful if further courts can be established by ordinance. The Crown's prerogative to set up courts having been exercised through the Order, any powers the Commissioner may have had to set up a court may have been impliedly excluded. See Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens, 1966), 464.

⁵¹ WOIC, art. 19.

⁵² See ch. 1.

⁵³ See ch. 6.

peace in England.⁵⁴ It will be seen in later chapters that English laws of procedure, particularly rules of evidence, were often ignored.⁵⁵ Magistrates were more like the investigating magistrates of civil jurisdictions than those in an adversarial system. In court, in the absence of lawyers, magistrates also assisted defendants and parties in putting their cases forward. The territory never attracted a Bar and the few counsel who appeared in its courts came from Shanghai.⁵⁶ Jury trials were introduced through the Jury Ordinance, 1905⁵⁷ but only a tiny proportion of cases were tried with a jury.

Where the punishment imposed was a fine of \$100 or greater or a term of imprisonment of at least three months, the decision of the magistrate could be appealed to the High Court.⁵⁸ Appeals from decisions of the High Court lay to the Supreme Court of Hong Kong.⁵⁹ There was also an ultimate right of appeal, subject to leave, to the Privy Council.⁶⁰ Since many of the convictions in the Magistrates' Courts were for petty offences, few convictions qualified for appeal. Indeed no appeals to the Supreme Court of Hong Kong or Privy Council were recorded in the history of the territory. For civil cases, the Rehearings Ordinance, 1913⁶¹ was passed to allow the High Court to rehear civil cases from the Magistrates' Courts. This law was passed because it was realised that the appeals process was a dead letter; few litigants were aware of the possibility of an appeal and few could have afforded one. To the chagrin of the magistrates, litigants often tried to get their cases reheard, sometimes by disguising their petitions to look like fresh disputes. No similar law was passed to provide for the rehearing of criminal cases.

Chinese assessors

The Order permitted the use of assessors - persons with knowledge of local customary law - in cases involving natives.⁶² Assessors did not take part in the decision of the

⁵⁴ WOIC, art. 19.

⁵⁵ See ch. 6.

⁵⁶ This was certainly the case with the barristers who defended in the criminal cases discussed in ch. 5.

⁵⁷ The controversy surrounding the introduction of this ordinance and the furore over the lack of a jury in two murder trials in 1912 are discussed in ch. 5.

⁵⁸ WOIC, art. 34.

⁵⁹ WOIC, art. 35.

⁶⁰ WOIC, arts 37 and 80.

⁶¹ Ord. 3 of 1913, CO 841/1. This ordinance is discussed further in ch. 6.

⁶² WOIC, art. 20.

court but their opinions were recorded. This would have assisted the court in determining the extent to which modifications and alterations to English law were necessary. However, assessors appear to have been used only exceptionally. Walter, one of the magistrates, observed that it was difficult finding assessors since few people were able to state authoritatively the relevant principles of Chinese law or custom.⁶³ In two of the four cases reported in the *Herald* in which Chinese assessors sat, both murder cases tried in 1912, the two assessors were both at one time district headmen.⁶⁴ In 1906, a Chinese assessor assisted the Magistrate in a case in which the defendant was convicted of assault after being charged with manslaughter⁶⁵ and, in 1925, H.P. Wilkinson, Judge of the High Court was assisted by an assessor in a case in which the defendant was charged with aggravated burglary.⁶⁶ The records contain few clues as to when it was considered that assessors should be used. The cases in which assessors were used indicate that, in practice, Chinese assessors sat when there were questions over which local sensibilities needed to be taken into account, as when the facts of a case indicated the possibility of a suicide.⁶⁷

Sources of Law

The sources of law by which the courts of Weihaiwei were to exercise their jurisdiction were provided in article 19 of the order. Before looking at article 19, a few minor matters should be mentioned here as a matter of convenience. First, the Order itself contained a number of substantive laws. Thus, article 44 made it an offence publicly to insult etc. any religion established or observed in Weihaiwei or to bring any religion into public ridicule. The section also protected places of worship,

⁶³ Report of Walter, SG, Annual Reports for 1908, CO 873/280.

⁶⁴ *Rex v. Wang Lieu-Hsi* [sic] and *Hsieh Lin-Shih*, 2 Sept 1912; and case of *Rex v. Li Sing-wu*, 5 Sept 1912; both H.M. High Court at Weihaiwei, Bourne J., Messrs Sun Fa-shan and Miao Tso-Pin, Assessors, *NCH*, vol. CIV, no. 2353, 14 Sept 1912, p. 784 and 785 respectively. It is elsewhere recorded that Sun Fa-Shan (*Sun Fashan*) was District Headman for the Port Edward area in 1916 and Miao Tso-pin (*Miao Zuobin*) was District Headman of Changtzu in 1910. See the discussion of these cases in ch. 5. The two other cases are *Rex v. Chang Chu*, *Chiang Chang-shih*, *Chang Miao-shih*, *Chang Ching-shih*, H.M. High Court at Weihaiwei, Aug 26, Bourne J., and Sun Fa-shan and Ku Fang-ting, Chinese Assessors, *NCH*, CVIII, no. 2405, 13 Sept 1913, p. 839; *Rex v. Chou Pen-shou*, *Chou Ching*, *Chou Teng* and *Chou Hsing*, H.M. High Court At Weihaiwei Before P. Grant Jones, Acting Judge sitting with Assessors [no names given], 12 and 13 Dec, *NCH*, vol. CXXV, no. 2629, 29 Dec 1917, p 792.

⁶⁵ Annual Report for 1906, CO 873/239.

⁶⁶ Annual Report for 1925, Russell Brown to SSC, 17 March 1926, CO 521/28.

⁶⁷ For further discussion of the use of Chinese assessors see ch. 5.

tombs and religious ceremonies from public insult.⁶⁸ Article 45 made it an offence to do an act 'calculated to excite tumult or disorder, or to excite enmity between British subjects, Chinese subjects, and foreign subjects, or any of them, or to excite opposition to the lawful authority of His Majesty within the territory.'

Second, the Order, in article 40, also extended to Weihaiwei, with some express modifications, a number of Acts of Parliament such as the Fugitive Offenders Act, 1881⁶⁹ and the Colonial Prisoners Removal Act, 1884.⁷⁰

The sources of law for the territory mentioned in the Order are English law, local ordinances, and Chinese law and custom. Article 19 is reproduced here in full:

Subject to the other provisions of this Order the criminal and civil jurisdiction of the Court shall, as far as circumstances admit, be exercised on the principles of and in conformity with the Statute Law and other law for the time being in force in England, and with the procedure and practice of Courts of Justice and Justices of the Peace in England, according to their respective jurisdiction and authority.

For the purposes of facilitating the application of such Statute Law, the Court may construe any enactment with such alterations and modifications not affecting the substance as may be necessary to meet the circumstances of the said territories.

Except as regard acts which are or may be made offences by this or any other Order in Council applying to the said territories, or by any laws or regulations made thereunder, such acts only as would be offences if committed in England shall be deemed to be offences rendering the person committing the same liable to punishment.

Provided that in civil cases between natives the Court shall be guided by Chinese or other native law and custom, so far as any such law or custom is not repugnant to justice and morality.

Subject to the provisions of this Order and of any Ordinance made under this Order, the High Court may make rules of Court with respect to procedure in all criminal and civil matters in the High Court and in the Magistrates' Courts.

English law

A number of observations can be made of article 19. First, by no means uncommon, the Order provided for the reception of English law in the territory in an ambulatory, rather than direct, way. It did this by referring to the court's exercise of jurisdiction in accordance with English law. Second, the reception of English law was continuous,

⁶⁸ Johnston wrote of his plans to prosecute a 'revolutionary gent' who had smashed village shrines: Johnston to Lockhart, 1 Feb 1912, *SLPNLS*, vol. 9.

⁶⁹ 44 & 45 Vict. c. 69.

⁷⁰ 47 & 48 Vict. c. 31.

not subject to a cut-off reception date. Amongst reception instruments for colonies, this is unusual but the Wei-hai-Wei Order's formula is, in this respect, identical to the relevant clause in a number of Orders in Council passed for the exercise of jurisdiction in foreign territories.⁷¹ Third, this reception encompassed both substantive and procedural laws and, in contrast with some reception statutes, article 19 was wide enough to include statute law, common law and principles of equity.⁷² In the case of statute law, this is implied by the second paragraph of article 19. Fourth, in relation to statute law, article 19 did not limit the applicable statutes to 'statutes of general application' as was common in other reception instruments. The absence of this qualification probably made no difference because of the qualification referring to 'circumstances' in article 19 discussed below. The application of statutes passed after the date of the Order is likely to have been subject to the principle that only statutes which were expressly, or by necessary intendment, extended to Weihaiwei, were applicable.

Fifth, the reception of English law was subject to other provisions of the Order and to the limits mentioned in article 19 itself.⁷³ The former included ordinances passed by the Commissioner under article 9 of the Order. The reception of English law was subject to such local laws. Article 19 provided that English law was to be applied only 'as far as circumstances admit' and that English statute law was to be construed with 'such alterations and modifications' to meet the circumstances of Weihaiwei. A court in Weihaiwei could therefore reject an English law or apply it with some modifications. Unlike many other provisions for the reception of English law and unlike the paragraph in article 19, which dealt with the construction of English statutes, only 'circumstances' are mentioned in relation to the rejection of an English law. 'Circumstances' would almost certainly include local circumstances and

⁷¹ Two examples are the Ottoman Order in Council, 1873, art. 6 and the China and Japan Order in Council, 1865, art. 5. See also the China and Corea Order in Council, 1904 arts 35(2) and 89.

⁷² The question of whether ecclesiastical law would have been included in a general reception of English law is a vexed one. In Weihaiwei, as the Order in Council gave the High Court only civil and criminal jurisdiction, it is arguable that in 1901, 'civil law' could not have included the entire body of ecclesiastical law. In settled colonies, the law which settlers carried with them to the new colony did not include ecclesiastical law. Though there may have been earlier cases, the authority usually cited is *Re The Lord Bishop of Natal* (1884) 3 Moo. P. C. (N. S.) 115. Ecclesiastical law would probably have been excluded to the same extent in conquered and ceded colonies by the operation of a general principle limiting the extent of English law applicable to such colonies: see *Attorney General v. Stewart* (1817) 2 Mer. 143. The practice in individual colonies is unlikely to have been sufficiently uniform to yield a definite rule.

⁷³ WOIC, art. 19.

also the circumstances which gave rise to the particular law.⁷⁴ The court could also take account of Chinese law and custom or other indigenous law as 'circumstances' affecting the application of English law.⁷⁵ Note also that, although the article only mentions that statute law is to be construed with alterations or modifications, the rule would, in effect, have been applicable to principles derived from the common law.

Sixth, in respect of criminal laws, the reception of English law was underscored by the third paragraph of article 19 that only 'such acts as would be offences if committed in England' and other acts deemed to be offences by local legislation or an Order in Council applying to the territory could be offences in Weihaiwei. Local legislation on crime is discussed below. We know that works on English law such as the 10th edition of *Harris's Principles of Criminal Law*⁷⁶ and *Russell on Crimes*⁷⁷ were referred to in the territory, the latter having been referred to in the High Court in the case of *Rex v Ku Chun-ko* (1917),⁷⁸ a case in which the court also examined several English authorities on forgery and deceit.⁷⁹

Seventh, in applying article 19, if English law recognised the *lex situs* as being the applicable law, this principle would have to be applied in Weihaiwei as part of English law. In a dispute over the ownership of some land consisting of sea beach and riverbed, the issue of applicable law was addressed.⁸⁰ Bourne J., the first Judge of the High Court of Weihaiwei, explained that the law of England, applicable to Weihaiwei through article 19, was that

land and its incidents are subject to the *lex situs*; if the framers of the Order in Council had intended to vary this rule a well-known canon of construction requires that such an intention being to alter the common law, should be explicitly stated; but there is no hint of such an intention. It was suggested on behalf of the Crown that English law in regard to land situated in England

⁷⁴ See Roberts-Wray, 549.

⁷⁵ *Ibid.*, 556.

⁷⁶ Seymour Frederick Harris, *Principles of the Criminal Law*, 10th edn, by Charles L. Attenborough (London: Stevens & Haynes, 1904).

⁷⁷ William Oldhall Russell, *A Treatise on Crimes and Misdemeanors*, 7th edn, by William Feilden Craies and Leonard William Kershaw, 3 vols. (London: Stevens, 1909).

⁷⁸ H.M. High Court at Weihaiwei, 13, 14 and 15 Dec, *NCH*, vol. CXXV, no. 2629, 29 Dec 1917, p. 793.

⁷⁹ The authorities cited by the Crown Advocate in representing the Crown were *R. v. Marsh*, *R. v. Ward*, *R. v. Toshack* and *R. v. Harris*. No citations were given but these cases could possibly be *R. v. Marsh* (1685) 3 Mod. Rep.66 or *R. v. Marsh* (1703) 3 Salk 172; *R. v. Ward* (1727) (2 Stra.747); *R. v. Toshack* (1849) 1 Den. 492; and *R. v. Harris* (1836) (7 C. & P. 429) or *R. v. Harris* (1842) (1 Car. & Kir. 179).

⁸⁰ *R v. Chi Hsing-nan and others*, *NCH*, vol. LXXIX, no. 2917, 6 Apr 1906, p. 39.

ought to be applied, but in the absence of any such explicit provision this seems to me to be an impossible interpretation of the Order, unless indeed China is to be classed among uninhabited and barbarous countries. ... She is certainly not uninhabited; nor, from a legal point of view, as it seems to me, barbarous; she has had for many centuries a system of land tenure and title and customary law.⁸¹

Consequently, he held that the *lex situs*, namely Chinese law, ought to be applied. Recognising the *lex situs* in this way had the advantage of avoiding inconsistency in matters pertaining to land.⁸² Had English substantive law been applied in this case, in other disputes over land, another court might have applied Chinese law where the parties were both of Chinese origin, as allowed by the proviso to article 19 and as discussed further below.

Finally, where the procedure and practice of the courts is concerned, the first and last paragraphs of article 19 were subject to the Commissioner's power to make rules of court under article 83.

Weihaiwei Ordinances

The Order in Council empowered the Commissioner to make laws for the territory. No legislative council was to be, nor was ever, established and the Commissioner was not obliged to consult an advisory body.⁸³ In practice, however, the Commissioner received advice from the Crown Advocate in Shanghai who had been formally appointed to advise the government of Weihaiwei. Some laws, such as the Jury Ordinance, 1905,⁸⁴ were introduced as a result of such advice.⁸⁵ The Commissioner also had the benefit of an Advisory Council consisting of prominent European merchants. This council and the district headmen were usually consulted before new laws were introduced.⁸⁶ Under article 9(3) of the Order, the sanction of the Colonial Office was, by implication, required for ordinances passed by the Commissioner.

⁸¹ *NCH*, vol. LXXIX, no. 2917, 6 Apr 1906, p. 39.

⁸² This decision is consistent with Bourne J.'s earlier judgment whilst sitting in the Supreme Court for China in the case of *Macdonald v. Anderson* (1904), a relevant excerpt from which appears in G.W. Keeton, *The Development of Extraterritoriality in China* (London: Longmans, 1928), vol. II, 295-297. In both cases, Bourne was applying the principle expounded by Lord Hobhouse in the decision of the Privy Council in *Secretary of State for Foreign Affairs v. Charlesworth, Pilling and Co* (1901) AC 373. See Keeton's discussion of this aspect of this case at 102.

⁸³ WOIC, art. 9.

⁸⁴ Ord. 2 of 1905, CO 841/1.

⁸⁵ See discussion of the jury in ch. 5.

⁸⁶ An example of this can be seen in ch. 7, in relation to a proposal to introduce a law prohibiting foot-binding.

Such laws were also subject to H.M.'s power of disallowance.⁸⁷ Ordinances made and proclaimed by the Commissioner came into force either immediately upon proclamation or on the date fixed by the Ordinance but were subject to H.M.'s disallowance, exercisable within a year of the ordinance being proclaimed. A disallowed Ordinance would have ceased to have force on the disallowance being published by the Commissioner. The records do not indicate that any Ordinances were disallowed though many ordinances deemed to be deficient in some respect were rectified through the passing of amendment ordinances.

Between 1903 and 1930, 114 ordinances were passed. Although a number of ordinances touched on crime and law and order, few ordinances brought significant change to the principles of English criminal law. Perhaps the perception of the administration that the people of the territory were fundamentally law-abiding meant that there was no obvious or pressing need for the introduction of more ordinances. For the few instances of serious crime, English law would suffice. Amongst the few ordinances of significance to criminal law were the Offences Against the Person Ordinance, 1905; the Protection of Women and Girls Ordinance, 1905; and the Chinese Marriage Preservation Ordinance, 1913.⁸⁸ Ordinances similar to the first of these three were commonly enacted elsewhere. The other two were adapted from Hong Kong legislation. The copying of Hong Kong legislation, with adaptations to suit local conditions, was expressly permitted by article 9(2) of the Order. Despite Lockhart's specific protests in 1902, discussed below, that they were not suitable, article 9(2) of the Order was often used to introduce, with necessary adaptations, Hong Kong ordinances. Although the wording of the article may have allowed it, Hong Kong ordinances were not applied directly but copied into Weihaiwei ordinances which were then passed in accordance with the procedures set out in article 9.

Other ordinances, such as the Police Force Ordinance, 1903, and the Oral Examination of Prisoners Ordinance, 1905,⁸⁹ were introduced to deal with either the policing of Weihaiwei or the punishment of offenders. Of the remaining, a number

⁸⁷ WOIC, arts 9(4) and 9(5).

⁸⁸ Ords 8 of 1905, 5 of 1905 and 1 of 1913 respectively, CO 841/1.

⁸⁹ Ords 5 of 1903 and 7 of 1905 respectively, CO 841/1.

were passed with public health in mind.⁹⁰ Yet other laws required licences of one kind or another or imposed obligations to pay various dues.⁹¹

A total of 114 Ordinances in nearly three decades is, by any standards, a small number of laws. This is all the more so if we discount the ordinances passed to amend earlier ordinances.

Limits to the legislative competence of the Commissioner

The Commissioner's authority to legislate was subject to some limits. Most of these limits proved purely theoretical, in that they were never the subject of litigation or discussion during the period of the lease. Indeed there was no reported litigation which challenged the legality of laws passed by the Commissioner. A theoretical survey of the general constraints on the law-making powers of Weihaiwei's legislature is better left to another occasion.⁹² The constraints contained in the Order in Council itself, however, are deserving of some attention. The procedural constraints of Colonial Office sanction and H.M.'s disallowance have already been mentioned. These constraints were attached to the power conferred on the Commissioner to pass ordinances for the 'peace, order and good governance' of the territory. No other type of law was mentioned in the Order. In an early row with the Colonial Office, Lockhart argued that he should be allowed to pass an umbrella ordinance to authorise him to pass regulations for the governance of the territory. This row is discussed below, along with brief treatments of the possible constraints in the phrase 'peace, order and good governance' and the terms of the Peking Convention.

1. Legislating through ordinances alone

Under article 9 of the Order, the legislative competence of the Commissioner extended only to ordinances passed in accordance with the procedures provided therein. In 1902, not long after Lockhart had arrived in Weihaiwei, he forwarded to the Secretary of State for the Colonies a draft of what was to have been the Peace and

⁹⁰ These include the Quarantine Ordinance, 1903, the Public Health and Buildings Ordinance, 1903; the Dogs Ordinance, 1904; the Infected Milk Ordinance, 1906; the Hawkers Ordinance, 1916; and the Medical Registration Ordinance, 1923.

⁹¹ Amongst these were the Licensing of Pawn Brokers Ordinance, 1904; the Land and Road Tax Ordinance, 1904; the Shipping Dues Ordinance, 1905; the Lands and Buildings Taxes Ordinance, 1906; the Anchorage and Junk Boat Ordinance, 1907; and the Harbour Regulations, Ordinance 1907.

⁹² The general principles are discussed in Roberts-Wray, 210ff.

Good Order Ordinance, 1902.⁹³ The Colonial Office objected to the following sections which were intended to allow the Commissioner to bypass the usual procedures for the enactment of ordinances:⁹⁴

3. It shall be lawful for the Commissioner from and after the date of the proclaiming of this Ordinance to make such regulations as he may deem necessary for regulating the peace, order, public health, revenue, buildings, and good government of the Territories.

4. All regulations made by the Commissioner under this Ordinance shall be published in such manner as the Commissioner may direct, and shall thereupon become as valid and binding as if inserted in this Ordinance.

5. Any person committing a breach of any regulation under this Ordinance shall be liable for any such breach, upon summary conviction, to the payment of a fine not exceeding one hundred dollars, or to imprisonment for a period not exceeding six months with or without hard labour.

Prior to the assumption by the Colonial Office of responsibility for the territory, no ordinances were passed. Instead, magisterial orders 'which were carried out as if they had the force of law' were used. Lockhart wrote about the simplicity of such orders which he thought suitable for the Chinese and which he wished to continue.⁹⁵

Joseph Chamberlain, the Secretary of State for the Colonies, replied pointing out that the Commissioner had failed to appreciate the far-reaching consequences of the proposed ordinance.⁹⁶ The objects of the last three subsections of article 9 - dealing with the sanction of the Secretary of State and H.M.'s disallowance - would be defeated and it would probably never be necessary to pass an ordinance under

⁹³ No. 98, Lockhart to Chamberlain, 13 May 1902, Eastern No. 75, CO 882/6/7. The text of the draft ordinance (to have been Ordinance 1 of 1902) appears as an enclosure in this despatch.

⁹⁴ A further objective of the ordinance was the retrospective placing, on a proper footing, of orders or regulations made by the authorities prior to Lockhart's arrival.

⁹⁵ No. 128, Lockhart to Chamberlain, 11 Sept 1902, Eastern No. 75, CO 662/6/7. G.T. Hare, an early assistant commissioner, reporting only a few weeks before Lockhart sent the draft ordinance to the Colonial Office, shared this view. He wrote that 'It is not advisable that the Commissioner should make and proclaim any Ordinances except such as may be found absolutely necessary ... [T]he Magisterial Orders made prior to the operation of the Order in Council fulfil all practical purposes at present, and should answer for a long time to come. Legislation is not required for the Chinese at all. Proclamations and instructions couched in Chinese terms and published in accordance with Chinese customs are all that is necessary for explaining the wishes of the Government.' A General Report on the Civil Administration of the Territory of Wei-hai-wei, 1899-1901, 31 March 1902, enc. to No. 96, G.T. Hare to Acting Commissioner Cowan, 15 Apr 1902, Eastern No. 75, CO 882/6/7.

⁹⁶ No. 109, Chamberlain to Lockhart, 31 July 1902, Eastern No. 75, CO 882/6/7. The Secretary of State's views reflected minutes written by Colonial Office clerks pointing out the unacceptable freedom to make law which s. 3 would bestow on the Commissioner, the complications which would arise from calling some laws ordinances and others regulations and refuting any relative ease which the making of regulations would entail when compared with ordinances: see Minutes in Commissioner to SSC, 13 May 1902, CO 521/3.

article 9 once the proposed ordinance had been passed. Chamberlain thought passing an ordinance should cause no inconvenience since the Commissioner was subject only to the control of the Secretary of State and H.M.'s power of disallowance.⁹⁷

Lockhart persisted in his efforts with his proposed ordinance by setting out, at some length, the arguments for using regulations as a means of legislating for the territory. His several comments were based on two grounds. The first was that 'simple regulations' and not 'elaborate legislation' was what was demanded by the circumstances of the territory. He was aware that the Order allowed for copycat legislation from Hong Kong but saw that colony's legislation as being far in advance of the needs of Weihaiwei. He seemed to be under the erroneous impression that the substance of Hong Kong legislation would have to be copied, including any regulatory provisions.⁹⁸ Parts of his despatch are worth reproducing:

the Chinese inhabitants of this dependency are uneducated rustics, entirely ignorant of Western methods of Government and quite unacquainted with the principles underlying British law. This mental condition of the native renders it imperative that all legal enactments should be made as simple as possible, and adapted, so far as this can be done, without departing from the principles of British jurisprudence, to the understanding of those who will be affected by their provisions.

6. Speaking from a long experience of the Chinese, I am convinced that, in the present state of this dependency and so long as its population remains as it now is, its legal requirements will be much more easily and effectively met by framing clear and simple regulations than by enacting Ordinances which must necessarily be more intricate and elaborate.

... if Ordinances are introduced such as exist in Hong Kong, it is certain they will not work so well, for they will be in advance of the mental capacity of the Chinese inhabitants and of the requirements of this dependency, whilst they are certain to lead to an increase in expenditure on account of the staff which will be requisite to carry out effectively their provisions.

... The drafting of a variety of Ordinances, even if it were only necessary in many cases to adopt them from the Statute Book of Hong Kong, would be a work of considerable labour and trouble, as the circumstances of this place at present differ so widely from those of Hong Kong, and would require skill in the drafting of Ordinances. As you are aware, there is no officer here skilled in such work who could devote to it the requisite amount of time and attention, the existing small staff of this dependency being fully occupied with carrying on the general work of administration.⁹⁹

Chamberlain made short shrift of these arguments, telling Lockhart that Ordinances passed under the Order were not necessarily more intricate or elaborate

⁹⁷ No. 109, Chamberlain to Lockhart, 31 July 1902, Eastern No. 75, CO 882/6/7. As for the problem of previous magisterial orders and regulations, Lockhart was told to pass a single validating Ordinance.

⁹⁸ Lockhart referred to Hong Kong ordinances dealing with health and buildings.

⁹⁹ No. 128, Lockhart to Chamberlain, 11 Sept 1902, Eastern No. 75, CO 882/6/7.

than Regulations nor more expensive, slow or inconvenient to put in place. He thought no delays ought to be caused by the submission of an ordinance for sanction. Lockhart was told that 'there is no reason why the Ordinance should not be drafted in terms as simple and as free from legal technicalities as you please' and that there was no need to apply any of the ordinances of Hong Kong if Lockhart did not think it desirable.¹⁰⁰ Lockhart's suggestion for a trial period for legislating by regulations was not approved.

Of Lockhart's arguments two observations should be made: the Chinese population, according to him, needed simpler laws than would be the case once the substance of a regulation was embodied in an ordinance. Further, Lockhart did not welcome the work of drafting ordinances and the trouble and labour such an activity would entail. He is very likely to have been aware of his own lack of experience when he told the Colonial Office that there was no officer with the requisite skills. Lockhart was later to provide ample evidence of this through his own drafting imperfections. Meanwhile, this dispute caused soreness on both sides. The draft annual report on the territory submitted for that year mentioned that Lockhart's suggestion for legislating by regulation had been rejected because it was 'not the British method',¹⁰¹ a remark expunged from the final draft of the report after Fiddian in the Colonial Office commented that 'Mr Lockhart oughtn't to take the public into his confidences as regards a "domestic" dispute.'¹⁰²

Thus it was that Lockhart settled down to the task of drafting ordinances. Later in 1902, he despatched a few draft laws to the Colonial Office. Although the Commissioner drafted laws with the assistance of the Magistrate or Government Secretary, and later, that of the High Court Judge, it was Lockhart who continued to be the target of criticism in the Colonial Office. They criticised his lapses in procedure. He should not have sent ordinances in batches; he should have despatched

¹⁰⁰ No. 131, Chamberlain to Lockhart, 29 Oct 1902, Eastern No. 75, CO 882/6/7. The views expressed in the Secretary of State's reply echoed the views of J.R. Risley, Legal Assistant in the Colonial Office, who wrote in a minute, 'What's in a name? Because a rule is found in an ordinance it need not necessarily be made elaborate or complex, or be couched in over-technical language. As regards other objections, I cannot see why a few clear and simple rules when constituting an ordinance should be harder to draft more expensive to print or more terrifying to the Chinese than they would be if they took the form of a Regulation! I should tell Mr. Lockhart to make his rules as simple as ever he pleases and as free from legal technicalities as possible, but to enact them in the form of ordinances subject to H.M. disallowance, and not of regulations.'; Risley, 24 Oct 1902, CO 521/3.

¹⁰¹ Draft Annual Report for 1902 submitted by the Commissioner to the Colonial Office, CO521/4.

¹⁰² Minute, 9 June 1903, CO 521/4.

each one separately together with a report of the proposed law, stating, *inter alia*, the source of the draft ordinance.¹⁰³ He was later criticised for lapses in form: 'To redress the balance caused by his putting two enacting clauses in the Pension Ordinance, Mr Lockhart now produces an Ordinance without any enacting clause at all.'¹⁰⁴ The substance of his laws was also criticised, as when an ordinance provided penalties exceeding the limits stated in the Order.¹⁰⁵

These errors were to prove a small advantage to Lockhart. When he suggested that he should have the assistance in legal matters of the Crown Advocate in Shanghai,¹⁰⁶ the Colonial Office agreed. Thenceforth, most, though not all, draft ordinances and other legal questions were referred to Shanghai. Lockhart sometimes refused to seek the Crown Advocate's help, e.g. when he was drafting the Opium Ordinance,¹⁰⁷ a subject about which he felt he had sufficient experience from his previous appointment in the New Territories. With regard to law-making, Lockhart never properly mastered everything required of him and, in 1905 and 1906, his drafting was still attracting criticism in the Colonial Office.

2. 'Peace, order and good governance'

The Commissioner could make and proclaim ordinances for the 'peace, order and good governance of the territory and all persons within the same.' This phrase does not appear to have added any constraints to the Commissioner's legislative competence over and above those that were applicable under general principles. A number of cases before the lease of Weihaiwei had established that a subordinate legislature was intended to have the 'plenary powers of legislation, as large, and of the same nature, as those of Parliament itself, subject only to the question of the ambit of the legislative powers which had been conferred.'¹⁰⁸ A court had also refused to analyse the component parts of a similar phrase in the constitutional instrument of another territory.¹⁰⁹

¹⁰³ Risley, Minute, 12 March 1903, CO 521/4.

¹⁰⁴ Harding, Minute, 10 Feb 1905, CO 521/7.

¹⁰⁵ Fiddian to Risley and Collins, Minute, 26 Feb 1903, CO 521/4, in which Lockhart was accused of 'personal government with a vengeance.'

¹⁰⁶ Lockhart to SSC, 22 Jan 1903, CO 521/4.

¹⁰⁷ Lockhart to SSC, 2 May 1905, CO 521/8.

¹⁰⁸ *Phillips v. Eyre* (1870) LR 6 QB 1; *R. v. Burah* (1878) 3 App. Cas. 889 and *Hodge v. R.* (1883) 9 App. Cas. 117.

¹⁰⁹ *Riel v. R.* (1885) 10 App. Cas. 675, at 678.

3. The lease convention and other constraints on law-making

We have already observed the discrepancy between the terms of the Peking Convention and the Order in Council.¹¹⁰ Could the Commissioner have passed an ordinance within the legislative competence allowed by the Order but beyond the terms of the Peking Convention? Article 11, which deals with jurisdiction in the walled city, claimed greater jurisdiction than was allowed by the Peking Convention.¹¹¹ The walled city clause in the Peking Convention provided for the continuation of the exercise of jurisdiction by Chinese officials 'except so far as may be inconsistent with naval and military requirements for the defence of the territory leased.' In the Order, the defence limitation is supplemented by the additional reason of 'the peace, order and good government', which, as we have just seen, is of the widest import. Had the Commissioner enacted law which contravened the terms of the Peking Convention, such law would not have been *ultra vires* because it was not beyond the Commissioner's legislative competence as defined by the Order in Council and the courts would have been most reluctant to consider as justiciable any challenge based on contravention of the terms of the Peking Convention.¹¹²

One final constraint on the legislative powers under the Order ought to be mentioned in passing. Only laws passed by the Commissioner which were not repugnant to an Act of Parliament which extended to Weihaiwei were valid. This is because, although the Colonial Laws Validity Act did not directly apply to Weihaiwei as a territory over which the Crown only possessed jurisdiction, the principles of this Act nonetheless applied. Section 12(1) of the Foreign Jurisdiction Act, 1890, reproduced the principle found in section 2 of the Colonial Laws Validity Act.¹¹³ As with most of the constraints, there does not appear to have been any discussion as to the validity of any of the ordinances passed by the Commissioner based on repugnance to an Act.

¹¹⁰ See ch. 2, 'The Weihaiwei Order in Council'.

¹¹¹ See the discussion of this article in ch. 2.

¹¹² See Roberts-Wray, 375.

¹¹³ In the absence of s. 12(1), this principle would nonetheless have applied as part of the common law received into Weihaiwei by virtue of article 19 of the Order.

Chinese law and custom

As we saw above, Chinese law and custom, as the *lex situs*, was recognised and applied in matters pertaining to land through the application of English law under article 19. The main provision in the Order regarding Chinese law and custom was the proviso to article 19.¹¹⁴ Under this proviso, in 'civil disputes between natives', the courts of Weihaiwei were to be 'guided by Chinese or other native law and custom, so far as such law or custom [was] not repugnant to justice and morality.' Since most civil disputes were between Chinese litigants and since the Commissioner passed few local ordinances relevant to civil disputes, Chinese law and custom was often used. The extent to which the application of such law was avoided on the grounds of repugnance to justice or morality is not known.

Weihaiwei's magistrates and judges had an increasing body of works on Chinese law published in English, aside from works in Chinese, which they could consult.¹¹⁵ The records do not reveal the extent to which these works were used. There is one reference to Sir George Staunton's work on the *Da Qing Lu Li*¹¹⁶ by Bourne J. in *R. v Chi Hsing-nan and others* (1906).¹¹⁷ In the same case, Bourne J. also mentioned a decision of a magistrate in Huchou reported in the *North China Herald*. There is also the suggestion in a Commissioner's file that law which had been passed

¹¹⁴ See also arts 66(2) and 67(3) which deals with High Court jurisdiction in relation to native marriages and to cases of probate and administration. In both, jurisdiction was to be exercised in accordance with Chinese law and custom, subject to consistency with 'justice and morality' in the case of marriage and 'justice' alone in the case of probate and administration. These provisions do not appear to have been resorted to by the courts of Weihaiwei and are not explored in this work.

¹¹⁵ Among the works on law which were published before the rendition of Weihaiwei are Staunton, see n. 116; Ernest Alabaster, *Notes and Commentaries on Chinese Criminal Law and Cognate Topics* (London: Luzac, 1899); Byron Brenan, 'The Office of District Magistrate in China', *Journal of the North China Branch of the Royal Asiatic Society*, 1897-8, vol. XXXII, 36-65; T.R. Jernigan, *China in Law and Commerce* (New York: Macmillan, 1905); R.T. Bryan, *An Outline of Chinese Civil Law* (Shanghai: Commercial Press, 1925); G. Jamieson, *Chinese Family and Commercial Law* (Shanghai: Kelly and Walsh, 1921); Edward Harper Parker, *Comparative Chinese Family Law* (Hong Kong: China Review, 1879) and Pierre Hoang, 'Notions Techniques sur la Propriété en Chine' (condensed version in English published in two parts), *China Law Review*, 1922-24, vol. 1, 90-96 and 232-244.

There were also the following general works on China which contained information on Chinese law and custom: - J. Doolittle, *Social Life of the Chinese* (New York: Harper, 1865); John Henry Gray, *China: a history of the laws, manners and customs of the people*, 2 vols (London: Macmillan, 1878); Arthur H. Smith, *Village Life in China* (New York: Fleming H. Revell, 1899); Arthur Henderson Smith, *Chinese Characteristics* (New York: Fleming H. Revell, 1894; 5th edn rev. Edinburgh: Oliphant Anderson & Ferrier, 1900); A.M. Fielde, *Pagoda Shadows*, 5th edn (Boston: Corthell, 1884); Adele Fielde, *A Corner of Cathay* (New York: Macmillan, 1894).

¹¹⁶ Sir George Thomas Staunton, *Ta Tsing Leu Lee* (London: T. Cadell and W. Davies, 1810).

¹¹⁷ *NCH*, vol. LXXIX, no. 2917, 6 Apr 1906, p. 39.

by the Chinese Republican Government may have been taken into account.¹¹⁸ Use of such law would have been valid under the Order as there was no cut-off date for the reception of Chinese law and custom.

Chinese law and custom was also incorporated into the laws of the territory through some ordinances. For example, the Chinese Marriage Preservation Ordinance, 1913¹¹⁹ was passed to protect marriages contracted in accordance with 'the laws and customs of China'.¹²⁰ Similarly, the Government Waste Lands Ordinance, 1919¹²¹ defined government waste land as 'all unoccupied land, whether originally waste or formerly cultivated but abandoned through famine, civil war or otherwise, which by Chinese law or custom is deemed to be public property and to vest in the State'. Other ordinances such as the Marriage Ordinance, 1903¹²² (as amended by the Marriage (Amendment Ordinance), 1921),¹²³ excluded from its licence, registration and other mandatory provisions marriages between Chinese persons regardless of their religion, and marriages between non-Chinese persons neither of whom professed the Christian religion.¹²⁴ In these marriages, the 'personal law and religion' of the parties - which for the vast majority of the inhabitants of Weihaiwei was Chinese law and custom - was applicable. Personal law refers to the law applicable to certain individuals in particular matters, usually, though not always, confined to family matters such as marriage, adoption and inheritance.¹²⁵ The courts of Weihaiwei certainly attempted to

¹¹⁸ See H.P. Wilkinson, 23 March 1916, CO 873/434 where the Crown Advocate advised the government of Weihaiwei of the existence of s. 18 of the Chinese 'Government Property Regulations' promulgated on the 31st July 1914 (3rd year of the Republic) which provided that arrears of rent could be collected by the government on waste land which had been previously cultivated without its authority. In fact, the Weihaiwei government decided against the collection of arrears.

¹¹⁹ Ord. 1 of 1913, CO 841/1.

¹²⁰ Sections 3 and 4 of the Chinese Marriage Preservation Ordinance, 1913, CO 841/1.

¹²¹ Ord. 6 of 1919, CO 841/1.

¹²² Ord. 9 of 1903, CO 841/1.

¹²³ Ord. 1 of 1921, CO 841/1.

¹²⁴ Section 40(a) of Ord. 9 of 1903, as amended by s. 2 of Ord. 1 of 1921. The original s. 40 had included marriages where one or both of the parties were Christians and in this regard did not discriminate between Chinese and non-Chinese. The amendment resulted from the views of a priest in Weihaiwei who reported that it would be even more difficult persuading Chinese Christians to marry in church if they were required to comply with the notice and registration requirements of the ordinance. See minutes in CO 873/610.

¹²⁵ The recognition of personal law was part of an established pattern in other jurisdictions to which English law had been introduced. This recognition was achieved by analogy with what might be contrasted as the 'traditional' area of private international law where two sets of municipal law clashed. The main differences were first, that it was the personal law of the individual that was in conflict with the law which but for the recognition of the personal law, would have been applicable, and second, that the individual was not claiming a foreign domicile. See M.B. Hooker, 'Private International Law and

apply Chinese law and custom to questions concerning adoption and inheritance, especially in civil disputes, in compliance with the proviso to article 19.

A few of the disputes over land offer a glimpse of the legal issues which arose. These are discussed in chapter 6. By and large, detailed information on the issues of difficulty encountered by magistrates when applying Chinese law and custom is not available. One of the magistrates complained in general terms of civil disputes being complex 'partly because of the difficulty of reconciling Chinese law with local custom.'¹²⁶ As we saw above in the context of finding persons qualified to be Chinese assessors, persons who could provide reliable information on Chinese law and custom were few; local headmen were often unable to be of assistance.¹²⁷ Other problems included legal rights which had not been asserted for a long time and long-standing practices which had been carried out without the objection of others.

Village Regulations

In looking at the sources of law in the territory, the existence of unofficial sources of law such as village regulations merits consideration. Village regulations, comprising lists of offences and penalties, are likely to have contributed significantly to the maintenance of law and order in the territory. Such regulations, probably made by village elders,¹²⁸ were to be found in nearly all villages in the leased territory. Though not a requirement imposed by the government, headmen did sometimes bring village regulations to the British Magistrate for his approval and to be stamped with the government's official seal. A copy of these regulations was usually kept in the clan ancestral temple or in the house of the headman. Acts prohibited by village regulations appear to have varied little from one village to the next, common offences being theft of crops, desecration of graves, grazing animals or cutting trees without permission. Village regulations against gambling were later said to be increasingly common, a development which was influenced by the government's campaign to

Personal Laws: a note on the Malaysian experience', *Malaya Law Review*, 1968, vol. 10, 55-67. See also the same author's longer work on the co-existence of personal laws and other laws within plural legal systems: M.B. Hooker, *Legal Pluralism* (Oxford: Clarendon Press, 1975).

¹²⁶ Report of the SG (Walter), Departmental Reports for the year 1908, CO 873/280. See also the discussion relating to the remarriage of widows in ch. 7 where some of the possible difficulties are mentioned.

¹²⁷ Report of the SG (Walter), Departmental Reports for the year 1908, CO 873/280. For examples of cases where the headmen were consulted on questions of customary rights see ch. 6.

¹²⁸ *LDNC*, 160.

divert people from the activity. Penalties, more than the offences, varied in severity from village to village but usually consisted of fines and, in the case of very serious village offences, expulsion from the village. Contempt of these penalties was usually dealt with by turning the case over to the Magistrate.

Aside from being a source of norms within the village, it would appear that the courts of Weihaiwei also tried defendants for breaches of village regulations. The annual reports suggest that such prosecutions were not exceptional.¹²⁹ Whether they could be justified under either English criminal law or local legislation is doubtful.

Of the various theoretical questions discussed above, few were of any practical significance in the territory. Of all the courts and procedures established by the Weihai-Wei Order in Council, only the lowest rung of the hierarchy of courts - the Magistrates' Courts - saw many cases. The redundant appeals procedure was later supplemented by an ordinance which allowed for cases to be reheard. It is also clear that civil disputes and petty crimes were handled by village and district headmen with the encouragement, at least in the case of civil disputes, of the government. Where sources of law were concerned, although not mentioned as a source of law in the Order, village regulations were recognised in the courts.

The overwhelming concentration of cases in the Magistrates' Courts calls for brief comment. From the perspective of the vast majority of villagers in Weihaiwei who had any experience of the courts during the lease period, the Magistrate was probably all that they knew of the judicial system. Indeed, due to their policing and investigative work and the magistrates' administrative functions, the magistrates are likely to have been viewed not only as the arms of the law but also as 'the government'. Their combination of judicial and administrative roles gave them a close resemblance to the Chinese district magistrate. This resemblance is further discussed in some of the chapters below. It should be noted, however, that the Order was not drafted with any intention of continuing, subject only to the substitution of a British official for the Chinese district magistrate, any Chinese court which existed prior to the lease. The combination of judicial and administrative functions owed more to the

¹²⁹ For example, there were 9 cases resulting in 8 convictions in 1910; 2 cases resulting in one conviction in the South Division in 1914; 3 cases resulting in two convictions and one custodial sentence in 1915; and 2 cases without any convictions in 1916.

practice elsewhere in British colonies and other territories in which jurisdiction was exercised; the British district officer with judicial powers was not novel. In Weihaiwei, however, the lack of resources was a factor in keeping the judicial and administrative roles combined even though the magistrates themselves preferred a separation of magistrate and administrator. In the next chapter, we discuss the effect of similar resource constraints on the policing of the territory.

CHAPTER 4

POLICING THE TERRITORY

[I]t is deemed advisable to utilise for police purposes the village organisation at present in existence throughout the territory instead of introducing a system of Police based on Western methods which, while being much more costly, would not likely be proved so effective. The people as a whole are ignorant of such methods and it is almost certain that they will be much more easily policed through their own Headmen than through Interpreters of Police, living in Police Stations scattered throughout the territory, who would be unable to communicate with the people except through interpreters, - a system which almost invariably results in abuses and malpractices.¹

Weihaiwei's British administrators commonly observed that the territory was peaceful: it was relatively free of crime and its people were law-abiding, a situation the government attributed in part to its own policies of 'the maintenance of the headmen system and abstention from unnecessary interference in the affairs of the people'.² After the boundary disturbances at the inception of the lease,³ there were few threats to law and order. In comparison with the civil caseload of the courts, the number of criminal cases was small. The vast majority of prosecutions were for gambling, minor infringements of public health regulations or failure to pay licence and other fees. Reported instances of robbery, theft, assault, rape and homicide were few. The number of crimes coming to the notice of the authorities would undoubtedly have been affected by under-reporting and limited policing.⁴ Although villagers were eager enough to bring their petty civil disputes to the magistrate,⁵ the authorities had, from the earliest months of the lease, experienced difficulties in gathering evidence of crimes and in persuading witnesses to provide testimony - something they put down to the 'native dread of revenge'.⁶ Similar difficulties continued to be observed later, even after more than a decade of British administration.⁷ This dread of revenge may have left many crimes unreported. Also unreported was the petty criminal activity that

¹ Lockhart to SSC, 5 June 1902, CO 521/3.

² Annual Report for 1904, CO 873/163.

³ See ch. 1 above.

⁴ Although suicide is better treated *sui generis*, see the discussion of under-reporting and the impact of policing on suicide statistics in ch. 7.

⁵ See ch. 6.

⁶ Report of the SG, Annual Reports for 1902, CO 873/97.

was dealt with within the villages. The evidence for this is considered both in this chapter and in the next. For present purposes it suffices to say that, although the territory experienced a few robberies, the inhabitants of the territory were never so insecure and at risk of crime as to have petitioned the government to do more in response. There were two exceptions to this. In 1903, some villagers petitioned the government for permission to keep arms with which to deal with robbers⁸ and, in 1905, the Chinese merchants of the town petitioned the government to increase policing of the Port Edward area.⁹

In this chapter, the extent to which the government sought to establish its control and authority in the territory through the police and the extent to which it relied upon indigenous forms of control are explored. It looks first at the police force before considering the part played by village and district headmen.

Establishing a Police Force

A small civil police force in Weihaiwei was created soon after the territory was leased. By September 1900, the police force had a European inspector, a Chinese sergeant and 11 Chinese police constables.¹⁰ Policing was confined to Liukung and the Mat'ou area. In 1901, when the disbandment of the 1st Chinese Regiment ('the Regiment') was under consideration, the government proposed the establishment of a police force for the mainland. Colonel Dorward, then Commissioner, feared that a rise in crime would follow disbandment and advocated the establishment of a civil police force.¹¹ He recommended a force of 47 men, including one superintendent; 29 men would carry out their duties in Mat'ou and the four market towns of the territory, 12 men would be divided between two police stations along the frontier of the territory and five detectives would police the entire mainland area. Dorward recommended recruiting former members of the Regiment to the force. These plans were not

⁷ Commissioner to SSC, 20 March 1913, CO 521/14.

⁸ Annual Report for 1903, Lockhart to SSC, 18 Apr 1904, CO 521/6. In 1911, the government more actively encouraged villages to organise the defence of their own villages, hoping that this would lead to a voluntary force which could be called upon to assist the police: 13 Jan 1912, Commissioner to SSC, CO 521/13.

⁹ Commissioner to SSC, 10 Sept 1905, CO 521/8. See further discussion below.

¹⁰ Colonel Prendergast, Acting Commissioner to War Office, 20 Sept 1900, CO 521/1, p. 520.

¹¹ Dorward to SSC, 12 Oct 1901, CO 521/2.

approved; Dorward was instead offered the ad hoc assistance of the soldiers of the Regiment.

When Lockhart took over as Commissioner in May 1902, he continued the discussions about the policing needs of the territory.¹² His views, a portion of which appears in the passage quoted at the start of this chapter, were in marked contrast to those of his predecessor. Realising that it would be too costly to police the territory in the same manner as the New Territories of Hong Kong and that it would be 'worse than useless' to carry it out on the scale put forward by Dorward, he advised that a different system be adopted for Weihaiwei. Rather than introduce more police, he believed that village headmen - already appointed by the Commissioner - should be used to police all areas outside of Mat'ou.¹³ Headmen would assist in arresting suspects and, for larger and more serious incidents, the Magistrate and troops were on hand to provide them with support. These proposals rested on the presence, at any given time, of a garrison of two or three companies in the territory able to deal with emergencies. Given that most of the territory was to be without police, Lockhart suggested the appointment of an intelligence officer to supervise the headmen. He was against the appointment to the police of Europeans who could not speak Chinese as the use of interpreters, he thought, was likely to lead to abuses. The Colonial Office, seeing the cost savings made possible by Lockhart's proposal, approved his suggestions.

By mid-1903, however, Lockhart was asking for more police to augment the force of three European inspectors, seven Chinese constables and six detectives.¹⁴ Of these, only one inspector and five detectives policed the territory beyond Port Edward.¹⁵ This time, a comparison with the New Territories was made to highlight the deficiencies in Weihaiwei: the Colonial Office was reminded that Hong Kong's annual cost of policing a population of 100,000 was £10,000 whilst Weihaiwei had received less than a tenth of that sum - £950 - for its larger population of around 150,000. In Kiaochou, the German authorities had a force of about 50 Europeans and

¹² Lockhart to SSC, 5 June 1902, CO 521/3.

¹³ *Ibid.*

¹⁴ Lockhart to SSC, 5 Aug 1903, CO 521/4.

¹⁵ See Annual Report for 1903, Lockhart to Secretary of State, 18 Apr 1904, CO 521/6. In 1902, there was one Inspector (Inspector Whittaker), three constables in uniform and three plain-clothes detectives on the island. The police also looked after security in the wharves and piers and collected rents from houses leased to the Chinese and Europeans as well as licence fees etc. - Annual Reports for 1902, Report of the SG, CO 873/97.

100 Chinese men.¹⁶ In reply to the Colonial Office view that the territory had the assistance of the Regiment, the Commissioner argued that their duties could not involve ordinary policing, nor were they suited to the task. However, information for a period of several years shows that the Regiment and other troops and marines in the territory were useful in particular instances of unrest and probably also in deterring unrest.¹⁷ Farewell speeches made by the Commissioner to detachments of the Prince Albert's (Somerset Light Infantry)¹⁸ and the Royal Inniskilling Fusiliers¹⁹ refer, somewhat apologetically, to their involvement in policing in the territory, in contrast with military action which he assumed they would have preferred. During 1912, there were troops in three places in the territory - Port Edward, Wen-ch'üan-t'ang and Lu-tao-kou - from whence they assisted in the capture of a band of robbers who had committed their crime outside the territory but who had entered the territory to divide the loot.²⁰ In the case of the Somerset regiment, for instance, they had mounted a guard outside Government House.²¹

The suitability of men of the Regiment for recruitment into a civil Police Force was a question that divided opinion. Swettenham's recommendation, made before the decision to disband the Regiment, was that 200 of its men should be detailed to undertake policing duties, under a Superintendent of Police.²² Some,

¹⁶ Lockhart to SSC, 5 Aug 1903, CO 521/4.

¹⁷ Aside from the Somerset and Inniskilling regiments, detachments of the East Yorkshire Regiment, Loyal Regiment (North Lancashire), the Middlesex Regiment (Duke of Cambridge's Own), Bedfordshire and Hertfordshire Regiment and the Argyll and Sutherland Highlanders (Princess Louise's) (91st and 93rd) served in the territory: See Johnston to Lockhart, 3 Apr, 12 May and 22 July 1927, and 2 Feb 1930, *SLPNLS*, vol. 10A. The last of these regiments, present in the territory in the early part of 1930, remained there till the formal rendition ceremonies.

¹⁸ 'The Somersets at Weihaiwei', *NCH*, vol. CVII, no. 2383, 12 Apr 1913, p. 103. This report included excerpts from the farewell speech of the Commissioner on the departure of men of Prince Albert's (Somerset Light Infantry) to their headquarters in Tientsin. He mentioned inter alia that as fighting men the soldiers could not have found their duties in Weihaiwei 'very exciting or deeply interesting as they have been more in the nature of police than military duties'.

¹⁹ 'The Inniskillings in Weihaiwei', *NCH*, vol. CIV, no. 2352, 7 Sept 1912, p. 701, from 'A Correspondent', Weihaiwei, 2 Sept in which Lockhart's speech on the occasion of the departure from Weihaiwei to Tientsin of men from the Royal Inniskilling Fusiliers, was reported. Lockhart mentioned the gratitude of the Chinese of the Territory for the 'kindly protection' provided by the Regiment. He added that though their recreations had been 'few', and their 'temptations ... many', they showed 'unruffled cheerfulness under all circumstances and conditions' revealing grit by 'refusing to indulge in excessive quenching of thirsts even when the thermometer was high and the throat very dry'.

²⁰ Johnston to Commissioner, 27 Oct 1912, enc. to Commissioner to SSC, 13 Dec 1912, CO 521/13.

²¹ 'The Somersets at Weihaiwei', *NCH*, vol. CVII, no. 2383, 12 Apr 1913, p. 103.

²² For details of this report see ch. 2.

however, thought that the Chinese would not trust the men of the Regiment. Commander Gaunt of HMS *Landrail* informed the Colonial Office that:

The Chinese, law abiding as they are, are intensely mistrustful of the military, and cannot be induced to lay grievances before the officer commanding the regiment; who, to them, is simply the head of an organised mob.²³

Others feared that the former soldiers would themselves commit crimes. Johnston, for instance, later remarked that a military training appeared to produce in some men

an apparent diminution of their native respect for civil authority; and ex-soldiers who continue to reside within British territory are apt to be less respectful in their demeanour and less obedient to civil law than their rustic neighbours who have never donned a British soldier's uniform.²⁴

With similar fears in mind, the government required disbanded soldiers remaining in the territory to register their names, occupation and place of residence with the magistrate. When the Regiment was drastically reduced from 1200 to 500 men in 1902, about 100 returned to their homes within the territory²⁵ whilst the rest went to other parts of China.²⁶ Of those who remained in the territory, about 80 registered their particulars with the magistrate. There was indeed an increase in crime, with ex-soldiers accounting for 100 of the 270 prisoners passing through the prisons in that year. Forty of these were imprisoned for purely military offences, the rest for crimes such as assault, extortion, gambling, robbery, and living in Weihaiwei without permission.²⁷

The authorities generally downplayed the crime attributable to the ex-soldiers. The then Government Secretary, Walter, counselled that 'it is only natural that when a man is suddenly turned loose after having a regular pay and regular duties to do he may drift into evil courses.'²⁸ In the early part of 1906, several robberies occurred which were thought to be attributable to a small gang of former soldiers. When the Regiment was finally disbanded later that year, no increase in crime was in fact observed. The earlier concerns about the wisdom of recruiting former soldiers did not resurface and the police force for the mainland area (also referred to as the 'Territory Police') was fully constituted in September 1906 from members of the disbanded

²³ 'Notes on Wei-Hai-Wei', Gaunt, Commander R. N., HMS *Landrail*, 19 July 1901, CO 521/2.

²⁴ Annual Report of the SG (Johnston), app. I to Annual Report for 1904, CO 874/163.

²⁵ Report of the SG, Annual Reports for 1902, CO 873/97.

²⁶ Tientsin is mentioned as a place from which many of the soldiers came, *Ibid.*

²⁷ Report of the SG, Annual Reports for 1902, CO 873/97.

²⁸ *Ibid.*

Regiment.²⁹ Nearly all of the inspectors in the early years of the Force were from the Regiment.³⁰ This was true of Inspectors Purdon, Whittaker and Young, three of the earliest to be appointed to the force, and of Crudge and Forcey who joined at the end of 1905.³¹

Dealing with complaints from the European community

Within the territory, the government faced some criticism of its police force from the small number of European residents. As early as 1902, the Government had adopted a defensive posture. Thefts were blamed on the 'consummate carelessness of Europeans who placed implicit confidence in their Chinese servants' to the extent of asking coolies to carry cash for them from the Island to the mainland.³² The Annual Report for 1903 contained a thinly veiled riposte:

This territory has been so accustomed to immunity from serious crime that when cases do unfortunately occur, there are arm-chair critics who declaim against the absence of a large police force, which they, having a strong belief in numbers, and no experience of the administration of the Chinese, seem to think would put an end to all crime. These critics appear to forget that where there are large police forces crime still continues, and, so long as human nature remains as it is, it seems utopian to hope that crime can in any place be entirely prevented. In the present circumstances of this dependency, where crime is comparatively rare, the imposition of a heavy tax in order to raise funds to defray the cost of a large police force does not seem to be justifiable. But should crime increase and such a tax become necessary, it is gratifying to know that the critics of the present arrangement, to judge from their criticisms, will be willing to give their support to such a tax.³³

In March of the following year, the *Herald's* Weihaiwei correspondent made similar complaints in a report on a serious robbery of an opium shop in Port Edward.³⁴ Weihaiwei had 'no police force worthy of the name', thanks to Colonial Office policy and the territory's 'penny-wise, pound foolish' policy of running the territory 'on the cheap.' The Government's response to the complaints from its European residents, most of whom lived on the island, was to consult its Advisory Council. This Council,

²⁹ Report by Inspector Crudge, Annual Report for 1906, CO 873/239.

³⁰ The police also took over some of the equipment, barracks and other premises of the Chinese Regiment.

³¹ Report of the SG, Annual Report for 1906, CO 873/239.

³² Report of the SG, Annual Reports for 1902, CO 873/97.

³³ Annual Report for 1903, Lockhart to SSC, 18 Apr 1904, CO 521/6. See also Minute, 5 Feb 1903, CO 873/47.

³⁴ 'Robbery with violence', 15 March, *NCH*, vol. LXXII, no. 1911, 25 March 1904, p. 601. Twelve armed robbers entered an opium shop in Port Edward and made away with \$1800.

Council, made up of prominent European merchants, was asked if a detective system should replace a beat system of policing and whether all Chinese residents of the island should be required to register with the police. The Advisory Council rejected the beat system but recommended that the police concentrate more on serious crime. It was recommended that three policemen, whose pay should be 'entirely dependent on the practical results of their work', should be employed for detective work alone. The Council believed that the overall number of police on the island was sufficient. On the matter of the registration of Chinese residents, they approved of a form of free registration by the police, with visitors arriving by sea reporting to the police on duty at the wharves and all hotels keeping a record of guests which could be inspected by the police.³⁵ A report to the Commissioner by Inspector Whittaker, submitted a few days later, showed that there were already three policemen whose work consisted only of being plainclothes detectives, and who received daily reports of persons staying for the night from the Chinese hotels.³⁶ A requirement that all Chinese present on the island should register with the police was introduced later in 1904.

Having made efforts to reassure Europeans who lived on the island of the adequacy of policing in 1903, Johnston (then the Acting Government Secretary) bristled with irritation when, in 1905, Mr Clark, the owner of one of the larger businesses on the island, complained of the prevalence of robberies. Johnston immediately instructed one of the police inspectors to produce a list of all reported crimes on the island, which he used to defend the police in lengthy minutes to the Commissioner, highlighting the high conviction rate of cases prosecuted. These minutes were then read out at a meeting of the Advisory Council. Johnston was satisfied that the Government had managed to convince the islanders that crime was not rampant, and that the police were not wholly inefficient. The Europeans living on the island were told, yet again, that most crimes were due to their own carelessness.³⁷ Despite this meeting with the Advisory Council, one island dweller, Commander Yorke, continued to complain to Johnston of the frequency of thefts on the island. When Johnston replied that the reports of theft were very few in number, the Commander offered the view that no reports were made because it was known that the police were ineffectual. For reasons that are not clear, Johnston took particular

³⁵ Advisory Council, 6 Feb 1903, CO 873/47.

³⁶ Inspector Whittaker, 11 Feb 1903, CO 873/47.

³⁷ Johnston to Commissioner, 19 March 1905, CO 873/178.

exception to the Commander's complaints. He suggested to the Commissioner that his previous minutes on the subject of theft be sent to the Commander and, further, that the Commander should be 'requested to assist the government in its efforts to suppress crime by furnishing a list of all unreported cases of theft on the island since the beginning of [that] year.'³⁸ Commander Yorke expressed his regret that Johnston should have turned a private conversation into an official matter. He went on to say that his views on the inefficiency of the police should be confined to the native police, giving five examples he had encountered. Yorke touched a raw nerve in Johnston when he concluded that it was 'inherent in the Chinese character that he cannot make an efficient policeman.' Johnston commented that this opinion was at odds with the experience in Hong Kong and in Singapore. Yorke noted that Sikhs and other foreigners were used as policemen in Hong Kong and Shanghai and that, in any case, his comments were to be confined to the natives of Weihaiwei. After more had passed between the two men, the Commissioner advised that the argument should be laid to rest.³⁹ As the handling of these complaints shows, within the territory, the government defended the police and the level of policing but, vis-à-vis the Colonial Office, they emphasised the inadequacy of resources.

The police were not unproblematic. Breaches of police regulations were common and often resulted in members of the force being tried by the Magistrate and dismissed from service. Under the Police Force Ordinance, 1903, which was based on a similar Hong Kong ordinance, the Commissioner was expressly empowered to make rules and regulations for the general governance and discipline of members of the police force.⁴⁰ Such rules were later made, then printed in booklet form from at least 1909, though translated into Chinese only in 1915.⁴¹ These rules applied to inspectors and constables, the rules for the latter having been prepared by Inspector Crudge, again borrowing from Hong Kong Police rules.⁴² Section 11 of the Police Force Ordinance empowered the Commissioner or any authorised officer to punish breaches of duty with fines of up to \$25 or imprisonment for up to 7 days, alongside an order for forfeiture of the offender's pay. Additionally, section 12 gave the Commissioner

³⁸ Minute, Johnston, 7 Sept 1905, CO 873/198.

³⁹ Minute, Lockhart, 19 Sept 1905, CO 873/198.

⁴⁰ Police Force Ordinance, 1903, s. 9, CO 841/1.

⁴¹ See Whittaker, 13 July 1915, and Sly to Commissioner, 14 July 1915, CO 973/432.

⁴² CO 873/277.

the power to dismiss or demote any inspector, sergeant or constable for misconduct or neglect of duty. These rules were enforced. In 1908, for instance, two policemen were dismissed for involvement in gambling and for pawning government property.⁴³ Extortion by the police and other forms of corruption were also a concern. In 1907, some of the police in charge of collecting shipping dues had routinely levied a small extra charge for their own profit. To discourage corruption, constables, detectives and others in the police were required to provide security for good behaviour.⁴⁴ Concerns over extortion were so strongly felt that the two posts vacated by the dismissals in 1908 were left unfilled.⁴⁵ In the following year, eight members of the police - amounting to 15% of the force - were dismissed for receiving bribes, acquiescing in gambling, and other less serious charges.⁴⁶ Another measure taken to reduce opportunities for bribery and corruption was the regular rotation of men to prevent them from becoming too familiar with the people. In 1911, for instance, in two separate tranches, the men normally stationed at Port Edward replaced the whole of the Island Police.⁴⁷ The effectiveness of monetary inducements was later turned to good effect by offering rewards for the clearing up of some crimes.⁴⁸

On the whole, the government did not lose faith in the Chinese as policemen. Annual Reports alternated between praise for the police and regret at the number of dismissals and cases of neglect of duty. The government were aware that corruption was always a possibility but thought that victims of corrupt practices would report the police to the magistrate.⁴⁹ Police breaches of discipline were blamed on the lack of training and supervision, as well as, in later years, the failure to increase wages in line

⁴³ Report of the SG, Departmental Reports for the year 1908, CO 873/280.

⁴⁴ Report of the SG, Departmental Reports for the Year 1907, CO 873/265. This was an extension of the same requirement imposed on the more senior Chinese clerks in government employment.

⁴⁵ Report on the Police and Gaol of Liu Kung Tao for 1908 by Inspector Whittaker, Departmental Reports for the year 1908, CO 873/280.

⁴⁶ Report of the SG, Departmental Reports for 1909, CO 873/292.

⁴⁷ Report of Inspector Whittaker on the Police of Liu Kung Tao, Departmental Reports for the Year 1911, CO 873/335. Also, Police at posts changed every now and again, Report of Inspector Crawley, Annual Reports for 1914, CO 873/435.

⁴⁸ See records on this matter in CO 873/652 which indicate that there had already been a system of rewards for opium and gambling cases but towards the end of 1921, Inspector Whittaker suggested that rewards for good work in all crimes should be instituted so as to increase the motivation of the force.

⁴⁹ Commissioner to Lord Elgin, 23 Aug 1906, CO 521/9.

with inflation, a fact acknowledged but not addressed by the Government.⁵⁰ In 1910 and 1926 policemen petitioned the government for salary increases.⁵¹

The wider duties of the police

The strength of the police force should not be discussed without taking into account the other demands on police resources, many of which were beyond the strict confines of crime and policing. Inspectors assisted the magistrate in civil disputes,⁵² helped with administrative tasks, and were responsible for specific matters such as street lighting. In 1904, the Port Edward Inspector was also the Sanitary Inspector, answerable to the territory's Medical Officer. At various times, the Island Inspector was the chief revenue collector, collecting sampan, wharfage, dog and other licence fees; rents from Government properties; and court fines. The Island Inspector was also in charge of the prison and acted as Registrar of births and deaths. Inspector Crawley, alongside his responsibilities as Inspector for Port Edward, supervised public works, particularly the time-consuming task of overseeing road works,⁵³ and carried out the functions of Financial Assistant.⁵⁴ Some policemen were also deployed as water police for the inspection of ships docking in the harbour.⁵⁵

Gradual expansion of the Police Force

Despite the grudging attitude of the United Kingdom Treasury, the territory saw a gradual expansion of its police force during the early years of the lease. In 1904, a year in which six cases of robbery with violence were reported,⁵⁶ a native sergeant and a constable were added to the force of three inspectors.⁵⁷ A fourth inspector was appointed in 1906. From 1905 onwards, an increased number of policemen patrolled

⁵⁰ Annual Report for 1927, CO 521/41.

⁵¹ Lockhart to Earl of Crewe, 4 Nov 1910, CO 521/11 and Annual General Report for 1926, CO 521/37.

⁵² Inspector Jennings visited a village, on behalf of the Senior District Officer, to collect evidence of a dispute between two women: Jennings to Senior District Officer, 19 Sept 1920: CO 873/590.

⁵³ Report of the Senior District Officer, Annual Reports for 1916, CO 873/493.

⁵⁴ Report of Inspector Crawley, Annual Reports for 1914, CO 873/435.

⁵⁵ Draft Annual Report, 1914 and District Officer's Report for 1914, CO 873/440.

⁵⁶ Annual Report for 1904, CO 873/163.

⁵⁷ One of these, Inspector Purdon, was said by Johnston to have an exceptional knowledge of both written and spoken Chinese: Annual Report of the SG, app. to Annual Report for 1904, CO 874/163.

the streets of Port Edward, made possible by the voluntary subscriptions of Chinese merchants under a scheme they had initiated after petitioning the government for an increase in police.⁵⁸ These voluntary payments continued to be made till 1918, at least. That year, Johnston, as Officer Administering the Government, expressed his wish to abolish the scheme and to replace it with public funding raised through increased taxation.⁵⁹

Figures from 1907 show that the force for the mainland area of the leased territory had two sergeants and 34 constables, large enough for a small section to form a mounted squad under the supervision of an inspector. The mounted squad formed two patrols of three men each to visit a network of routes covering some twenty-five miles every day. The inspector visited the villages and police posts in the interior twice a month. A second detachment of nine men formed three patrols and left Port Edward nightly for villages lying within six miles of Port Edward. A third portion of the police force numbering eight men was stationed with the district officer in the interior. The remainder of the force was stationed at Port Edward with duties relating to the offices, armouries, magazine and other property belonging to the government.⁶⁰

By 1911, the Weihaiwei Police Force consisted of three European inspectors, three Chinese sergeants and 52 constables. The demise of the Qing dynasty and the unsettled state of the surrounding areas made the territory vulnerable and this brought about a marked change in the official line on policing. Until that time, the government had been in favour of keeping the police force small. It was also clear that the government could not always rely on the co-operation of the War Office for the provision of troops for quasi-policing duties, for some in the War Office were not prepared to continue, as they saw it, subsidising the Colonial Office. Several times in the early 1910s, the government asked for further expenditure on the police force and requested that the withdrawal of troops be delayed. The government also encouraged villagers to provide for the defence of their own villages, permitting them to keep arms and providing some with instruction on the proper use of those arms. By such means, the government hoped that those authorised to carry arms would gradually organise themselves into a voluntary force. Unfortunately, it was reported that the

⁵⁸ Commissioner to SSC, 10 Sept 1905, CO 521/8. As a result of this scheme 12 more policemen were recruited, bringing the total up to 21 men.

⁵⁹ Officer Administering the Government (Johnston) to SSC, 11 March 1918, CO 521/19.

⁶⁰ Report by Inspector Crudge, Annual Report for 1906, CO 873/239.

villagers were frequently outclassed by the robbers, many of whom had better weapons.⁶¹ Meanwhile, the Colonial Office was enquiring of the Commissioner if the size of the police force could be reduced; the Commissioner made it clear that no reduction could be made.⁶²

In 1912, the year the Somerset Light Infantry was withdrawn from the area, 40 constables were added to the force, enabling the stationing of policemen at six police posts in the territory.⁶³ To economise, the men were issued with only a badge, not uniforms.⁶⁴ Later that year, after members of a band of robbers had been captured, Johnston wrote to the Commissioner advocating an enlargement of the police force to about one hundred men. The leased territory he said, had evidently become 'an Alsatia for the murderers and armed robbers of the neighbouring Chinese districts'⁶⁵ who relied on the fact that the Chinese authorities were not allowed to enter Weihaiwei and that surveillance of outsiders entering the territory was negligible given the territory's small police force. The captured robbers had used the territory as their base for committing robberies across the border. Johnston described the shortage of staff. For his district which covered about 200 square miles and in which there were about 100,000 inhabitants and all of the territory's land frontier, there was only himself and eight Chinese constables and one Chinese detective. He went on to say,

My diminutive force of nine police has to carry out all the duties of gaol-warders, court-messengers (to carry summonses etc to witnesses and others in civil and criminal cases) and ordinary police. The country is mountainous, roads are bad, and there are no telephones or other means of rapid communication. There are occasions on which I have been so hard pressed for men that my own domestic servants have had to perform the duties of policemen: and there have been numerous occasions on which I have had to postpone enquiries into criminal outrages for sheer lack of available men. For urgent temporary purposes a few extra police can be obtained from Port Edward, but even this cannot be done without serious inconvenience, for the force of police stationed at Port Edward and on the Island is only just large enough for the requirements of those important centres.⁶⁶

In January 1913, Lockhart conveyed the change in policy to the Colonial Office. He wrote that it was neither prudent nor safe 'to continue to rely on the very

⁶¹ See Annual Report for 1903, Lockhart to SSC, 18 Apr 1904, CO 521/6 and Lockhart to SSC, 13 Jan 1912, CO521/13.

⁶² Commissioner to SSC, 11 Apr 1911, CO 521/12.

⁶³ Report of the SG, Annual Departmental Reports for the Year 1913, CO 873/378.

⁶⁴ Commissioner to SSC, 13 Jan 1912, CO 521/13.

⁶⁵ Johnston to Commissioner, 27 Oct 1912, enc. to Commissioner to SSC, 13 Dec 1912, CO 521/13.

⁶⁶ *Ibid.*

small and inexpensive Police Force which for many years was fortunately found to be sufficient for the maintenance of peace and good order in the leased Territory.⁶⁷ He asked for an extra European inspector, six Chinese sergeants and 36 constables.⁶⁸ Statistics compiled for 1916 showed a police force numbering 95,⁶⁹ part of the force being stationed at six police posts in the territory.⁷⁰ Three posts were added in 1920.⁷¹

At the beginning of the 1920s, a decade during which the territory was threatened with unrest on its boundaries, the territory had nine police posts in the territory throughout which 49 constables were distributed.⁷² Preventing bandit incursion at the fringes of the territory was a great concern and British troops from various infantry regiments did much to help the police patrol the borders and to reassure the population. In 1921, the Peace Preservation Ordinance⁷³ granted the Commissioner powers to appoint special constables, with powers akin to those of ordinary police, for the suppression of actual or apprehended disorder. These powers were probably not used.

In 1925, with the population of Port Edward growing steadily⁷⁴ and unrest increasing outside the territory, the government applied to the Treasury for funds to enlarge the police force by one corporal and 23 constables as a matter of urgency.⁷⁵ The extra men were hired in April that year, bringing the total size of the police to 148.⁷⁶ For the first time in the history of the Weihaiwei Police, new recruits underwent six weeks of training before being placed on duty.⁷⁷ Training had previously been done on the job; men had been recruited

straight from the streets, given uniform, a rifle, rudimentary instruction in drill and duty and despatched forthwith to isolated stations along the frontier,

⁶⁷ Commissioner to SSC, 14 Jan 1913, CO 521/14.

⁶⁸ *Ibid.*

⁶⁹ Annual Reports for 1916, Lockhart to SSC, 15 May 1917, CO 521/18.

⁷⁰ Annual Report for 1917, Officer Administering the Government to SSC, 21 May 1918, CO 521/19.

⁷¹ Report by Inspector Jennings, Annual Reports 1920, CO 873/627.

⁷² *Ibid.*

⁷³ Ord. 2 of 1921, CO 841/1. Special constables had the full powers of the ordinary police but not their entitlement to pay and other reward.

⁷⁴ In 1927 it was estimated that the population of the territory had swollen to 175,000, partly due to merchants arriving to settle in the suburbs around Port Edward. Port Edward's population was thought to have been close to 20,000: Annual Report for 1927, CO 521/41.

⁷⁵ Commissioner to SSC, 13 March 1913, CO 521/27.

⁷⁶ Figures for 1925 include 16 prison warders.

⁷⁷ Annual Report for 1925, Russell Brown to SSC, 17 March 1926, CO 521/28.

there to guard against the inroads of robber and pirate and the commission by their friends and neighbours of every class of crime from murder to adultery.⁷⁸

From the mid-1920s till the end of British rule, the Weihaiwei Police Force continued to grow. Figures from 1927 show a force of three European inspectors, 19 Chinese non-commissioned officers, and 142 other men making a total of 164 men.⁷⁹ They were distributed as follows: one inspector and 17 men on the island, one inspector and 56 men at Port Edward, and the remainder on duty at the police posts - by this time 13 in total.⁸⁰ This was a period in which border patrol had become absolutely necessary and it was felt that a fourth inspector was needed. With one inspector on duty on the island and one in Port Edward, the remaining inspector had a large force to supervise. This need was felt all the more as a shortage of staff in government pending rendition meant that the police had to carry out even more administrative tasks. The introduction of a lorry and motor cycles to the force a year later no doubt made it easier for the same number of police, using the network of roads criss-crossing the territory by that time, to cover more of the territory.⁸¹

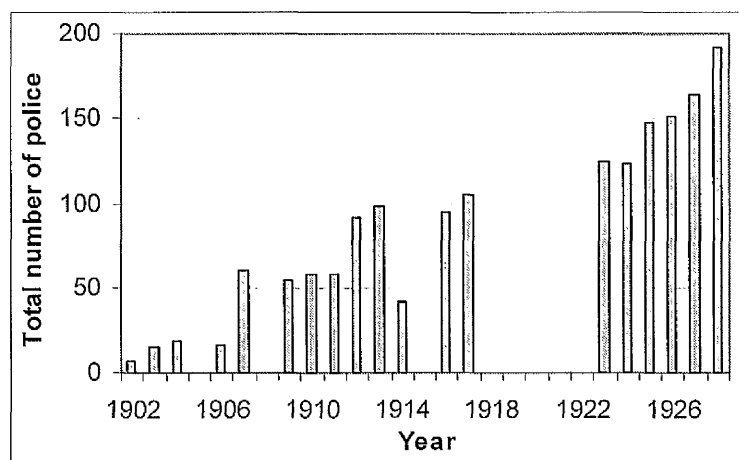


Figure 4. Strength of Police Force

Looking back at the history of the Weihaiwei Police Force, it is remarkable that, while a force of 47 men had been suggested sometime before Lockhart took over as the territory's Commissioner, this number of police was only reached during the

⁷⁸ Annual General Report for 1924, Russell Brown to SSC, 10 March 1925, CO 521/27.

⁷⁹ The police force after rendition was larger. In 1933, there were 205 policemen, 20 constables and 6 patrol officers, reinforced by 50 policemen from Peking. See *Guide to Wei-hai-wei* ([n. p.]: Office of the Weihaiwei Commissioner, 1933).

⁸⁰ Annual Report for 1927, CO 521/41.

⁸¹ Johnston to Lockhart, 2 Jan 1928, *SLPNLS*, vol. 10A.

years 1908-1910. This was partly to do with Lockhart's own proposal in 1902 in which he rejected Dorward's proposals and argued that a uniformed force, especially if made up of men who could not understand the local dialect, was unsuited to the territory. However, his alternative proposal of relying on headmen was quickly forgotten and, in subsequent years, applications were regularly made to increase the police force. The effectiveness or otherwise of the headmen was never once mentioned in these applications, the previous policy never being acknowledged, or for that matter, questioned, by the Colonial Office. The role of headmen and their effectiveness in carrying out the policing and other miscellaneous tasks expected of them is looked at below, after an examination of the role of the Magistrates in the maintenance of law and order.

The Magistrates

In discussing policing in the territory, mention should be made of the territory's magistrates. Part of the work of the magistrates was to investigate crimes, carry out raids and make arrests. They regularly led raids on gambling dens⁸² and brothels. One of the most exciting chases led by Johnston occurred in December 1911 when six armed pirates stormed a junk in Weihaiwei's waters close to Port Edward and demanded a ransom. Johnston, together with armed police, took charge of a Japanese-owned launch and pursued the pirates into Chinese waters where they caught three of them, the remaining three drowning in an attempt to swim ashore.⁸³

Crimes were often reported to the magistrate without a full investigation having taken place and it would then be up to the magistrate to apply his investigative skills. He would, if necessary, absent himself from his court for several days to visit the scene of the crime and interview possible witnesses. For a period, the magistrate in the interior was probably required to perform these extra responsibilities due to the absence of a police inspector at his headquarters in Wen-ch'üan-t'ang. In 1914, Johnston complained to the Commissioner regarding this state of affairs: he was overworked and concerned about the conflict of interest inherent in his multifaceted position. In the changes which were instituted, Johnston instructed the police that they should henceforth report cases to him only after a proper initial investigation. Three of

⁸² Report of the SG, Departmental Reports for the year 1907, CO 873/265.

⁸³ Lockhart to SSC, 13 Jan 1912, CO521/13.

the four inspectors would henceforth receive all reports relating to crime, lawlessness, breaches of police or other regulations, make all necessary investigations, prepare cases for prosecution and appear in court to conduct the case for the prosecution. Minor cases could be delegated to a Chinese sergeant or constable.⁸⁴

Even when the police inspectors conducted investigations without recourse to the magistrate, the magistrate was still responsible for the supervision and deployment of the police in the territory. In their administrative capacities both magistrates also supervised the district and village headmen. This last supervisory function had been the main justification used by the Commissioner in applying to the Colonial Office in 1906 for the appointment of a district officer who would reside in the interior.⁸⁵ As he later argued, the appointment of the officer was not so much to augment the administrative staff of the government as to 'provide for an efficient police.'⁸⁶

Village and district headmen

As alluded to above, Lockhart fully supported Swettenham's proposal that traditional village organisation should be maintained. Traditional forms of social control were incorporated into early policies on law and order, in part because the alternatives would have been costly and in part because the government believed that they should interfere as little as possible with village life. Village order was thus made the responsibility of village headmen who were issued with certificates of appointment. Headmen were told that they were the 'eyes and ears' of the government, and should report to the government any untoward occurrences (including serious crimes and the presence of undesirables) in their villages.

A certain amount of self-policing was assumed and expected to take place in the village. In Johnston's *Lion*, the villages were described as being 'somewhat like so many little self-contained republics.'⁸⁷ The government assumed that each village was made up of blood relatives and had a socio-political hierarchy, with the most respected elders at the top. Since the headman was chosen from amongst the elders, he was in a natural position to prevent trouble and to keep an eye on individuals

⁸⁴ CO 873/432.

⁸⁵ Commissioner to Lord Elgin, 13 Feb 1906, CO 521/9.

⁸⁶ Commissioner to Lord Elgin, 7 Apr 1906, CO 521/9.

⁸⁷ *LDNC*, 155.

within the village. The government counted on the fact that villagers would instantly spot outsiders and potential troublemakers. The self-policing processes occurring within the village in relation to petty crime were not reported in any detail by the government. However, Swettenham's report described the way in which villagers co-operated in watching over their fields, in schemes organised by a village elder.⁸⁸ In a farming area, most thefts would have been of crops or farming tools. Since it was often the case that a family's fields were not contiguous, it was impossible to watch over all of them simultaneously. A few villagers were therefore paid by the village to guard over fields. Suspicious characters would be arrested by the crop watchers and taken to the village elders. Crop watching is not often mentioned in the records but it would appear that the practice continued well into the third decade of British rule; in 1925 a crop watcher was reportedly murdered while on duty late at night.⁸⁹ The existence of village regulations, discussed above in chapter 3, many of which were intended to protect crops and fields, also suggests that villages took action against those who desecrated graves or engaged in gambling.

The government expected that headmen would, as part of their general responsibility to maintain order in their respective villages, resolve petty disputes and prevent them from erupting into disorder or from reaching the magistrate. The mediation of petty disputes was mentioned in the headman's letter of appointment but no division of jurisdiction was formalised by means of court rules. The magistrates, as we shall see, sometimes thought that many of the cases reaching them could easily have been dealt with by the headmen.

The salaried district headmen introduced in 1905⁹⁰ were, amongst their other duties, expected to ensure the success of newly introduced laws such as the Opium Ordinance, which was introduced in 1909 to eradicate the smoking of opium except by licensed users. At a regular meeting of district headmen with the Commissioner, the former were reminded of sayings on the authority of the law from the *Sacred Edict* and other sources such as 'Explain the law in order to warn the ignorant and the

⁸⁸ Report on Weihaiwei and its Future Administration, 23 June 1900, enc. to Swettenham to SSC, 26 July 1900, CO 521/1, p. 642.

⁸⁹ Annual General Report for 1926, CO 521/37.

⁹⁰ See ch. 1.

obstinate', 'Instruct the youth in order to prevent them from doing evil', and 'Do not that which is a transgression of the law.'⁹¹

Effectiveness of the headmen

It is not easy to determine how effective the headmen were in keeping order in the villages and reporting crimes. The opinions of government officials on this subject varied. Walter, the Government Secretary, thought headmen to be without influence and incapable. He complained about their inability to mediate civil disputes effectively and their failure to report gambling and other offences.⁹² By 1908, through resignation and or dismissal, the total number of district headmen had been reduced to nineteen from twenty-six.⁹³ So pessimistic was Walter by this time that he thought it was probable that the system of district headmen would 'gradually die a natural death'.⁹⁴ This prediction turned out to be incorrect, but doubts over the effectiveness of headmen lingered.

Like the police, headmen were occasionally summoned to appear before a magistrate on charges of neglect of duty or other offences. In 1916, a district headman was convicted of manslaughter and fined for neglecting to report a fatal revenge attack carried out by the relatives of a village headman who had been killed in the course of a robbery.⁹⁵ Some years earlier, a headman - Kuo Lien-yüeh of the village of Sung-ling-kuo-chia - was dismissed for making false statements in a petition to the government and falsely putting the names of district headmen and two village headmen on the petition. Kuo was found guilty and removed from office. He had been under surveillance by the police for suspected involvement in gambling transactions and in the suicide of a gambling debtor. The evidence was insufficient to support a conviction but Johnston ordered that a bond be posted to secure his future good behaviour. Johnston explained to the Commissioner that the headman's false petition to the government was probably rooted in his annoyance at being under suspicion. However, Johnston's remark that 'he has no excuse for his conduct except that he is

⁹¹ Text of Commissioner's address to District Headmen, prepared for a meeting on 8 Apr 1910, CO 873/299.

⁹² Report of the SG, Annual Reports for 1902, CO 873/97.

⁹³ Departmental Reports for 1907, CO 873/265. See also further discussion below.

⁹⁴ Departmental Reports for 1907, CO 873/265.

⁹⁵ Departmental Report of the Junior District Officer for 1916, Annual Reports 1916, CO 873/493.

old and foolish' and the views of other district and village headmen resulted in a lesser penalty than the Commissioner might otherwise have imposed. The headman was fined \$50 and removed from his office.⁹⁶ The authorities lost no time making the details of the case known through a proclamation warning Kuo and others that similar conduct in the future would not be treated with leniency.⁹⁷ On another occasion, the headman of the village of Meng-chia-chuang, who had earlier been sacked from office, was stripped of a previously awarded good service medal.⁹⁸

Several times during the term of the lease, village headmen were held responsible for not preventing their villagers from fighting with people from a neighbouring village. In one case, a headman whose villagers had been involved in riotous behaviour was imprisoned after he had refused to find security against repetition.⁹⁹ Such riots usually had their root cause in disputes over land. It is quite probable that village headmen were better at maintaining order within their respective villages than when their village was in dispute with another. In such instances, the involvement of the Magistrate and the police was almost inevitable and the stationing of extra police to keep the peace was sometimes necessary. In 1913, three policemen were stationed in two villages which had been quarrelling over rights to land. The cost of the extra policing was imposed on the two villages.¹⁰⁰ Where order within the village was concerned, it is likely that headmen were effective in reporting serious crimes to the government (if somewhat selectively) and in dealing with most of the petty crimes themselves. In view of the government's general policy of non-interference in village life, this was acceptable, so long as village matters were not allowed to fester and grow into disputes of a magnitude no government could ignore.

In general, however, Johnston and Lockhart defended the headman system. It was Lockhart who had officially co-opted the headmen and awarded medals to those who had served the government well. In addition to these medals, the government was quick to present honorific tablets to headmen for their exemplary conduct. In 1905, as a result of a petition from a man who had been saved by the headman of the village of Hai-hsi-t'ou when the steamer he was on was shipwrecked, Lockhart had a tablet

⁹⁶ CO 873/238.

⁹⁷ See draft proclamation, CO 873/238.

⁹⁸ Lockhart, 7 Oct 1907, CO 873/256.

⁹⁹ Johnston to Lockhart, 9 May 1913, *SLPNLS* vol. 9(h); the underlying dispute was one involving rights over grazing lands.

made up in Hong Kong through the trading firm of Butterfield and Swire.¹⁰¹ When it arrived in the territory, the headman was presented with it at the district officer's *yamen* and arrangements were made to have the tablet sent to Hai-hsi-t'ou by sampan.¹⁰² In 1910, a district headman, Miao Tso-pin (*Miao Zuobin*), was similarly presented with a tablet for his good work in rescuing the crew of a wrecked Japanese steamer.¹⁰³

In his farewell speech to the local community in September 1930, Johnston, who had suggested the introduction of a higher level of headman, praised district headmen¹⁰⁴ for their work in developing a public spirit in Weihaiwei. He said that, as a result, roads had been built not only thanks to the villagers' free labour but also through their provision of land without compensation where roads encroached upon their property.¹⁰⁵ However, Johnston had realised that the headman's position was 'not altogether enviable', noting that when a vacancy arose there were often few applicants for the position.¹⁰⁶ Indeed, some villages had to be persuaded to produce a candidate for headship by the threat of a fine.¹⁰⁷ There is evidence that district headmen felt that their influence might be insufficient without the express backing of the government. On one occasion, when headmen were asked to establish village guards, they asked the government to buttress their authority through the issue of a proclamation announcing that district headmen would be carrying out the orders of the government.¹⁰⁸

The uncertain status of headmen within the village will have contributed to their lack of influence. Martin Yang's account of village life in Taitou, within the

¹⁰⁰ Johnston to Lockhart, 8 May 1913, *SLPNLS*, vol. 9(h).

¹⁰¹ This was a matter in which the Commissioner took much personal interest, to the extent of providing specific instructions on the design of the tablet. On Johnston's suggestion, the tablet was presented by himself as District Officer after advising the Commissioner against too much ceremony because the headman 'may get inflated ideas about his own value and importance': Johnston to Lockhart, 28 July 1905, CO 873/184.

¹⁰² See Johnston, 10 Aug 1905 and other minutes and correspondence in CO 873/184.

¹⁰³ See CO 873/299. This District Headman was an assessor in the murder trial of *R. v. Wang and Liu* discussed in ch. 5.

¹⁰⁴ Commissioner's speech at the Government Offices, Weihaiwei, 29 Sept 1930: *SLPNLS*, vol. 64.

¹⁰⁵ Address to District Headmen and Headmen by Commissioner, 18 Apr 1914, Government House, which alludes to this, Commissioner to SSC, 29 Apr 1914, CO 521/15.

¹⁰⁶ *LDNC*, 156.

¹⁰⁷ *Ibid.*, 156.

¹⁰⁸ CO 873/770.

same province as Weihaiwei, confirms the ambiguous standing of headmen who were agents of the government. Yang carefully distinguished official from lay leaders. Lay leaders included the elders of the village and others such as the local schoolteacher. It was these lay leaders, not the official leaders, who were the most influential and respected in the village. The official leaders were, like their Weihaiwei counterparts, elected by the villagers before being appointed by the local county government. These leaders formed a hierarchy of rural district head, village head, tax collector and '*ti-fang*', or village policeman. Officially elected posts were, according to Yang, unpopular because 'those in office acted as government representatives and consequently were somewhat disassociated from the village and generally disliked by the other villagers'.¹⁰⁹ Those who sought the position of village head were persons who 'did not care overmuch for reputation or social status', being more interested in the profits to be made.¹¹⁰ The person who typically become a village head might be a person such as one P'an Chi, a man considered by villagers to be a successful village headman. Like all village heads Yang could remember, P'an Chi came from an unimportant family in the village. He was, nevertheless, a man of leisure whose sons worked the family's market garden. He was articulate, persuasive and good at making speeches. These characteristics enabled him to convince villagers of the benefits of government proposals and to be an effective mediator in village disputes. A pragmatist, P'an Chi was cunning in his dealings with villagers and was not above acts of petty deception. Pan Ch'i acknowledged his subordinate position vis-à-vis the lay leaders of the village - elders and others such as the school teacher, whose support was vital, if he were to carry out his tasks at all. Government orders had first to be discussed with the village elders before implementation. Besides, it was the lay leaders who had the power to dismiss the official leaders. Yang reported that, since most villagers knew that the lay leaders could dismiss the headman, they did not attribute to him a great deal of importance. In mediation, lay leaders had the tendency to be more successful than village heads because of the greater respect accorded to the lay leaders. This lower status was also apparent in the way in which the Chinese

¹⁰⁹ Martin Yang, *A Chinese Village* (Columbia University Press, 1945), 174.

¹¹⁰ *Ibid.*, 186.

magistrates traditionally paid respect to the village gentry, teachers and heads of large clans but 'assume[d] an air of superiority toward the official leaders.'¹¹¹

Village hierarchy in Weihaiwei was less stratified than in Taitou and, as discussed in chapter 2, prior to British rule there appear to have been no *dipao* or *difang* and indeed no agent of the government. There were, instead, village headmen and village elders who were independent of the government. The experience of Taitou alerts us to the likelihood that the headmen accountable to the British government were not necessarily the most influential persons in the village. If this were the case, it would go a long way towards explaining the ineffectiveness complained of in an early annual report.¹¹² Not much appears in the official records to shed light on the esteem in which the headmen in Weihaiwei might have been held or on their backgrounds. We know that very few of them, at least in the earliest years and quite possibly even in the later years of British rule, were literate but this is not surprising since few of the territory's Chinese were literate. Headmen were usually heads of families or clans, chosen by the people, either informally or by some system of election, and confirmed by the government.¹¹³ In 1908, when the villagers of Yu-chia-chuang reported dissatisfaction with their headmen to the Commissioner, they were asked to name a new headman.¹¹⁴ Officially, the power to dismiss a headman lay with the district officer but villagers had a large say in the matter. This is demonstrated by the case of Yü I-tung (*Yu Yidong*), the headman of the village of Shuang-ssü-k'uang. His fellow villagers complained to Johnston that Yü had ignored their requests to produce the village accounts. Johnston ordered Yü to produce the accounts and later dismissed him for improper manipulation of public funds and his refusal to produce the accounts. He was found to have engaged in extortion and to have tyrannised several families in the village.¹¹⁵ The fact that villagers could remove a headman and the nexus of headmen to the government may have distanced them from other villagers. These isolated cases suggest that Johnston's account, in which the headman was 'the

¹¹¹ *Ibid.*, 186.

¹¹² See discussion in ch. 6, 'Mediation'.

¹¹³ *LDNC*, 156.

¹¹⁴ *CO* 873/270.

¹¹⁵ Johnston to Lockhart, 15 Sept 1910, *CO* 873/309. Yü had also come to the attention of the government when he evicted cattle grazers from land which he had recently purchased. This dispute is discussed in ch. 6.

senior representative of the senior branch of the family' and therefore higher in status than the village gentry, was naïve.¹¹⁶ The comment mentioned above - that the position was 'not entirely enviable' - is probably more accurate.

There is also the headmen's association with the government to take into account. To the extent that headmen were accountable to the British authorities, they were in fact acting as government agents. This created the risk that, by co-opting village elders or village headmen and making them the lowest rung of the British administration, the government in effect compromised whatever standing and influence the headmen may have previously had in their own communities. The position of headman probably brought some personal advantage to the individuals involved, but it also attracted the suspicion of fellow villagers and brought other personal risks, such as the humiliation of being prosecuted for neglect of duty. Not surprisingly, it was not always easy to fill vacancies and it may be that, instead of attracting those held in the highest esteem in the village, persons with characteristics similar to Taitou's Pan Ch'i were drawn to the posts. The British authorities in Weihaiwei were no doubt genuine in their efforts to preserve and use the village organisation which had existed prior to the lease. In general, the government saw itself as not merely maintaining previous social organisation but also, where necessary, repairing it. In the process, however, unintended changes were almost certainly effected. Despite these considerations, the relationship between the government and the villages was not problematic; sufficient order was maintained in the territory for the system of headmen never to have been in danger of collapse or in need of fundamental reform. Although over time the number of district headmen diminished and some of them had to be removed from their positions, the majority carried out their tasks to varying degrees of government satisfaction.

The foregoing discussion shows how, given relatively peaceful conditions in the territory and some assistance from troops of various regiments in the territory, it was possible for the authorities in Weihaiwei to maintain order through a combination of a small police force and local headmen, supervised by inspectors and magistrates, at least some of whom had a very good command of the local language. The

¹¹⁶ *LDNC*, 156.

government's initial position was to deny the need for police, preferring instead to use local headmen supervised by a district officer but, in subsequent years, the police force underwent slow but steady growth without the headman system being abandoned. Even with the growth in the size of the police force and the establishment of posts in the hinterland, the police probably continued to have a relatively limited presence in the villages of Weihaiwei. Police resources for law enforcement work were in practice diminished by the administrative tasks for which the police were also responsible. This is one reason why headmen continued to be useful in maintaining order within the village and in other ways, particularly in being a conduit between the authorities and the villagers of Weihaiwei. Police resources in the territory were always over-extended, as evidenced by the fact that the magistrate continued to investigate crimes, make arrests and lead the police in raids. Moreover, the police were not used in the application of oppressive policies against the territory's inhabitants. Incidents of police high-handedness and corruption were punished, whenever they came to light. This was in keeping with the government's policy of maintaining good relations with the Chinese, which required the deliberate avoidance of any unnecessary intrusion into village life.

It has frequently been argued that policing in places occupied or colonised by the British in the late nineteenth and early twentieth centuries was modelled on the example of the Royal Irish Constabulary (the RIC).¹¹⁷ The model of the RIC meant, in essence, that policing was seen as an extension of the executive branch of government rather than being founded on the community's consent.¹¹⁸ Other salient features drawn from the RIC included a uniformed, military style of policing in which the police, recruited from other places, were armed, lived in barracks and, like troops, drilled and trained to move quickly *en masse* to react to disturbances. It is unclear to what extent the Weihaiwei Police had these qualities. It was the case that the European police inspectors and a high proportion of the Chinese rank and file had

¹¹⁷ Comparison of policing in Weihaiwei may be thought inappropriate since Weihaiwei was, in theory, neither a colony nor occupied territory. The view taken here is that this would be too technical an approach, one which is not likely to have been intended by those who have examined British methods of policing overseas nor consistent with the attitude on the ground in Weihaiwei. The fact that Weihaiwei was not a colony may well explain why the territory was not more lavishly funded. When it came to discussion of the policing needs of the territory, however, the fact that the territory was merely a leased territory and not a colony was never once raised. Note that the view that the RIC was the model for policing overseas has been criticised as being inaccurate.

¹¹⁸ David M. Anderson and D. Killingray (eds), *Policing the Empire* (Manchester: Manchester University Press, 1991), particularly the editors' overview in ch. 1.

been in the 1st Chinese Regiment and thus had received some military training. On the other hand, when resources did not allow it, police uniforms were dispensed with and training of the men, whether in drill or otherwise, was minimal. So far as can be ascertained from the records, the men were not housed in barracks. The police were armed but it is doubtful that they were trained to be a defensive force. The presence, in the territory, of detachments of troops belonging to various British regiments, probably made it unnecessary to train the Weihaiwei police to be a semi-military force. As we saw, troops were used to deal with particular large-scale disturbances. Furthermore, the government did not, in recruiting men, adopt a policy of selecting men from outside China or from other parts of China. The fact that the police were required to perform administrative tasks was something the Weihaiwei Police Force shared with some colonial police forces. On balance, however, the police in Weihaiwei exhibited few of the features associated with the Irish police.

Despite the weaknesses of the headmen system and police indiscipline and cases of corruption, the government never lost faith in either. As an indigenous institution, the headmen system appealed to the traditionalist preference of officials such as Lockhart and Johnston and on the whole, the policing of the territory was sufficient to prevent serious problems from arising. There was an absence of strife and the vast majority of the territory's inhabitants saw no grounds for complaint. In devising their policy and practice with regard to the policing of the territory, the task of the government of Weihaiwei was simplified by the fact that there were few Europeans resident in the territory. Without a European lobby, it could concentrate its efforts on ensuring that there were adequate and acceptable forms of policing from the point of view of the Chinese inhabitants of the territory. The occasional outburst of criticism from Europeans about the inadequacy of policing could be largely ignored. And, due to the small number of Europeans present, there was an absence of the kind of social friction between the two communities, so that the day-to day routines of the Chinese could become a nuisance to the European inhabitants, necessitating more intrusive policing. It is also relevant to note that the territory did not, at any stage, experience a worrying influx of bad characters, apart from during limited periods of upheaval in the province when troops were on hand to patrol the territory's boundaries.

The attention to the needs of the territory's Chinese inhabitants is similarly to be observed with regard to the trial and punishment of offenders. The next chapter

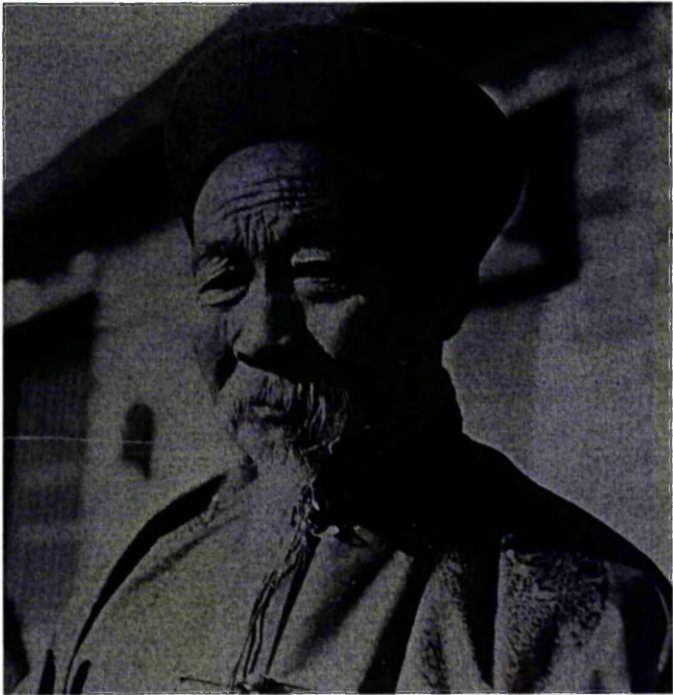
shows how the government of the territory was indifferent to the question of the introduction of the jury and that of legal representation for defendants.



9. James Stewart Lockhart with soldiers from the 1st Chinese Regiment and pupils of the Government Free School.



10. Ch'e Shuo-hsüe, District Headman, with the tablet he received from the government in recognition of his efforts to rescue a wreck, August 1905.



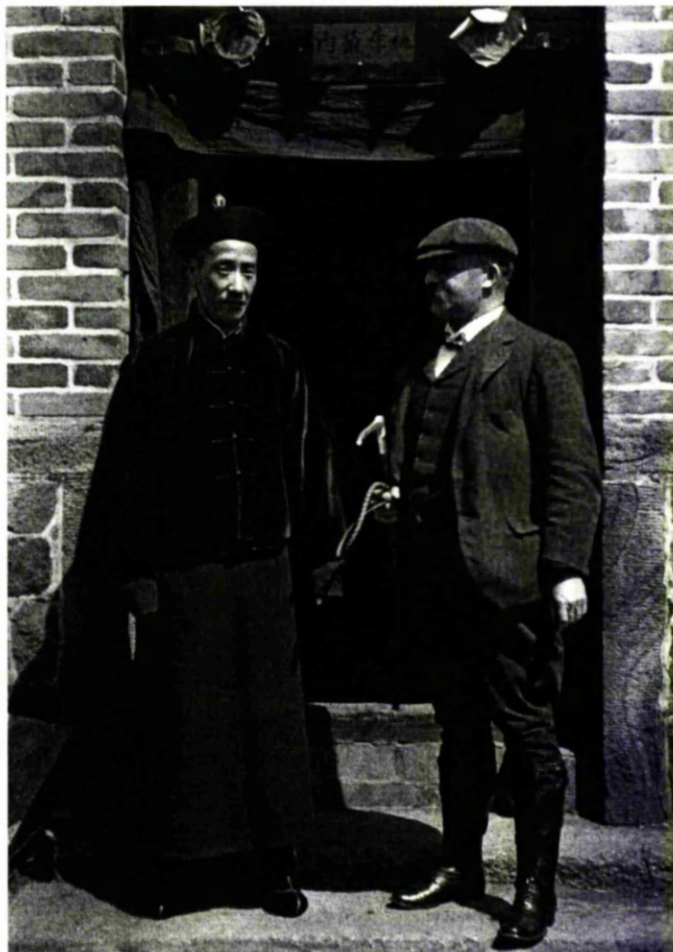
11. District Headman of Feng Ling.



12. Police Inspectors Whittaker, Crudge and Forcey.



13. Headman of Hai-hsi-t'ou village and his family, 23 April 1905.



14. James Stewart Lockhart and Luo Chong-ming, Magistrate of Jung-ch'eng, 1905.

CHAPTER 5

TRYING AND PUNISHING OFFENDERS

It seems to be the fact - to my mind an amazing fact - that by this Order in Council, it is possible for a man to be condemned to death in a British court without trial by jury and without legal defence. ... I am in a position to state that two foreigners have within the past ten years been tried in H.M. High Court, Weihaiwei, and in each case there was the usual and regular procedure. Weihaiwei has been a British possession for fourteen years, and it is time the native population were accustomed to British methods and British procedure in criminal trials.¹

As we saw in the previous chapter, Weihaiwei was considered to be a relatively peaceful place, almost free of serious crime. Compared with civil litigation, the trial and punishment of offenders appears to have been given less attention by the government. Civil disputes took up a substantial amount of court time and measures to reduce litigation were often discussed. The criminal caseload, on the other hand, was rarely the subject of adverse comment. Procedures for prosecuting offences were modified from time to time such as when an overworked magistrate suggested that the police prepared cases before reporting them to him, but, by and large, the criminal justice process was carried out without difficulties. This was certainly the case with regard to the criminal process experienced by the vast majority of defendants. In 1912, however, Weihaiwei received unwelcome attention in the *North-China Herald*. Weihaiwei's criminal justice system was criticised for the death sentences for murder of three unrepresented defendants in trials in which no jury was present.² These cases and their aftermath, looked at in some detail below, gave rise to public funding for the defence of those accused of capital crimes and may also have revived the use of the jury in Weihaiwei.

For most defendants charged with a crime in Weihaiwei, however, jury trial and legal counsel were not relevant. Their experience of the law after their arrests would have been at the Magistrates' Courts and, if given a custodial sentence, in the territory's prisons. This chapter looks at the criminal processes relevant to most defendants. In these processes, adaptations to English law and procedure were made

¹ 'Fiat Justitia', 29 Sept 1912, letter to the editor, *NCH*, vol. CV, no. 2356, 5 Oct 1912, p. 46.

² These were the first murder convictions brought under the Order. At least one death sentence was carried out prior to the Wei-hai-Wei Order in Council, 1901.

to take into account local circumstances, such adaptations also being shaped by the magistrate's multifaceted role and the government's attitude towards indigenous institutions. First, this chapter traces the development of legal representation and the jury in the territory in the context of the territory's criminal justice processes and explores some possible reasons as to why interest in these aspects of the criminal trial within the territory was muted.

*R. v. Wang and Hsieh*³

During one of the visits by the High Court Judge to the territory in the autumn of 1912, the High Court of Weihaiwei heard two murder cases involving three defendants. All three were convicted.⁴ Both trials were reported in the *Herald*. Of the two cases, the case which caught greater attention in the press was *R. v. Wang and Hsieh* (1912). The facts of this case⁵ were that, on 8 February 1912, some villagers reported to the district officer that a man called Hsieh So had died in suspicious circumstances the previous day. A post-mortem was carried out and samples from the deceased's stomach were sent to Shanghai for analysis. The cause of death was determined as arsenic poisoning and the District Officer, in his capacity as coroner, returned a verdict of wilful murder. The son-in-law of the deceased, Wang, and the deceased's wife, Hsieh, were committed for trial in the High Court.

At the trial in September of the same year, evidence was given that the deceased had been away from the territory for much of the four-year period preceding his death. In his absence, the two accused allegedly began an affair. Before Hsieh So's return to the village, Wang married the daughter of Hsieh So and the defendant, but continued the affair with the latter. Evidence was produced showing that both Wang and Hsieh stood to gain interests in land in the event of Hsieh So's death pursuant to deeds executed a few months earlier. Another possible motive for the killing was the desire to continue their affair without the inconvenience of Hsieh So's

³ *Rex v. Wang Lieu-Hsi [sic] and Hsieh Lin-Shih*, H.M. High Court at Weihaiwei, Bourne J., Messrs Sun Fa-shan and Miao Tso-Pin, Assessors, 2 Sept 1912, Weihaiwei, *NCH*, vol. CIV, no. 2353, 14 Sept 1912, p. 784.

⁴ Although not stated in the reports of the cases, the charges of murder would have been brought under the Offences Against the Person Ordinance, 1905 (Ord. 8 of 1905).

⁵ These facts have been gathered from the following sources: Report of Carpmael, District Officer and Magistrate (Southern Division) to the Commissioner, 27 Apr 1912, enc. I, Commissioner to SSC, 12 May 1914, CO 521/15; and *NCH*, n. 3.

presence. It was also almost certain that, before the death of Hsieh So, the two defendants knew that Hsieh was expecting a child.

The Coroner and the High Court heard that the dead man spoke to relatives and neighbours, shortly before his death, about how he had eaten half a meal cake for his breakfast in which he tasted something akin to pepper and afterwards felt very ill. He died in the early afternoon that same day. Witnesses who had seen the deceased hours before his death said that he appeared to be in good health. The accused were alleged to have administered the poison.

In the absence of counsel for the defence, the prosecutor, the Crown Advocate, raised the possibility of suicide:

He [deceased] knew of the intimacy between the two persons charged; he might have been suffering from great disgust, from a sense of disgrace to himself and his family. It is a well-known fact that suicide by arsenic was very common, but on the other hand there was no evidence to show that the deceased had given expression to any feeling of disgust or any feeling of shame. It was, of course, possible that he was suffering this sense of disgust and shame without expressing it or apparently showing it.⁶

Evidence given by villagers said that suicide was not in keeping with the man's character. Bourne J., sitting with two Chinese assessors, found the accused guilty and passed death sentences.⁷

The second case, *Rex v. Li Sing-Wu* (1912),⁸ was a case in which the defendant, driven by jealousy over a woman, had stabbed his victim in the throat. The report of the case suggests that the defendant had been convicted on confession evidence. The defendant was found guilty by the same judge, assisted by the same Chinese assessors as in *Wang and Hsieh*, and sentenced to death.

The aftermath of *R. v. Wang and Hsieh*

The reports of these cases, *Wang and Hsieh* more than *Li Sing-Wu*, provoked a letter to the *Herald* by a reader using the pseudonym of 'Fiat Justitia'. He wrote: 'There are features about these trials which must strike any, but the most casual of readers, as unusual, if not irregular.'⁹ The lack of a jury trial, if necessary, of Chinese, the

⁶ As reported in the *NCH*.

⁷ The death penalty for murder was prescribed by s. 2 of the Offences Against the Person Ordinance, 1905 (Ord. 8 of 1905, CO 841/1).

⁸ H.M. High Court of Weihaiwei, Bourne, J., Messrs Sun Fa-shan and Miao Tso-Pin, Assessors, 5 Sept 1912, Weihaiwei, *NCH*, vol. CIV, no. 2353, 14 Sept 1912, p. 785.

⁹ 'British Justice', *NCH*, vol. CIV, no. 2354, 21 Sept 1912, p. 828.

absence of legal representation for the defendants, especially given that counsel prosecuted for the Crown, and the delay in holding the trial were questioned. Referring specifically to *Wang and Hsieh*, he said that, if the case were appealed, the defendants would have a 'fighting chance'.¹⁰ Is it not, he asked, 'the invariable rule of British courts that criminals are provided with legal defence at public expense?'¹¹ Fiat Justitia was not familiar with the Order but, when its provisions were pointed out to him through a leading article in the *Herald*, he mentioned the fact that two foreigners had, within the decade preceding *Wang and Hsieh*, been tried in accordance with 'the usual and regular procedure.'¹² He went on to say that 'Weihaiwei has been a British possession for fourteen years, and it is time the native population were accustomed to British methods and British procedure in criminal trials.'¹³ He pointed out that a trial with Chinese assessors did not preclude a jury. Trial by jury, he confidently asserted, was the 'undoubted right of every British subject whether white, or coloured.'¹⁴ On legal defence, he insisted that a lawyer should have been provided; the Order did not exclude this possibility. A defence barrister, he asserted, would have made more of the possibility of suicide and the possible impact on the female defendant's mind of her pregnancy. As we have seen, the possibility of suicide was raised at trial by the Crown Advocate but dismissed because there was no evidence of revulsion by the victim at the intimate relationship between his wife and their son-in-law.

In total, Fiat Justitia's letters provoked two leading articles and a letter to the editor. The authorship of the leading articles is not given but it is very likely to have been written by or with the assistance of someone acquainted with Weihaiwei. Aside from informing Fiat Justitia of the provisions of the Order, the first leading article also mentioned that the Crown Advocate, H.P. Wilkinson, had carefully considered the mode of trial. The readership of the *Herald* were asked to consider the particular circumstances of the leased territory:

Arcadian in simplicity, halcyon in its normal calm. The gaol is but rarely occupied, taxes are regularly brought in on the appointed day and the sense of

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² 'British Justice', *NCH*, vol. CV, no. 2356, 5 Oct 1912, p. 46.

¹³ *Ibid.*

¹⁴ *Ibid.*

community is, on the whole, against law-breakers. Of the intricacies of trial by jury the Chinese of Weihaiwei have never had any experience.¹⁵

In the second leading article¹⁶ readers were told that the Colonial Office had forbidden the expenditure of public funds to provide counsel for the defendant; that the Chinese of Weihaiwei were not British and therefore the rights of British citizens did not apply to them; that comparisons with Hong Kong were not apt because, unlike Hong Kong, Weihaiwei was not a colony. On the outcome of the trial of *Wang and Hsieh*, it was argued that there was 'no shadow of doubt that the prisoners at Weihaiwei were justly condemned.' One of the reasons cited for this was the petition by the families of the defendants which asked only that the sentence be modified without protesting against the finding of guilt. 'If the Chinese of the Territory had any doubt on this point, they would not have hesitated to present a petition, after their usual custom', argued the author of the article. The author further pointed out that, under the Order, to avoid any possible miscarriage of justice, the judge's verdict was subject to confirmation by the Commissioner and the judge was required to report his decision and notes of the case to him.¹⁷ Thus, the reply argued, the system contained safeguards against any miscarriage of justice.

In Fiat Justitia's second letter, he canvassed the view that the lack of outrage in the territory could have been due to the fact that adultery was punishable under Chinese law and it might have been thought that the defendants were receiving their just desserts for that, rather than for murder. Justice lay, he argued, in a more thorough exploration of the alternative explanation of suicide.¹⁸

Within the territory itself, Johnston, then District Officer and Magistrate in the South Division but who had not been involved in the case, had earlier expressed his concern in a letter to Lockhart. He wondered if execution of the woman could be avoided, seeing that an infant would be deprived of its mother.¹⁹ In an even earlier letter Johnston had said that he had not heard any murmurs of discontent amongst the people over the outcome of the case and added that the people of the territory would

¹⁵ 'British Justice at Weihaiwei', 23 Sept 1912, *NCH*, vol. CIV, no. 2355, 28 Sept 1912, p. 874.

¹⁶ 'Justice in the Protectorates', 2 Oct 1912, *NCH*, vol. CV, no. 2356, 5 Oct 1912, p. 11.

¹⁷ WOIC, art. 32. For the judge's report see 'Report to H. H. The Commissioner under Article 32 of the Order-in-Council 1901', 7 Sept 1912, enc. I. B, Lockhart to SSC, 12 May 1914, CO 521/15.

¹⁸ 'British Justice', *NCH*, vol. CV, no. 2356, 5 Oct 1912, p. 46. As seen above, the possibility of suicide had been raised during the trial by the Crown Advocate.

¹⁹ Johnston to Lockhart, 28 Sept 1912, *SLPNLS*, vol. 9.

probably be glad that the British did, in fact, pass the death sentence.²⁰ Lockhart sympathised with Johnston but felt unable to 'reconcile ... duty with [his] private feelings which revolt at hanging a woman.'²¹ He felt duty bound because the judge had found no extenuating circumstances and, moreover, the trial had shown that the woman had been the 'leading spirit' in the crime. If her sentence was commuted that of her accomplice would also have to be commuted. Having both sentences commuted would not tend to increase the confidence of the people in British justice. Lockhart could only express regret that he could not do as Johnston had suggested.²² There was also the matter, not mentioned by Lockhart, of the third prisoner awaiting execution. Johnston accepted the Commissioner's explanation.²³

It must have come as some relief to the Commissioner and others in Weihaiwei when, just days before the date set for the execution, Wang, the male defendant, confessed to the crime of poisoning his father-in-law.²⁴ He made a statement to the effect that he had a grudge against Hsieh So because, when he sought repayment of a loan made to Hsieh So, the latter refused and threatened to revoke the gift of land previously made. He said that he had planned to poison Hsieh So with rat poison seven or eight days before the act was perpetrated. His co-defendant was ignorant of his plans. He denied having immoral relations with his mother-in-law and said that he had spent the night at her house only because he was inebriated.²⁵

Following the confession, Bourne J. recommended reprieve of the woman prisoner's sentence pending consultation with the assessors who sat with Bourne on the case. His instructions were that a long sentence of imprisonment should be substituted if the assessors thought she was guilty of a crime. If they absolved her of guilt she should be pardoned. The Commissioner then consulted the assessors. In their view the woman was guilty and, in accordance with the judge's instructions, they recommended that she should be sentenced to imprisonment. After further consultation with the judge, the assessors and the magistrate involved in the case, the

²⁰ Johnston to Lockhart, 6 Sept 1912, *SLPNLS*, vol. 9.

²¹ Lockhart to Johnston, 29 Sept 1912, *SLPNLS*, vol. 9.

²² *Ibid.*

²³ Johnston to Lockhart, 30 Sept 1912, *SLPNLS*, vol. 9.

²⁴ 'The Weihaiwei Murder. Male Prisoner's Confession', 6 Oct 1912, *NCH*, vol. CV, no. 2357, 12 Oct 1912, p. 124.

²⁵ Statement made by Wang Lien-Hsi to the SG, 2 Oct 1912, enc. 1 to Commissioner to SSC, 12 May 1914, CO 521/15.

Commissioner sentenced the woman to ten years penal servitude to be served in Hong Kong.²⁶ Fiat Justitia wrote a final time to the *Herald* to say that he had all along maintained that there had been some irregularity in the trial.²⁷ He also argued that it was not clear that the benchmark of Hong Kong could be dismissed so easily:

[I]n all essentials the natives of Weihaiwei may be regarded as British subjects ... they are amenable to British laws and punishments, as the recent trials and executions show. At Weihaiwei there are British Courts, British magistrates, British inspectors of police and, when H.M. High Court sits, a British judge.²⁸

He referred to the ban on employing counsel out of public funds and suggested that 'since the British Government finds itself so short of funds perhaps some public-spirited resident of that "Arcadian" seaside resort will initiate a subscription list and so create a fund to supply this serious deficiency.'²⁹

There was to be one more episode to this case. Two years after the conviction, the Secretary of State for the Colonies received a letter from Ramsay Macdonald, then a Member of Parliament, urged by personal correspondence from 'a correspondent occupying a somewhat important official position in Wei-hai-wei.'³⁰ The correspondent had written to MacDonald of the lack of trial by jury for Chinese defendants and the lack of legal defence for criminals, even in capital cases, because of Colonial Office policy. These allegations were not revealed to Lockhart, but he was nonetheless asked to supply a report of the case to the Colonial Office. Without having been told the allegations, the Commissioner thought that the delay in the holding of the trial had been criticised. He wrote that 'it is impossible to avoid a certain amount of delay in the administration of justice so long as the judge of the High Court and the Legal Adviser of this Government are as at present resident in Shanghai and not in this Territory.'³¹ With the passage of time since the case, Lockhart must have forgotten that the trial had been deliberately delayed until the

²⁶ Jamieson (SG) to SSC, 17 Apr 1914, enc. 1 to Commissioner to SSC, 12 May 1914, CO 521/15. The Commissioner's actions were permitted under WOIC, art. 32. The option of trying the woman for conspiracy to commit murder or murder through poisoning under ss. 5 and 10 respectively of the Offences Against the Person Ordinance, 1905, does not appear to have been considered.

²⁷ 'British Justice', *NCH*, vol. CV, no. 2358, 19 Oct 1912, p. 184.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Ramsay McDonald to Colonial Office, 6 March 1914, CO 521/15.

³¹ Lockhart to SSC, 12 May 1915, CO 521/15.

woman defendant had given birth. The Colonial Office replied to Macdonald and no further explanation was asked of the Commissioner.

Although the Order made no mention of counsel in court proceedings or the jury, both had been experienced in the courts in Weihaiwei prior to 1912. However, events prior to 1912 had ensured that the defendants in the two capital cases in 1912 were not offered legal representation. The jury, as we shall see, appears to have been used only sparingly.

Legal representation of defendants

The first legally defended accused were the two defendants in the manslaughter trial of *Wang Ch'eng and Ch'i Chiu*³² in 1905. This trial was one of the first cases from the courts of Weihaiwei to be reported in the *Herald*. From the very long report, possibly the longest of the reports of Weihaiwei cases, it appears that the two defendants, a son of the deceased and the brother of the deceased's wife, were charged with manslaughter. When this case arose, Swettenham's recommendation that no counsel should be allowed for at least ten years had apparently been forgotten or deliberately ignored. The Crown Advocate advised that it was necessary to retain counsel for the defence for those who could not afford it.³³ A barrister from Shanghai, Francis Ellis, was engaged for the two men and the jury returned a verdict of guilty. Both defendants were sentenced to seven years penal servitude.

When the Colonial Office heard that counsel had been hired, they were indignant. According to officers there, there was not 'the slightest need' for defence or prosecuting counsel in a place like Weihaiwei.³⁴ However, they had little choice but to rally behind the Commissioner: 'A dozen cases in a year would almost swallow up the grant in aid. But we could not expect Mr Lockhart to disregard the advice of the Crown Advocate.'³⁵ Alfred J. Harding, one the clerks in the Eastern department of the Colonial Office asked if they should express the hope that the Commissioner would not 'find it necessary to do such a thing again'³⁶ but Charles Lucas, a confidant of Lockhart's and one of the two Assistant Under-Secretaries of State at the Colonial

³² *NCH*, vol. LXXV, no. 1976, 23 June 1905, p. 655.

³³ Lockhart to SSC, 6 Sept 1905, CO 521/8.

³⁴ Harding to Fiddes, 23 Oct 1905, CO 521/8.

³⁵ Fiddes to Cox, 23 Oct 1905, CO 521/8.

³⁶ Harding to Lucas, 10 Nov 1905, CO 521/8.

Office, prevented such a message from being sent, saying that Lockhart objected as strongly as they did to the use of counsel.³⁷

Shortly after this, however, Lockhart received a despatch from Lord Elgin, Secretary of State for the Colonies stating that there was 'no sufficient reason for retaining barristers for the defence of prisoners ... and the practice should not be adopted in the future.'³⁸ This despatch put a stop to the public funding of defence counsel until after *Wang and Hsieh*. In none of the reported criminal cases were Chinese defendants legally represented. Counsel appeared to defend in *R. v. T.C. Ramsey* (1906)³⁹ but it is almost certain that the defendant paid for his own defence. Ramsey, who had previously served as a juror, was acquitted on a charge of receiving stolen property belonging to the Crown. Europeans were not invariably defended. The defendant in *R v. Purvis* (1907), a Royal Navy stoker charged with the manslaughter of another stoker after a brawl in the naval canteen on Liukung island, appears to have been unrepresented.⁴⁰ In short, so far as the available information indicates, the defendants in *Wang Ch'eng and Ch'i Chiu*⁴¹ were the only defendants to be defended out of the public purse until after *Wang and Hsieh*.

When the trial of Wang and Hsieh loomed, neither the Crown Advocate nor the judge raised the issue of legal representation for the defendants. As mentioned above, in the 1905 case of *Wang Ch'eng and Ch'i Chiu*,⁴² the suggestion that counsel be hired was made by the Crown Advocate. Similarly, the Acting Crown Advocate had suggested representation for the manslaughter case of *Rex v. Chang Chu, Chang-shih, Chang Miao-shih and Chang Ching-shih* (1913),⁴³ tried a year after *Wang and Hsieh*. In this case, the accused were charged with being responsible for the death of a woman by strangulation. The Commissioner explained to the Acting Crown Advocate that, in accordance with Lord Elgin's despatch of 1906, it was not possible to hire

³⁷ Lucas, 11 Nov 1905, CO 521/8.

³⁸ Despatch no. 32 of 27 Jul 1906, referred to in Lockhart to SSC, 18 Sept 1913, CO 521/14.

³⁹ *R. v. T. C. Ramsey* (1906), Bourne J., 27 and 28 Feb 1906, *NCH*, vol. LXXVIII, no. 2014, 15 March 1906, p. 613.

⁴⁰ *Rex v. Purvis* (1907), *NCH*, vol. LXXXIII, no. 2079, 14 June 1907, p. 659.

⁴¹ *NCH*, vol. LXXV, no. 1976, 23 June 1905, p. 655.

⁴² *Ibid.*

⁴³ H.M. High Court at Weihaiwei, 26 Aug 1913, *NCH*, vol. CVIII, no. 2405, 13 Dec 1913, p. 839. For more details on the case, see also Annual Reports for 1913, CO 873/377.

defence counsel.⁴⁴ When the papers for the case reached Bourne, the High Court judge, he deemed defence counsel essential in the interests of justice.⁴⁵ Fortunately, from the point of view of keeping costs down, a barrister called Parsons was, at the time, on holiday in Weihaiwei. He was asked to undertake the defence on the promise that, although he would not be paid an adequate fee, some remuneration would be recommended. The Judge, sitting with two Chinese assessors, acquitted the defendants. The skeletal report of the case provides no details of the case but some complexity is suggested by the length of the trial - three to four days. The Acting Crown Advocate later also said that the trial had confirmed the view which he and the judge had expressed over the need for counsel for the defence.⁴⁶ It seems very likely that the Acting Crown Advocate and Judge were emboldened by the debate in the *Herald* begun by Fiat Justitia.

It would appear that Lord Elgin's despatch in 1906 effectively ended payments from public funds to legal counsel. After 1914, however, defence counsel appeared in all three capital cases reported in the *Herald*. In the first of these, *Rex v. Liu Huan-chu* (1915),⁴⁷ the defendant was defended by Alexander Ting, the first Chinese lawyer to be admitted to practise in Shanghai.⁴⁸ The defendant pleaded guilty to a charge of escaping from custody but pleaded not guilty to charges of murder, burglary, and assaulting and wounding a police officer. The Crown was represented by Francis Ellis, the Acting Crown Advocate. The defendant was convicted of burglary, assault, and escaping from police custody, the murder charge having been dropped as a result of the Crown entering a plea of *nolle prosequi*. The second case, *R. v. Feoderova* (1924),⁴⁹ was deemed newsworthy because the defendant was a Russian woman charged with the murder of her Chinese husband who had died from

⁴⁴ See Lockhart to the SSC, 18 Sept 1913, CO 521/14.

⁴⁵ See Bourne to Lockhart, 11 Sept 1913, CO 521/14.

⁴⁶ Macleod to Lockhart, 11 Sept 1913, CO 521/14.

⁴⁷ H.M. High Court At Weihaiwei, 5 and 6 Nov, H. P. Wilkinson, Acting Judge, *NCH*, vol. CXVII, no. 2518, 13 Nov 1915, p. 526.

⁴⁸ Alexander Ting was a graduate of Manchester University, admitted to practice at the Mixed Court at Shanghai before 1911, at a time when there was no other Chinese lawyer admitted to practice at that court. Ting was admitted on the basis of his British Bar Association certificate: A.M. Kotenev, *Shanghai: Its Mixed Court and Council* (Shanghai: North-China Daily News and Herald, 1925), passim. Kotenev refers to Alexander Ting and four other Chinese lawyers as 'gifted jurists' (at 202) and describes Ting's representation of the views of the Chamber of Commerce at a meeting during 1911 to discuss reform of the Mixed Court.

⁴⁹ Only reported as 'Dramatic Trial At Weihaiwei: Foreign Woman Charged with Murder of Chinese Husband - found not guilty', *NCH*, vol. CLXVII, no. 2964, 31 May 1924, p. 343.

stab wounds. The defendant was defended by J.G. Priestwood and acquitted after members of the jury were directed to consider only whether she was guilty of manslaughter. Upon her acquittal, a collection was raised in the territory to enable the destitute woman and her son to return to Russia. The defendants in *R. v. Liu Mu-te and Huang Yueh* (1925),⁵⁰ in which the prosecution withdrew all charges after the leading witness for the prosecution recanted his evidence, were also represented by J.G. Priestwood.

The reappearance of counsel for the defence in Weihaiwei was not an accident. In the summer of 1914, after *Wang and Hsieh* (1912) and *Chang Chu, Chang-shih, Chang Miao-shih and Chang Ching-shih* (1913), the Crown Advocate recommended that the government of Weihaiwei establish a fund for the cost of hiring defence counsel into which £50 would be deposited each year and rolled over until such a time when there was a healthy balance. The annual sum to be deposited was based on the estimate of requiring defence counsel once every two years.⁵¹ Eventually, the Treasury wrote to the Colonial Office saying that, while they agreed with Lord Elgin's view that defence barristers should not be retained at public expense, they were always willing to approve exceptions in special cases. On the understanding that such cases were rare, the Treasury gave the Commissioner 'general authority for the employment of Counsel at the desire of the judge to defend prisoners where the Commissioner is satisfied that the accused has insufficient funds to obtain the services of counsel.'⁵²

It is more than likely that Fiat Justitia's letters had had some impact on this development. No doubt the letter from MacDonald, thought, in the Colonial Office, to have been inspired by either Bourne J. or Macleod, the Acting Crown Advocate, also helped pave the way. The timing was almost choreographed. MacDonald's informant wrote to him after the case of *Chang Chu* etc. for which the barrister by the name of Parsons was briefed as defence counsel. The Commissioner supplied reports of *Wang and Hsieh* to the Colonial Office in May 1914 and, in July, Lockhart was writing to the Secretary of State about public funds for defence counsel. In September of that

⁵⁰ 'Weihaiwei Murder Trial: State's Witness Contradicts His Former Testimony: Sordid Story of A Gambling Debt', *NCH*, vol. CLVII, no. 3044, 12 Dec 1925, p. 493.

⁵¹ This figure, based on the regular charge of lawyers in Shanghai going elsewhere for the day of £12.10 a day plus travelling expenses, and the idea of a fund, was advised by the Crown Advocate at Shanghai and approved by Bourne J.: CO 873/411.

⁵² Heath (Treasury) to SSC, 4 Sept 1914, CO 521/15.

year, the Colonial Office informed Lockhart of the decision of the Treasury allowing him to employ counsel.⁵³

Jury trials

As with the issue of legal representation, jury trials were introduced in Weihaiwei as a result of the advice of the Crown Advocate and against the judgement of the Colonial Office. The Colonial Office could not understand why a jury was needed when the Order had provided, in cases involving Chinese defendants, for trial by judge or magistrate, assisted, if necessary, by Chinese assessors. The ordinance was not disallowed but the possibility of repealing it later was noted.⁵⁴ The fact that the drafter of the Order, Albert Gray, had informed the Foreign Office that there was to be no trial by jury but that the court had the discretion, in cases involving Chinese law, to employ assessors, had either been forgotten or never brought to the attention of the Colonial Office and others. Gray had indeed further said that, in serious cases where the accused was a British or other (non-Chinese) subject, a corresponding provision for the appointment of British or other assessors might be considered.⁵⁵

As mentioned earlier, the case in which defence counsel's fee was found from public funds – *Wang Ch'eng and Ch'i Chiu*⁵⁶ – was also the case which gave rise to the jury trial in Weihaiwei. In addition to advising the necessity of defence counsel, the Crown Advocate also recommended that an ordinance allowing for trial by jury should be passed. One of the deceased's sons and his wife's brother were to be tried for manslaughter, death having been caused by assault. In the course of his opinion, the Crown Advocate, addressing the question of the absence of the jury in the Order,⁵⁷ advised that '[w]here and when a jury can ... be summoned, there is no doubt as to the expediency of conducting criminal trials' in accordance with 'home practice and procedure.'⁵⁸ He considered that Chinese assessors could not make up for the lack of

⁵³ SSC to Lockhart, 10 Sept 1914, CO 521/15.

⁵⁴ Cox to Lucas, 12 May 1905, CO 521/8. The subject of repealing it appears never to have been subsequently raised.

⁵⁵ Gray to Foreign Office, Confidential Print - Affairs of China, 19 Sept 1899, FO 17/1664.

⁵⁶ *NCH*, vol. LXXV, no. 1976, 23 June 1905, p. 655.

⁵⁷ The jury is not mentioned in the Order except in art. 47 where it is mentioned in the context of the Coroner's Court.

⁵⁸ Crown Advocate's opinion forwarded in Lockhart to SSC, 2 June 1905, CO 521/8.

a jury since they had no voice in the decision of the court.⁵⁹ An ordinance⁶⁰ was duly passed by the Commissioner and the defendants were convicted by a jury.⁶¹

Weihaiwei's Jury Ordinance, 1905, was based on the Hong Kong Jury Ordinance, 1887, the major differences being that the number on a jury panel was reduced from seven to five⁶² and fewer exceptions to jury service were permitted. These modifications were probably deemed necessary because there were few people in Weihaiwei qualified to sit on the jury. Cases, with the exception of capital cases triable only by a jury of five,⁶³ could continue with up to two jurors leaving the panel.⁶⁴ Majority verdicts were permitted in both civil and criminal cases, though, for criminal cases, a majority verdict of at least three jurors was required.⁶⁵ Jurors had to be male, between the ages of 21 and 60, and resident in the territory.⁶⁶ The small European community in Weihaiwei was reflected in the repetition of juror's names in the cases reported. Mr Beer, the principal of the Weihaiwei School, is one example. Indeed, his presence as a juror shows how few qualified jurors there were; schoolmasters were amongst those exempted from jury service unless there was a deficiency in numbers.⁶⁷ Some of the few Chinese residents who met the English language qualification also served as jurors.⁶⁸

From a perusal of the reports in the *Herald* and the Annual Reports returned for the territory, it is apparent that some defendants were tried by jury. Of the cases reported in the former, seven were tried by jury. Three of these – *Ramsey* (1906),⁶⁹

⁵⁹ *Ibid.*

⁶⁰ Ord. 2 of 1905.

⁶¹ The defendants were sentenced to seven years penal servitude to be served in Hong Kong.

⁶² Jury Ordinance, 1905, s. 2.

⁶³ *Ibid.*, ss 19 and 20.

⁶⁴ *Ibid.*, s. 20.

⁶⁵ *Ibid.*, s. 19.

⁶⁶ *Ibid.*, s. 3.

⁶⁷ *Ibid.*, s. 4.

⁶⁸ One of the jurors in *R. v. Liu Chang-te* - Y.C. Lee (Yi Chi Lee) - was Chinese, as may have been the juror H.W. Sun. Although nothing was said in the Order about familiarity with the Chinese language, it was a practical asset for a juror. Donald Clark, a European resident of Weihaiwei thought that his fluency in Chinese was one reason why he had been a juror on several occasions: 'Memories of China', tape recording and transcription of interviews by Duncan Clark of Donald Clark, who was born in Weihaiwei on 6 April 1901 and who became manager of King's Hotel, Weihaiwei, from 1930 until September 1939.

⁶⁹ *R. v. T.C. Ramsey* (1906), Bourne J., 27 and 28 Feb 1906, *NCH*, vol. LXXVIII, no. 2014, 15 March 1906, p. 613.

Purvis (1907)⁷⁰ and *Feoderova* (1924);⁷¹ trials for receiving stolen property, manslaughter and murder, respectively – were cases in which the defendant was a European. In all other cases – where the defendant was Chinese – the charge was either manslaughter (*Wang Ch'eng and Ch'i Chiu, Liu Mu-te, Kao Liu and Huang Yueh*,⁷² and *Chang Yung-fu*)⁷³ or murder (*Liu Chang-te*).⁷⁴ Aside from the 1905 case of *Wang Ch'eng and Ch'i Chiu* mentioned above, the three jury trials involving Chinese defendants were heard in the last six years of British rule. There are no reasons to indicate why Wang and Hsieh were not offered a jury trial except for the fact that they were offered trial by a judge in the presence of Chinese assessors. The jury and Chinese assessors appeared to have been treated as mutually exclusive alternatives, there being no reported cases in which the defendant was tried by both Chinese assessors and a jury. Although it cannot be said with certainty, it could well be that *Wang and Hsieh* marked a turning point in procedure; the negative publicity in the aftermath of this case paved the way for the use of the jury in trials of Chinese defendants charged with either murder or manslaughter.

The criticisms of *Fiat Justitia* appear to have prompted no discussion within Weihaiwei as to whether the jury should either be used more often or be the principal mode of trial for all serious charges. In meeting the criticisms of *Fiat Justitia*, the authors of the leaders in the *Herald* do not even mention that a jury tried the case of *Wang Ch'eng and Ch'i Chiu* in 1905. Instead, the defence of the Weihaiwei criminal justice system was focused on the use of Chinese assessors.

Chinese assessors in criminal trials

Chinese assessors – defined in the Order as persons with knowledge of Chinese law and custom – could, if necessary and where the defendant was Chinese, sit with the magistrate or judge.⁷⁵ Such assessors had no voice in the judgment but could advise

⁷⁰ *Rex v. Purvis* (1907), *NCH*, vol. LXXXIII, no. 2079, 14 Jun 1907, p. 659.

⁷¹ Only reported as 'Dramatic Trial At Weihaiwei: Foreign Woman Charged with Murder of Chinese Husband – found not guilty', *NCH*, vol. CLXVII, no. 2964, 31 May 1924, p. 343.

⁷² 'Weihaiwei Murder Trial: State's Witness Contradicts His Former Testimony: Sordid Story of A Gambling Debt', *NCH*, vol. CLVII, no. 3044, 12 Dec 1925, p. 493.

⁷³ *NCH*, vol. CLXXIV, no. 3260, 28 Jan 1930, p. 137.

⁷⁴ 'The Murder Trial at Weihaiwei - Son Convicted of Killing His Mother', 16 Jan 1930, *NCH*, vol. CLXXIV, no. 3260, 28 Jan 1930, p. 137.

⁷⁵ WOIC, art. 20.

the magistrate or judge.⁷⁶ Judging from the fact that Chinese assessors were mentioned only infrequently in the annual reports and that, in relation to civil cases, a paucity of qualified persons in the territory was observed, it is likely that Chinese assessors were used only exceptionally in criminal trials. In 1906, an assessor assisted the magistrate in a manslaughter case which resulted in a conviction for assault⁷⁷ and, in 1925, H.P. Wilkinson, the High Court Judge, was assisted by a Chinese assessor in a case where the defendant was charged with aggravated burglary.⁷⁸ Chinese assessors are mentioned in only four of the cases reported in the *Herald*. The first two of these are the cases of *Wang and Hsieh* (1912)⁷⁹ and *Li Sing-Wu* (1912),⁸⁰ both mentioned above. One of the assessors who sat in both these cases is Sun Fa-Shan (*Sun Fashan*) who was, for some time, the district headman for the Port Edward area. The third was the manslaughter trial in 1913 of the four members of the Chang family also already mentioned.⁸¹ The fourth, *Rex v. Chou Pen-shou and Others* (1917),⁸² was the trial of four members of the same family for the manslaughter of the daughter-in-law in the household. Although disadvantaged by the small number of reported cases, it is quite possible that the court saw the need to appoint Chinese assessors only when the case contained issues touching upon Chinese law and custom. This would follow from the qualifications required of an assessor – knowledge of Chinese law and custom. Cases of unlawful death in which suicide had to be eliminated as a cause were probably thought to be typical cases where, in the interest of justice, Chinese assessors would be of assistance to the court, Chinese and English law being at such variance on the subject. The cases reported in the *Herald* bear this out to an extent – Chinese assessors assisted the court in a number of the cases in which suicide was arguable. *Wang and Hsieh* (1912) is an example of this. Suicide was also an issue in *Chou Pen-shou and Others* (1917) and very likely to have been an issue in *Chang Chu* etc

⁷⁶ *Ibid.*

⁷⁷ Annual Report for 1906, CO 873/239.

⁷⁸ Annual Report for 1925, Russell Brown to the SSC, 17 March 1926, CO 521/28.

⁷⁹ *Rex v. Wang Lieu-Hsi [sic] and Hsieh Lin-Shih*, H.M. High Court at Weihaiwei, Bourne J., Messrs Sun Fa-shan and Miao Tso-Pin, Assessors, 2 Sept 1912, Weihaiwei, *NCH*, vol. CIV, no. 2353, 14 Sept 1912, p. 784.

⁸⁰ H.M. High Court of Weihaiwei, Bourne, J., Messrs Sun Fa-shan and Miao Tso-Pin, Assessors, 5 Sept 1912, Weihaiwei, *NCH*, vol. CIV, no. 2353, 14 Sept 1912, p. 785.

⁸¹ *Rex v. Chang Chu, Chiang Chang-shih, Chang Miao-shih, Chang Ching-shih*, H.M. High Court at Weihaiwei, *NCH*, vol. CVIII, no. 22405, 13 Dec 1913, p. 839.

⁸² *Rex v. Chou Pen-shou, Chou Ching, Chou Teng and Chou Hsing*, H.M. High Court at Weihaiwei, *NCH*, vol. CXXV, no. 2629, 29 Dec 1917, p. 792.

(1913). In the former, the daughter-in-law of the first accused was beaten by the accused after a family quarrel. The post-mortem showed that she died from injuries to her spleen but there was also a small amount of arsenic in the contents of her stomach. The evidence in this case was complicated; it included a statement made by the deceased's husband who had, since her death, committed suicide. In this statement, the husband said that his wife had admitted having an affair and that she had committed suicide. There was a suggestion in the trial that the daughter-in-law, having been fatally injured, was urged by her husband to take the poison. Her death would thus look like a suicide and cause no, or less, loss of face to her father-in-law. With regard to the other cases, we have insufficient information on *Li Sing-Wu* and the aggravated robbery case referred to in the Annual Reports for 1925. In the report of the case of *R. v. Feoderova*, in which the possibility of suicide was mentioned in court, we are not told whether Chinese assessors assisted the Judge.

Notwithstanding the informational gaps, the law reports of the *Herald* suggest that Chinese assessors were used less frequently in the last decade or so of British rule, whilst the opposite was true for juries. It should, however, be emphasised that the reported cases form a small and perhaps unrepresentative sample from which only tentative conclusions may be drawn.

Criminal justice in the Magistrates' Courts

Neither the absence of legal representation nor that of a jury trial was relevant to the vast majority of defendants charged with a crime. For them, the criminal justice they experienced in Weihaiwei territory took the form of a summary trial⁸³ before a magistrate without a jury or legal counsel and very likely also without Chinese assessors. Procedures in the Magistrates' Courts were conducted in broad accordance with the provisions of the Weihaiwei Order. Cases were begun either by complaint or by the issue of summonses and warrants for arrest⁸⁴ and prosecuted by either a police inspector or, in the case of breaches of sanitary regulations, the medical officer. Although obliged by article 19 of the Order to apply, subject to necessary alterations and modifications, the procedure and practice of the Courts of Justice and Justices of

⁸³ Offences punishable with imprisonment not exceeding six months or with a fine not exceeding \$100 had to be tried summarily.

⁸⁴ Returns for the number of summonses and arrest warrants issued were regularly made.

the Peace in England,⁸⁵ there are indications that, in the case of the rules of evidence, English rules were not strictly observed. Here, we are acutely constrained by the lack of records of cases heard in the Magistrates' Courts. In the context of civil litigation, it was said that if English rules of evidence were followed, justice would seldom be done.⁸⁶

Trial procedure would also have been affected by the absence of lawyers. The territory never acquired a legal profession. All counsel who appeared in the small number of reported cases in which the parties were represented were practitioners from Shanghai. This was true of Francis Ellis, Alexander Ting, J.G. Priestwood, and Parsons mentioned above in connection with particular trials. In almost all cases, the defendant represented himself in court. In preparing the draft of the Order, the Colonial Office had been in receipt of a recommendation that no legal counsel be allowed to practice in the courts of the territory for at least 10 years.⁸⁷ This and other recommendations were based on the premise that the territory's largely peasant population required only the simplest of arrangements for trial. Without lawyers, proceedings were likely to have been more informal and the magistrate would have had to adapt to a more inquisitorial role, advising the defendant or adjourning to the scene of the crime when necessary.⁸⁸ Indeed, the magistrate, in many instances, was involved in the earlier investigation into the crime and in effecting attendant raids and arrests. As mentioned in an earlier chapter, magistrates also supervised the police.⁸⁹

Petty village crimes

Not much is reported of how village headmen, or others within the village, dealt with petty crime and infringements of clan or village regulations. Yet, there are reasons to believe that some form of village justice was allowed to continue. Village headmen were formally recognised and authorised by the government for general administrative purposes, including the collection of taxes and the distribution of important information. As we saw in chapter 4, headmen were instructed by the

⁸⁵ WOIC, art. 19.

⁸⁶ See ch. 6, 'Trial Procedure'.

⁸⁷ Swettenham to Colonial Office, enclosing his report on Weihaiwei and its future administration, 26 July 1900, CO 882/6/4, No. 52, also to be found in CO 521/1.

⁸⁸ An example is a manslaughter case in 1906 which was reported to have been tried at the scene of the crime: Annual Report for 1906, CO 873/239.

government to be its eyes and ears. Their role in policing is clear; their role in establishing guilt and punishing offenders less so. If they had a role, which is highly likely, it was not formally authorised or acknowledged. The government appears not to have concerned itself with village justice and thus very little is in fact known of how petty crimes were dealt with. We know from Johnston's *Lion* that the authorities were aware that 'for minor offences evil-doers [were] punished by their neighbours in accordance with long-standing rules and bye-laws.'⁹⁰ The incorrigible could be expelled from the village or turned over to the magistrate. Some guidance may be afforded by anthropological data from elsewhere in Shantung and from other parts of China. Martin Yang's fieldwork in Taitou shows petty crimes being dealt with summarily within the village whilst more serious crimes were reported to the county government.⁹¹ Forcible entry into homes or other buildings to steal grain, animals, and other useful things at night are examples he furnishes of crimes which were punishable by local leaders in accordance with local regulations. Even serious crimes such as theft and burglary could still be dealt with within the village, in accordance with 'village custom' and subject to fines or other punishment ordered by the local leaders of the village. More serious crimes such as armed burglary involving cash and accompanied by threatening behaviour, along with highway robbery, arson and kidnap could only be dealt with outside the village.

The crimes mentioned above such as entry into homes to steal grain which were punishable in accordance with local regulations were crimes which were often mentioned in local village regulations in Weihaiwei. The existence of these regulations and the fact that, in Weihaiwei, some villages took their regulations to the magistrate for his official seal indicates strongly that some form of tribunal must have existed at village level and, moreover, that the government was aware that some crimes were being dealt with therein. It may be recalled that Frank Swettenham, commissioned by the Colonial Office to look at the administrative needs of the territory, had recommended that the government retain village 'Councils of Elders' who would, inter alia, hear all minor cases, including minor crimes. However, the Order in Council did not provide for any form of criminal process beneath the Magistrates' Courts, nor was the Commissioner empowered to set up any such

⁸⁹ See discussion in ch. 4, 'The Magistrates'.

⁹⁰ *LDNC*, 159.

⁹¹ Martin Yang, *A Chinese Village* (Columbia University Press, 1945), 149-150.

tribunals. What is likely is that the government allowed villages to deal with some minor crimes and, if this could be accomplished without incident within the village, was probably ready to close one eye to what was going on. It was only if peace was not restored within the village that the government became interested and, at that stage, processes could be begun which would result in the offender coming before a magistrate. This would have been entirely in keeping with the view of Johnston that villages in the territory were 'to a certain limited extent, so far as their domestic affairs are concerned, like so many little self-contained republics' ... 'Every individual is bound by rigid unwritten law to conform to the will of the *maior et sanior pars* and to fulfil his duties to the community.'⁹² It was also consistent with a machinery of government and justice which was stretched to the extent that it quietly welcomed the resolution of disputes, whether civil or criminal, within the village.

Sentencing and punishment of offenders

Having found offenders guilty of crimes, the courts of Weihaiwei were empowered by article 21 of the Order to award any punishment as may have been awarded by a court of criminal jurisdiction in England at the time, subject to limits on the sentencing powers of the magistrates and other statutory limits.⁹³ As we saw above, the death sentence could be passed by the High Court, subject to confirmation by the Commissioner in accordance with article 32. Death sentences were rare, the territory experiencing very few serious crimes. The three death sentences handed down in 1912 were the first such sentences recorded since the Order was passed.⁹⁴ One defendant in 1927⁹⁵ and another in 1930 made up the remaining death sentences.⁹⁶ Aside from the female defendant in *Wang and Hsieh*, at least one of the other sentences was commuted. The prisoner sentenced in 1927 had his sentence commuted to 10 years penal servitude by Peter Grain, Judge of the High Court, after the jury recommended that the defendant be treated mercifully.⁹⁷ The Commissioner was also

⁹² Report of the SG for the year 1904, Annual Report 1904, app. I, CO 874/163.

⁹³ See for instance ss 2-4 of the Flogging Regulation Ordinance, 1903 (Ord. 8 of 1903), which imposed maximum sentences of flogging for both offences and breaches of prison regulations.

⁹⁴ One prisoner was sentenced to death during the period before the Order in Council was passed. No other death sentences are mentioned in the records.

⁹⁵ Annual Report for 1927, CO 521/41.

⁹⁶ *Rex v. Liu Chang-te, NCH*, vol. CLXXIV, no. 3260, 28 Jan 1930, p. 137.

⁹⁷ Annual Report for 1927, CO 521/41.

empowered to grant conditional or unconditional pardons in all cases.⁹⁸ The two death sentences following the convictions in *Wang and Hsieh* and *Li Sing-Wu* discussed above were carried out in Weihaiwei by an executioner from Hong Kong.⁹⁹

With the introduction of the Children and Juvenile Offenders Ordinance¹⁰⁰ in 1910, death sentences could no longer be passed on offenders under the age of sixteen but detention during H.M.'s pleasure could be directed by the Commissioner. This law was passed because the Offences Against the Person Ordinance, 1905, contained no provision exempting young offenders from the death penalty. Neither before the Ordinance was passed nor afterwards was a person under the age of sixteen convicted of a capital crime.

Other penalties included imprisonment with or without hard labour, penal servitude, deportation, payment of damages¹⁰¹ and fines. Costs could also be ordered of the person convicted¹⁰² and, in cases of vexatious or frivolous prosecution, the court could order the complainant to pay all or part of the expenses of both sides.¹⁰³ Powers to banish from the territory for up to five years those convicted of an offence or considered to be a threat to peace and good order were introduced in 1905 through the Banishment and Conditional Pardons Ordinance.¹⁰⁴ Some sentences of floggings were ordered and carried out before the Colonial Office pointed out in 1905 that flogging, with the exception of the case of juveniles and other minor exceptions, was unlawful.¹⁰⁵

Given the paucity of serious crimes and the overwhelming number of prosecutions for gambling, fines were the most frequently imposed penalty. The fines

⁹⁸ WOIC, art. 32. The power to pardon crimes applied to all sentences, not just death sentences: WOIC, art. 38.

⁹⁹ Report of Case by Mr. Jamieson, SG, enc. I, Lockhart to SSC, 12 May 1914, CO 521/12.

¹⁰⁰ Ord. 1 of 1910, CO 841/1.

¹⁰¹ For instance, persons convicted of assault could be ordered to pay the victim damages not exceeding \$50: WOIC, art. 28.

¹⁰² WOIC, art. 33.

¹⁰³ *Ibid.*

¹⁰⁴ Ord. 6 of 1905. This Ordinance, based almost entirely upon Hong Kong Ord. No. 1 of 1882, allowed for the deportation of Chinese, non-British subjects to Chefoo. Some violations of banishment orders are recorded in the statistics of police cases but these are not numerous. The Ordinance was recommended by Johnston - 'It is most desirable in the interests of the peace and good order of the Territory that the executive should possess the power which has for many years been found so useful in Hong Kong and the Straits Settlements and is conferred by this Ordinance upon the Commissioner of Weihaiwei', Johnston to Lockhart 10 Oct 1905.

¹⁰⁵ SSC to Lockhart, 3 March 1905, CO 521/8.

imposed were probably not excessive, given that there were few convicted of contempt of court for failure to pay. One penalty which appears to have been inflicted in excess of the provisions of the Order was the imposition of a fine on entire villages, where appropriate, the fine being calculated to cover the extra costs of policing to prevent the outbreak of fighting in or between villages.

Imprisonment

Prison sentences were usually carried out in the prison on Liukung island. On the mainland, the only detention facility was the small lock-up at Port Edward.¹⁰⁶ In 1904, the island jail had 12 cells in which prisoners, till then male only, were detained two to a cell.¹⁰⁷ Three years before the end of British rule in Weihaiwei, the prison's capacity was put at 70 male and 20 female prisoners while the Port Edward lockup had seven cells.¹⁰⁸ The increase in capacity was largely the result of major improvements made to the island jail in 1911. Prior to this, the facilities were clearly inadequate, prisoners being held three or more to a cell in buildings which were not conducive to proper surveillance. One government officer described the detention facilities as being 'only suitable for rustics sentenced to short terms of imprisonment.' As a result, long term prisoners - those sentenced to two or more years - had to serve their sentences elsewhere.¹⁰⁹ The serving of sentences in Hong Kong or in some other part of H.M.'s dominions was permitted by article 39(1) of the Order.¹¹⁰ The need to expand the detention facilities of the territory's main prison was given impetus in 1910, when long term prisoners from the Transvaal and, later, Singapore were expected. The improvements involved demolishing part of the prison and building a perimeter wall enclosing new facilities. When finished in November 1911, the prison had a well, exercise grounds, prison cells, guardrooms, a washhouse, hospital, several

¹⁰⁶ This lockup was similar to cells for the short-term detention of prisoners at police stations: Walter, 20 Sept 1906, CO 873/230.

¹⁰⁷ CO 873/134. Alterations carried out in 1903 had given the jail twice as many cells and a larger prison yard surrounded by a wall: Annual Report for 1903, enc. Lockhart to SSC, 18 Apr 1904, CO 521/6.

¹⁰⁸ Annual Report for 1927, CO521/41.

¹⁰⁹ In 1909 for instance, two prisoners sentenced to two years rigorous imprisonment with hard labour upon convictions for manslaughter were sent to Hong Kong: Report of the SG, Departmental Reports for 1909, CO 873/292. See also the case of *R. v. Wang and Hsieh* discussed above.

¹¹⁰ This provision is allowed by ss 6 and 7 of the FJA. Note also that WOIC, art. 39(2) extended to Weihaiwei, with some modifications, the Colonial Prisoners Removal Act, 1884 (47 & 48 Vict. c. 31).

workshops, a tool store and isolation rooms. The staff of the improved prison included one head warden, four sub-wardens and a female warden.¹¹¹ Despite these improvements, several prisoners were later sent to Hong Kong.¹¹²

The power to make rules for prisoners and wardens lay with the Commissioner. The Prisons Ordinance, 1903,¹¹³ reiterated the Commissioner's rather comprehensive powers under the Order to

make rules for the regulation and government of prisons and for the duties and conduct of the officers and other persons employed in prisons and of the visitors and for the classification, diet, clothing, maintenance, employment, discipline, instruction and correction of prisoners and for all other matters relating to prisons, and may from time to time repeal, alter, or add to such rules, provided that such rules shall not be inconsistent with anything contained in this Ordinance.¹¹⁴

Section 8 of this Ordinance provided two classes of 'hard labour'; the first consisting of 'work at the tread wheel, shot-drill, crank, capstan, stone breaking or such other like description of hard bodily labour as may be appointed by the Commissioner.' The second class comprised 'such description of bodily labour as may be appointed by the Commissioner.' Prisoners sentenced to hard labour could be employed in labour of the second class outside the prison so long as supervised.

The annual reports show that the prisoners made and repaired roads, drains, tennis courts and piers, laid telephone cables, rolled golf links, and maintained the public gardens and nurseries. In 1911, they planted firs on the hills of Liukung and acacias along the roads. Although most of the work was carried out on the island, prisoners were sometimes transferred to the lock-up on the mainland so that works around Port Edward could be carried out. Women prisoners, confined to the jail along with some long sentence prisoners,¹¹⁵ made, washed and mended summer and winter prison uniforms.¹¹⁶ Prisoners received some remuneration for their work.¹¹⁷

¹¹¹ A female warden was appointed for the first time in 1906: Report of Inspector Whittaker on the Liukungtao Gaol for 1906, CO 873/239.

¹¹² In 1915, for example, a prisoner sentenced to a total of twelve years penal servitude for burglary, escape from custody and assault was sent to Hong Kong: Report of the North Division, Annual Reports for 1915, CO 873/458.

¹¹³ Ord. 4 of 1903.

¹¹⁴ Rules made by the Commissioner under this section were binding on all persons as if they had been contained in the Ordinance: Prison Ordinance, 1903, s. 17.

¹¹⁵ In 1904, after sentencing two men to long sentences with hard labour the Commissioner instructed Inspector Whittaker that both prisoners were to be engaged in the breaking of stones in the prison yard: CO 873/134.

¹¹⁶ CO 873/230. Prisoners' uniforms had originally been imported from Hong Kong.

On the whole, prisoners were regarded as unproblematic, prompting the Medical Officer to remark, in 1909, that 'Chinese prisoners as a class give little trouble. They cheerfully make the best of things. They do good work and they obey orders.'¹¹⁸ Minor infringements, such as the possession of cigarettes smuggled in while working outside the prison were common but no serious disorder ever erupted. From time to time, prisoners complained of real or imaginary illnesses to avoid work and some of them attempted escape. Some prisoners also complained of insufficient food. In 1914, one prisoner went on a hunger strike to protest against the lack of food. Breaches of prison discipline were dealt with by the magistrate. Minor breaches were punished with a low diet¹¹⁹ whilst floggings were administered for more serious infringements. In 1914, a higher diet was introduced as a reward for hard work.¹²⁰ The basic diet of prisoners, as introduced in 1906, consisted of three pounds of Chinese meal bread and four ounces of salted vegetables four days a week, four ounces of fresh vegetables three days a week, and two pints of hot water daily. This is hardly a balanced diet but more nutritious than the low diet of two pounds of meal bread and two pints of hot water a day.¹²¹ Walter, perhaps naïvely, saw the diets as 'considerably superior fare to what they get in their own homes' so much so that 'prisoners come out of gaol in far better health than when they are admitted.' When, in 1915, the Magistrate for the North Division received a complaint of insufficient food from prisoners in the island jail, Inspector Crawley compiled a table showing the weight of prisoners compared with their weight on entering the jail. All prisoners who had served more than a month of their sentences had gained weight, in one case 21 pounds.¹²² The increase in weight was probably that which inevitably occurs when coming off opium, together with a stodgy diet and inadequate exercise.

¹¹⁷ Report on H.M. Gaol Liukungtao, Departmental Reports for 1911, Annual Report for 1911, CO 873/335.

¹¹⁸ Report of Dr. Hickin, Medical Officer, in Departmental Reports for 1909, CO 873/292. Prisoners were of course not uniformly compliant.

¹¹⁹ Report of Inspector Whittaker on the Island Gaol and Police, Annual Report 1910, CO 873/313.

¹²⁰ Report on Gaol by Inspector Whittaker, 11 Jan 1915, CO 873/435.

¹²¹ CO 873/230.

¹²² CO 873/455.

Two aspects of the territory's criminal justice system - legal representation and jury trials - brought notoriety to Weihaiwei in 1912. The comments made by Fiat Justitia and the responses his letters provoked contained obvious inaccuracies. One general misconception of his was that jury trials and legal representation were a necessary part of the British criminal process. Throughout the many places under British colonial rule or protection, there were many examples of trial without jury or lawyers. Trial by judge and lay assessors was often the mode of trial introduced.¹²³ As we have just seen, although we do not know of the policies or principles which might have determined in which cases a jury trial was offered, jury trials were held from 1905 onwards. What seems clear is that, prior to *Wang and Hsieh*, Chinese defendants were not precluded from a jury trial.

On legal representation, barristers appeared both to defend and prosecute in the exceptional case. Moreover, public funds were used to provide defence counsel where the defendants were unable to afford the costs themselves. This was not repeated after *R. v. Wang Cheng and Others* because of Lord Elgin's despatch.

In tracing the history of the jury trial and legal representation in the territory, it is clear that the impetus for both came not from those in daily contact with the inhabitants of the territory - government officials, including magistrates, in Weihaiwei - but from outside the territory. There are no traces in Colonial Office despatches of the Commissioner being troubled by the lack of defence counsel, whether generally or with regard to particular trials. Lucas' comment that, on the question of legal representation, the Commissioner shared the views of the Colonial Office was probably accurate, given that he and Lockhart were in private correspondence. Even after the publicity following *Wang and Hsieh*, the principle and practice of having counsel in court, at least in civil cases, was still to be established.

¹²³ See J.H. Jearey, 'Trial by Jury and Trial with the Aid of Assessors in the Superior Courts of British African Territories: I', *Journal of African Law*, 1960, vol. 4, pt 3, 133-146; T. Olawale Elias, *British Colonial Law* (London: Stevens, 1962) and the overview in Neil Vidmar (ed.), *World Jury Systems* (Oxford: Oxford University Press, 2000), ch. 13. Where jury trials were introduced, they were sometimes the privilege of European defendants. In England itself, although the alarm over the decline of the jury in criminal trials was overstated, successive legal reforms from the middle of the 19th century had reduced the incidence of jury trials; the number of crimes triable either way was increased and crimes triable summarily was increased, first for young offenders and later for adults. By the end of the lease of Weihaiwei in 1930, five statutes which effected curtailment of trial by jury had been passed onto the English statute book. See R.M. Jackson, 'The Incidence of Jury Trial During the Past Century', *Modern Law Review*, 1937, vol. 1, 132-144, esp. 132-138.

In 1914, Moss, one of the magistrates, heard a contract dispute in which one party was represented by a barrister from Shanghai. He minuted the Commissioner afterwards to say that he would prefer it if no counsel appeared except in very exceptional circumstances.¹²⁴ He asked if, in all cases, lawyers had a right to appear in his court and gave his own view that, in criminal trials, no lawyer should be allowed to appear until the case had been referred to the Crown Advocate and that, in civil cases, 'where both or one of the parties is an Asiatic, absolute discretion should be granted to the Court – subject to a local appeal to the Commissioner – to refuse permission to appear in Court.'¹²⁵ The Commissioner sought the Crown Advocate's opinion without offering his own. The Crown Advocate informed Lockhart that litigants in any British Court of Record were presumed entitled to the assistance of any duly qualified British legal practitioner, a presumption which could only be negated expressly by Order in Council. Furthermore, 'in criminal cases, the accused is undoubtedly entitled to have such legal assistance as he can obtain.' The Crown Advocate went on to sympathise, saying that he could 'quite understand the apprehensions expressed by Mr Moss' but that the presence of Counsel 'where the parties really need him, is also in the long run of assistance to the court.'¹²⁶ This exchange is instructive of the attitude in the territory towards the question of legal representation.

On the question of the jury, the opposition of the Colonial Office is unsurprising. From the time it took over responsibility for the territory in 1901, due in part to the uncertain length of stay, it intended to run the territory with the minimum of expenditure. There was no ambition to establish British rule beyond the level determined by necessity.

The indifference of the government of Weihaiwei to the question of jury is understandable. Lockhart and other officers in Weihaiwei may have known something of its unsuccessful use in Hong Kong a few decades earlier.¹²⁷ In Weihaiwei,

¹²⁴ Moss to Commissioner, 15 June 1914, CO 873/421.

¹²⁵ *Ibid.*

¹²⁶ Memorandum on questions raised by Mr Moss, 17 July 1914, CO 873/421.

¹²⁷ Jury trials had been introduced in Hong Kong in 1844 when the Supreme Court of Hong Kong was established. At first, such trials were few but jury trials increased when, after an instance of injustice in the Magistracy, the Chief Justice ordered that defendants should be tried in the Supreme Court. The jury system did not work well: too few qualified to be jurors; those who qualified found the task time-consuming; jurors were not always fluent in English even though this was a qualifying condition; and most jurors, unable to understand Cantonese, heard the evidence through an interpreter. With many unsafe convictions, trial by jury failed to impress the Chinese that British justice was fair. The jury system was only one of several problems which beset the criminal trial system in Hong Kong and these

moreover, the jury would have been relevant only to the few cases heard in the High Court. Officials in Weihaiwei, working within the constraints of limited resources, were concerned with retaining the confidence of their Chinese residents in the ability of the territory's courts to prosecute crimes and punish offenders satisfactorily. This included adapting procedure to the lack of counsel in the lower courts by adopting a more inquisitorial process; and providing adequate detention facilities. Indeed, the government feared that the Chinese of the territory would see its laws as too soft on crime. This would explain the remark made by Johnston after being informed by the Commissioner that Wang's death sentence could not be commuted. Magistrates were often aware of the harsher penalties for crime committed within Chinese jurisdiction. Moreover, lenient laws and a limited police force, it was feared, would draw bad characters into the territory. These fears aside, the system worked reasonably well and there was nothing to suggest that the inhabitants of the leased territory were critical or resentful of the criminal justice process. Trial by jury and legal representation would not have been familiar to those previously acquainted only with the Chinese courts and, from the point of view of the relations between the government and the Chinese of Weihaiwei, there was no reason to acquaint them with 'British methods and British procedure'.

problems caused the Chief Justice to enlarge the jurisdiction of the lower court. With this change, fewer defendants faced trial by jury. For an ample discussion of these and other developments, see Christopher Munn, *Anglo-China* (Richmond, Surrey: Curzon, 2001).

CHAPTER 6

RESOLVING CIVIL DISPUTES

The people of this Territory positively revel in going to Court and look upon it in very much the same light as going to the Theatre or other places of diversion. An injured husband will walk 20 miles to inform the Magistrate that he is quite unable to keep his wife in order, - An aggrieved rustic will plod wearily a distance of 10 miles to tell the Magistrate that his neighbour has stolen 6 handfuls of grass that belonged to him, - and he will couch his plaint in words of poetic pathos, imploring "the great man to help him, in which case his gratitude will be as the ocean in depth and the vault of heaven in height".¹

This was the impression formed by one of the earliest British magistrates. It was his and other magistrates' experience that the Chinese of the territory took their disputes, both petty and serious, to court without hesitation. Litigation appeared to be a 'favourite pastime' and more villagers took advantage of the courts once it was discovered that they could do so at 'a fraction of the cost'² of the previous court system.³ Arguments between family members or between neighbours made up the larger part of the magistrates' caseload and family disputes over the adoption of heirs, remarriage of widows, custody of children, ownership of clan property, and rights in succession were commonly litigated. Disputes between villages over rights to land were amongst the most troublesome of cases. Debt, arising from the failure to record agreements in writing, bankruptcy and breach of contract cases were fewer; disputes involving businesses were less likely to be litigated because these tended to be settled through negotiation. Many of those that were not settled were referred for arbitration to the Chamber of Commerce in Port Edward or to its predecessor, the *gonghui* (merchants' guild).⁴

¹ Draft Annual Departmental Report for 1902, Walter, SG and Magistrate, CO 873/97.

² App. 1, Report of Johnston, SG, CO 873/163.

³ Although we have no data on civil cases in the two districts, parts of which became the leased territory, it is established that the Chinese magistrate would have heard many civil disputes. See Adele Fielde, *A Corner of Cathay* (New York: Macmillan, 1894), especially the chapter on 'Suits in Law.' Fielde was an Australian missionary who worked in China for fifteen years, mostly in Swatow. See also Byron Brenan, 'The Office of District Magistrate in China', *Journal of the North China Branch of the Royal Asiatic Society*, 1897-8, vol. XXXII, 36-65; David C. Buxbaum, 'Some Aspects of Civil Procedure and Practice at Trial Level in Tanshui and Hsinchu from 1789 to 1895', *Journal of Asian Studies*, 1971, vol. 30, pt 2, 255-279; John R. Watt, *The District Magistrate in Late Imperial China* (New York: Columbia University Press, 1972); and Philip C.C. Huang, *Civil Justice in China* (Stanford: Stanford University Press, 1996).

⁴ The *gonghui* handled most of the disputes involving debt and bankruptcy, deciding cases on the basis of mercantile custom. See Annual General Report for 1925, Russell Brown to SSC, 17 March 1926,

In this chapter, the main aspects of the civil justice system put in place under British administration are explored. The accessibility of the system and its use by the people of Weihaiwei, the trial procedure adopted, the use of Chinese law and custom in civil disputes, and the procedures for appealing decisions are each considered in turn. The territory's magistrates and other officials were attentive to the need to provide a forum for civil disputes, yet the burden of a large number of petitions on the magistrates led them to urge village and district headmen to mediate the settlement of some of the disputes.

Access to civil justice

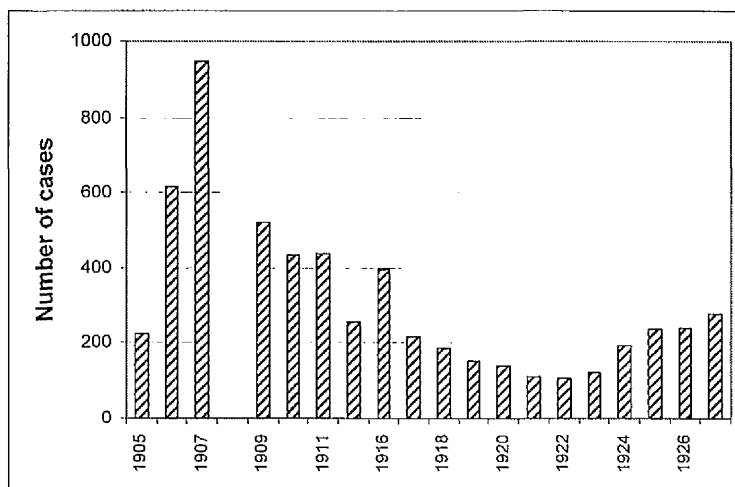


Figure 5. Civil cases heard in the Magistrates' Courts

Until 1906, as mentioned in chapter 3, the territory had just one magistrate, whose court was at Port Edward, the territory's administrative centre. The introduction of the post of district officer and magistrate resident in the interior in that year allowed for a second Magistrates' Court to be established in a remote village. The establishment of this court brought the court system much closer to a large proportion of the population of Weihaiwei. In addition to dealing with criminal cases, both this court and the court at Port Edward also heard civil disputes. This state of

CO 521/28. There is no information in these records on the way in which the Chamber of Commerce dealt with such disputes. We might, however, gain some insight from the excellent and succinct synthesis of works on the dispute settlement functions of guilds in Jerome Alan Cohen, 'Chinese Mediation on the Eve of Modernization', *California Law Review*, 1966, vol. 54, 1201-1226, at 1222, and from Madeleine Zelin, 'Merchant Dispute Mediation in Twentieth-Century Zigong, Sichuan' in Kathryn Bernhardt and Philip C.C. Huang (eds), *Civil Law in Qing and Republican China* (Stanford: Stanford University Press, 1994), 249-286. The Chamber of Commerce at Weihaiwei was begun in 1916, motivated by a need, expressed by some local merchants, to be able to deal on a more equal footing with modern chambers set up in other cities.

affairs remained until 1916, when all civil cases were heard in the court at Wen-ch'üan-t'ang. Unfortunately, due to staff shortages, this court was removed to Port Edward in late 1916, reopening in the interior for a few months in 1919. The statistics, shown in graph form in Figure 5 above show that fewer cases were litigated in the years immediately following closure.

From the first, importance was placed on access to civil justice. The Chinese inhabitants of Weihaiwei, it would seem, began petitioning the British officials with their disputes as soon as there was an official to whom they could turn. In the first few years of British rule, litigants often made unauthorised payments to the magistrate's staff in the course of starting their civil actions but such payments were later stopped. In an early report Johnston complained of the prevalence of such activities:

Previous annual Reports will have shown how difficult it is to convince our Chinese subjects that British justice is not a marketable commodity. The greatest vigilance on the part of the Magistrate cannot ensure that no money is passing from plaintiffs and defendants into the hands of his Chinese subordinates, and it is all but impossible to make litigants understand that bribery of underlings does not and cannot have the slightest effect upon magisterial decisions.⁵

It was the desire to press home the point that British justice could not be bought that led to the simplification of the procedures for handing in petitions. Petitions were, from then on, delivered at any time to the magistrate himself⁶ or placed in a locked petition box at the roadside near the court. The idea of the box was to encourage the communication of legitimate grievances by those who 'dare[d] not openly bring a lawsuit or make accusations against some influential person or family in their own village'⁷ and to avoid giving the magistrate's staff the opportunity to receive bribes. The box proved useful from the point of view of both administration and court work. Some of its contents such as the 'anonymous denunciations of the private enemies of the writers' were discarded immediately, whilst others 'greatly facilitated the labours of the court in ascertaining the rights and wrongs of pending cases.'⁸

Petitioners could use petition forms purchased from local shops at a price fixed by the government but use of these forms was not, at least initially,

⁵ Report of the SG, app. I, Annual Report for 1904, CO 873/163.

⁶ *Ibid.*

⁷ *LDNC*, 114.

⁸ *Ibid.*, 115 where an example of a typical document from the petition-box is provided.

compulsory.⁹ Indeed, the Order allowed for applications to be made orally¹⁰ and it was reported by the district officer in 1908 that, with the abolition of licensed petition writers in 1907, '[e]very party to a case now makes his case in the Court *viva voce*'.¹¹ Such oral petitions were later found to be unsatisfactory and prohibited. Lockhart summarised the disadvantages of a procedure in which the litigant appeared without any assistance whatsoever:

The ordinary litigant in Weihaiwei is an illiterate peasant, and is very rarely capable of giving the Court a clear and succinct oral account of his own case. Very frequently, indeed, he damages his cause not only by his own ignorance of the law but by unintentionally omitting to mention essential facts that might be favourable to himself. Sometimes, through nervousness, want of intelligence, or lack of education, he is apt to find himself at a greater disadvantage when he is called upon to plead orally against an opponent who happens to be more skilful or more accomplished than himself.¹²

Many litigants engaged a licensed petition writer to help them frame their pleas. The government had, for a time, recognised petition writers, allowing them to charge litigants a fee of \$1 for drawing up a petition. However, petition writers were found to have made surcharges and some of them were prosecuted for these and other corrupt practices. In one such case, the petition writer had impressed upon his clients that he was in receipt of a salary from both the British and Chinese governments.¹³ It was the difficulties of controlling or supervising their work that led the government, in 1907, to ban petition writers.¹⁴

With access in mind, the government resisted the imposition of court fees until 1910, when a petition fee of \$2 was introduced.¹⁵ The introduction of fees coincided with the next development - the introduction of government-salaried petition writers.

⁹ These forms were introduced in 1902 and were still in use in 1907: Annual Report of the SG, 1 March 1903, Annual Reports for 1902, CO 521/4.

¹⁰ WOIC, art. 49(2). This permission was subject to the order of the court and Rules of Court.

¹¹ District Officer's Department, Report for the Year 1907: CO 873/265.

¹² Lockhart to Colonial Office, 7 March 1910, CO 521/11.

¹³ Report of the SG, Annual Report for 1907, CO 873/265.

¹⁴ Petition writers were certainly practising their trade in Weihaiwei in 1904: see Report of the SG, Annual Report for 1904, app. 1, CO 873/163. Detailed information on petition writers in Weihaiwei is not available but there is some evidence of their marginal status. In 1903, the SG, reported that he had once 'asked a rustic who wrote his petition for him and was given the reply "I don't know. A man wrote it and then ran away."': Draft Annual Report for 1902, CO 873/97. For a study of litigation specialists see the excellent description by Meadows quoted at length by A.M. Kotenev, *Shanghai: Its Mixed Court and Council* (Shanghai: North-China Daily News and Herald, 1925), 203 or Melissa A. Macauley, 'Civil and Uncivil Disputes in Southeast Coastal China, 1723-1820' in Bernhardt and Huang (eds), (1994).

¹⁵ Lockhart to Colonial Office, 7 March 1910, CO 521/11. These rules were subsequently approved. See Rules of Court, 13 June 1910, CO 873/543.

This was a response to the deficiencies already mentioned - the failure of oral-only proceedings and the ban on petition writers. Without the use of petition writers, some litigants submitted petitions which were 'so vague in their terms and so slovenly drafted that they [were] not much if any help to the Magistrates in their inquiries into the facts of the case.'¹⁶ The introduction of the petition fee was also intended to deter trivial cases from reaching the courts. As the petition fee had no noticeable impact on the level of litigation, an increase of one dollar was instituted in 1913.

The Commissioner will have been aware of the burden on magistrates such as Johnston. In a letter to Lockhart, Johnston wrote that his court day began at nine and ended at six, the workload allowing only a brief pause for lunch. This was despite turning away some cases on the grounds of triviality.¹⁷ On the day he wrote this letter, he had turned four cases away. Two years later, he declined the Commissioner's invitation to attend a children's picnic on the grounds of having to catch up with work. He wrote that 'court-work is so exhausting that it leaves me every evening fit for nothing but walking and reading.'¹⁸ Letter after letter to Lockhart, particularly those written in 1916, told of the high number of petitions. He once wrote, 'There is such a deluge of litigants that my petition-writer cannot keep pace with them, and I am turning people away without receiving petitions from them as I cannot deal with their cases.'¹⁹ Even public holidays had to be disregarded if the work was not to pile up.²⁰ Where appropriate, and it was often so in the case of disputes over land, the magistrate held his court at the place of the dispute. In letters to Lockhart written in 1910, Johnston mentioned going to the villages of Meng-chia-chuang, Tun-h'ou-chia and Lu-tao-k'ou. These visits invariably involved 'tenting it', sometimes for up to 10 consecutive days. In 1913, trips to Lu-tao-k'ou to investigate land disputes again occupied his time.

The increase in Johnston's caseload in 1916 no doubt played a part in the further increase of petition fees to \$5 that year and the dramatic increase to \$10 which came into effect on 1 January 1917. The effect of this large increase can be seen in Figure 5 above, although the decrease was also attributable to one other factor -

¹⁶ Lockhart to Wilkinson, Crown Advocate, 10 Jan 1910, CO 521/11, enc. to Lockhart to Colonial Office, 7 March 1910.

¹⁷ Johnston to Lockhart, 29 Nov 1907, *SLPNLS*, vol. 9.

¹⁸ Johnston to Lockhart, 21 May 1909, *SLPNLS*, vol. 9.

¹⁹ Johnston to Lockhart, 29 June 1916, *SLPNLS*, vol. 10.

reduced accessibility to the magistrates' court. Around the same time, it may be recalled, due to complaints of overwork from the magistrate at Port Edward, the administration of the territory was reorganised.²¹ The Commissioner accepted Johnston's proposal that his court should hear all civil cases while the other magistrates' court should hear all criminal cases. This change was instituted together with the restructuring of the administrative posts to produce a Senior and a Junior District Officer. Due to staff shortages, this was followed not long after by the earlier mentioned closure of the court in Wen-ch'üan-t'ang. This measure and the increase in petition fees to \$10, occurring within the same year, were regretted by the government; officers such as Johnston suggested that both be reversed as soon as resources permitted.²²

Trial procedure

If the procedure for starting a case was simple and relatively informal, procedure in court was similarly adapted to suit local conditions. Although article 19 of the Order in Council provided for the application of the procedure of English courts in civil matters, as it did in criminal matters, the Order itself also allowed relaxations from English procedural law. Thus, applications could be made orally and, ordinarily, there were no written pleadings²³ unless rules of court otherwise dictated,²⁴ as they did in 1910. The Order expressly provided that a plea could not be invalidated on the sole grounds of a technical error. Rules of evidence were also relaxed, so that evidence could be partly oral or written or in the form of an affidavit or deposition.²⁵ In practice, magistrates, we are told, did not adhere to English law rules of evidence.²⁶

Johnston's opinion was that

if civil cases in Weihaiwei were to be decided entirely by British rules of evidence and strictly in accordance with the information laid before the Court

²⁰ Johnston to Lockhart, 25 May 1916, *SLPNLS*, vol. 10.

²¹ The reorganisation took effect on 1 Nov 1916: Report of the Senior District Officer, Annual Reports for 1916, CO873/493.

²² Johnston to SSC, 11 March 1918, CO 521/19.

²³ WOIC, arts 48(3), 48(4) and 56.

²⁴ *Ibid.*, art. 48(2).

²⁵ *Ibid.*, art. 57.

²⁶ *LDNC*, 104.

by the parties concerned, it is to be feared that justice would seldom be done except by accident.²⁷

The absence of barristers in the territory also made it necessary for the magistrates to advise the parties and to adopt a more inquisitorial role in order for the court to be an effective fact-finder. Plaintiff and defendant appeared in person, often accompanied by their more articulate young sons,²⁸ 'each to conduct his own case ... [and with] practically unlimited freedom to say what he likes about his opponent and about things in general.'²⁹ In this atmosphere, some parties made 'clamorous recitals of real or imaginary woes, bitter denunciations [and] passionate appeals for justice.'³⁰ Johnston's early experience had taught him that, although abusive language would have been used, accusations of personal violence were usually untrue.

The application of Chinese law and custom

As we saw in chapter 3, article 19 of the Order, whilst providing for the *prima facie* application of English law, also contained a proviso reserving a role for Chinese law and custom, so far as it was not repugnant to justice or morality, 'in civil cases between natives'. The court was to be 'guided by Chinese or other native law and custom.' The annual reports compiled by the magistrates and the small sample of cases which were reported or otherwise recorded suggests that Chinese law and custom were routinely used in civil disputes between Chinese parties.

The magistrates and the High Court Judge of Weihaiwei carried out their work in a period during which there was, in addition to works in Chinese, a growing body of reference works on Chinese law published in the English language.³¹ Where local customary law was concerned, most of the magistrates in Weihaiwei accumulated first-hand knowledge of the customs of the territory. As we shall see, sometimes this accumulation of knowledge had the consequence that a magistrate's view on a particular issue changed as he became more familiar with local customary law.³² Remaining difficulties were usually resolved by asking the opinion of the magistrates

²⁷ Report of the SG, Annual Report for 1904, app. 1, CO873/163.

²⁸ *Ibid.*

²⁹ *LDNC*, 105.

³⁰ *Ibid.*, 105.

³¹ See ch. 3.

³² See the case of Yü I-tung discussed below.

of either Wen-teng or Jung-ch'eng districts or interviewing district and village headmen. Article 20 of the Order allowed cases to be heard with the assistance of Chinese assessors, who, by their qualifications, ought to have been able to provide expertise on matters of local custom. However, the use of local assessors was probably the exception rather than the rule.³³ In none of the land cases reported in the *Herald* is the presence of Chinese assessors recorded. As previously mentioned, it was difficult to find persons who met the qualifications for appointment as an assessor.³⁴

We saw earlier that, in the case of *R. v. Hsing-nan*, the judge cited a published work on the Qing code.³⁵ This express reference to a source of law is, however, unusual in the law reports and other records for Weihaiwei. It should also be remembered that very few cases were reported in detail and, of the small number that were, fewer still were reported with particular attention to legal principle. This lack of detail limits considerably the extent to which a critical assessment can be made of Chinese law and custom in the courts of the territory. For the vast majority of the disputes purportedly decided in accordance with Chinese law and custom, it is not possible to examine if the magistrates or judge dealt with the issues in a knowledgeable and correct manner. This applies even to disputes over land, a greater proportion of which were reported in the *Herald*. Furthermore, few decisions from the Magistrates' Courts are to be found in the records. In the section which follows, the discussion of Chinese law and custom is shaped by the themes yielded by the data. It offers a glimpse of how the magistrates collected information on local customary law; how local customary law may not have been grasped immediately; and how the High Court Judge and one of the magistrates may have had different priorities.

Disputes over land

Aside from the proviso to article 19, it should be remembered that, in accordance with the High Court decision in the case of *R. v. Hsing-nan*,³⁶ rights relating to land situated within the territory were to be decided in accordance with Chinese law and custom by virtue of the application of the principle in English law that the *lex situs* should govern such rights. Owing chiefly to the lack of a full survey of landholding in

³³ Annual Report for 1914, CO 873/440.

³⁴ See ch. 3.

³⁵ *R. v. Chi Hsing-nan and others*, NCH, vol. LXXIX, no. 2917, 6 Apr 1906, p. 39.

³⁶ *Ibid.*

the territory and the absence of a system of compulsory registration of ownership and transfers in land, disputes involving rights to land were amongst those which proved troublesome.

The territory's early authorities estimated that nearly all land in the territory was held by private individuals or families. The great majority of landlords held title deeds; some of these were Chinese registered or 'red' deeds, while others were unregistered or 'white' deeds. British officials later understood that most transactions in land were conducted through white deeds to avoid taxation. Cultivation of the land would normally be carried out by the landowner or a tenant. A few pieces of land in the territory were set apart for worship in the name of a dead ancestor or for the upkeep of temples. So far as could be ascertained at the time, there was no land in the ownership of clans.³⁷ As the British authorities later discovered, there was often no correspondence between the possession of red deeds and ownership of land, since sometimes several red deeds - none of which appeared to have been cancelled - existed in relation to the same piece of land. This situation was never systematically remedied.

The Wei-hai-Wei Order in Council provided for a Land Commission to determine the ownership and other rights in land in the territory.³⁸ Such a commission was never set up; the costs of surveying all land was thought to out-weigh any resulting increase in taxes from the land. Furthermore, the government was aware that tax increases could give rise to discontent and it was, therefore, disinclined to increase the land tax. It was rumours of taxation - on farmyard fowls, for instance - that were partly responsible for the boundary riots early in the lease of Weihaiwei.³⁹ Whatever the shortcomings of the land tax system, it was thought that the people of the territory were paying sufficient amounts and that very little land escaped taxation.⁴⁰ One of the

³⁷ G.T. Hare to Acting Commissioner Cowan, 15 Apr 1902, enc. in No. 96, A General Report on the Civil Administration of the Territory of Wei-hai Wei 1899-1901, Eastern No. 75, CO 882/6/7.

³⁸ WOIC, art. 81.

³⁹ LDNC, 93. See also Johnston to SSC, 11 March 1918, CO 521/19, recommending that no fresh taxation should be initiated. The Colonial Office was also of the view that care had to be taken not to 'overtax' the villagers of Weihaiwei: Harding to Fiddes, 7 Oct 1904, CO 521, p. 31. When the Land and Road Tax Ordinance was passed in 1904, it contain a section intended to demonstrate that the British government was only collecting tax at the same level as had been collected under the Chinese.

⁴⁰ G.T. Hare to Acting Commissioner Cowan, 15 Apr 1902, enc. in No. 96, A General Report on the Civil Administration of the Territory of Wei-hai Wei 1899-1901, Eastern No. 75, CO 882/6/7. See also Annual Report for 1906, Commissioner to Lord Elgin, 14 May 1907, CO 521/10 in which it is stated that 'probably only a minute fraction of the Territory now escapes taxation.' The land tax was also used

deficiencies was that the tax collected, though called the land tax, bore very little correspondence to actual land ownership in the territory. The old land registers inherited from the magistrates of Wen-teng and Jung-ch'eng, on the basis of which the land-tax was levied, were very inaccurate. This, coupled with the fact that each village determined how much tax each person or family paid, is why the tax was often said to be a village, rather than a land, tax.⁴¹

The government remained interested in increasing its revenue and, to that end, introduced a system of voluntary registration of sales and mortgages of land for which a fee was paid to the land office. This system was initially announced in a notice issued in 1899 by the territory's first commissioner, Colonel Dorward,⁴² and does not appear to have been put on a firmer footing until 1914, when an ordinance was passed.⁴³ At first, very few registrations were received;⁴⁴ only 38 transfers were recorded in 1902.⁴⁵ A 'more stirring proclamation' produced the registration of 2,409 transfers in the following year, giving the government a yield of over \$2,000.⁴⁶

At the end of 1905, the district officer reminded the Commissioner that the situation was still imperfect:

[t]he system of land registration is in a chaotic state. The ignorance of the people and the haphazard and inaccurate manner in which deeds of sale and mortgage are drawn up, coupled with the results of the apathy of the Chinese officials for years past, are a source of trouble and vexation to the Government and a very fruitful source of litigation among the people.⁴⁷

as the basis on which to collect a road tax which was introduced to replace corvée labour. Thus in effect, twice the amount of land tax was collected. See Land and Road Tax Ordinance, Ord. 8 of 1904.

⁴¹ Johnston wrote that '[h]ow the amount is assessed among the various families is a matter which the people decide amongst themselves, on the general understanding that no one should be called upon to pay more than his ancestors paid before him unless the family property has been considerably increased.', *LDNC*, 96.

⁴² A copy of these regulations can be found in CO 873/211.

⁴³ Land Registration Ordinance, 1914: Ord. 1 of 1914, CO 841/1.

⁴⁴ Very few registrations were received in 1900 and 1901: Hare to Acting Commissioner Cowan, 15 Apr 1902, enc. in No. 96, A General Report on the Civil Administration of the Territory of Wei-hai-Wei 1899-1901, Eastern No. 75.

⁴⁵ Report of the SG (Walter) for the year 1903, app. I to Lockhart to SSC, 18 Apr 1904, Annual Report for 1903, CO 521/6. It was speculated that there was a reluctance to register transfers since under Qing administration, such registration was invariably expensive: Report of the SG, Annual Reports for 1902, CO 873/97.

⁴⁶ Report of the SG (Walter) for the year 1903, app. I to Lockhart to SSC, 18 Apr 1904, Annual Report for 1903, CO 521/6.

⁴⁷ G.T. Hare remarked that very few transfers had been registered by officials in eastern Shantung 'chiefly owing to the land being poor and valueless', Hare to Acting Commissioner Cowan, 15 Apr 1902, enc. in No. 96, A General Report on the Civil Administration of the Territory of Wei-hai-Wei 1899-1901, Eastern No. 75, CO 882/6/7.

He thus recommended a system whereby all sales and mortgages would have to conform to official printed forms, these forms creating the basis for a system of registration of land titles. Such forms would replace the 'flimsy papers'⁴⁸ which had, until then, been in use and would be distributed to district headmen who would bring them into the magistrate's office on quarterly visits to be checked. Counterfoils with brief details of the sale or mortgage would be kept as a permanent record by the government. The registration fee of 1% of the purchase price, levied for some years, was to be continued, with the addition of another 1% to recoup the cost of printing the forms. The buyer would also pay a sum of \$30 cash⁴⁹ to the district headman for his role in registering the new owner's interest.⁵⁰ This compared favourably with the fee of some 6% of the purchase price (including both proper and improper fees) reported to be payable outside the territory.⁵¹ The years immediately following the introduction of the new forms and procedures saw a marked increase in the number of registrations. In 1906, 5,145 old deeds of sale, 904 new deeds of sale, 65 old mortgage deeds, and 217 new mortgage deeds were registered. Registration continued apace in the following year, one of the government officers noted that 'people have been encouraged to bring in their old white deeds by the knowledge that no penalty for late registration will attach provided they have any reasonable explanation to offer for the delay.'⁵² Legislation on the registration of land transfers, which, inter alia, legalised the levying of fees, was only introduced in 1914 through the Land Registration Ordinance.⁵³ During the discussions before the ordinance was passed, Lockhart had wished to make the registration of transfers compulsory but the Crown Advocate advised that this was not advisable and that it would be better to substitute incentives for registration.⁵⁴ At this time, there was also discussion within the government concerning the resealing of red deeds or registered Chinese deeds. It was suggested that, thereafter, no Chinese deed - red or white - should be recognised unless it was registered and replaced with a British deed. This suggestion was not adopted. The

⁴⁸ Annual Report of the SG, 1906, CO 873/239.

⁴⁹ 'Cash' referred to Chinese copper coins with a square hole in the middle.

⁵⁰ See Johnston to Lockhart, Memorandum, 8 Dec 1905, CO 521/14.

⁵¹ See for instance, T.R. Jernigan, *China in Law and Commerce* (New York: Macmillan, 1905), 140.

⁵² Report of the SG for 1907, CO 873/265.

⁵³ Ord. 1 of 1914, CO 841/1.

⁵⁴ Lockhart to SSC, 15 Nov 1913 and enclosed Memorandum by Crown Advocate, 7 Nov 1913, CO 521/14.

need to increase the territory's revenue led to a proclamation later in 1914 which specifically urged people to register their unregistered white deeds and *fenshu* documents, the latter being the written document recording a division of family property.⁵⁵ It is not possible to determine whether the registration procedures reduced markedly the number of disputes regarding the ownership or possession of land in the territory. Disputes over land, however, remained a mainstay in the Magistrates' Courts and were amongst the cases heard in the High Court.

Particular issues

In a number of High Court cases, the principle that uncultivated land, usually seashore or riverbed, was waste land and, therefore, belonged to the Crown was applied. One of the earliest reported High Court cases involving rights to land was a case on which hung the outcome of disputes over sixteen other tracts of land. This case, *R v. Chi Hsing-nan*,⁵⁶ previously mentioned in connection with the application of the *lex situs*, was one in which the disputed land was a tract of uncultivable seashore and riverbed. At issue was title to the land. Bourne J. found in favour of the government on the basis that the land was waste land. He explained that cultivated land would have been treated differently, for

[I]n regard to so much of the land as has been bona fide cultivated and on which land tax has been paid, there is no dispute, for generally the government admitted the title of the several descendants.⁵⁷

Other cases heard in the High Court in the years 1912 and 1913 stated more clearly the principle that uncultivated land belonging to the Crown could become privately owned through cultivation followed by purchase from the government and payment of the land tax.⁵⁸ This principle appears to be the same as the one elaborated by Jernigan, quoted here for convenience:

⁵⁵ See various minutes in CO 873/419, especially, Lockhart, 19 June 1914, Moss to Johnston, 5 June 1914 and Johnston to Lockhart, 9 June 1914. There was a difference of opinion between Moss and Johnston over the question of resealing Chinese red deeds.

⁵⁶ *R. v. Chi Hsing-nan and others*, NCH, vol. LXXIX, no. 2917, 6 Apr 1906, p. 39.

⁵⁷ See also the criminal case of *R. v. Chi Fu-cheng*, NCH, vol. LXXVIII, no. 2014, 15 March 1906, p. 613, 27 and 28 Feb 1906, Mr Justice Bourne, in which judgment was reserved. This case concerned a stretch of beach which the government claimed was waste land over which the defendant had allegedly trespassed.

⁵⁸ *Hsiachiak'uang Village v. Wangchiak'uang Village*, NCH, vol. CV, no. 2356, 5 Oct 1912, p. 69; *He P'u Wan v. The Hsia chuang Village*, NCH, vol. CV, no. 2356, 5 Oct 1912, p. 69; *Chuang Village v. Lu Tao-k'ou, Tien shang, Ao Shang Villages*, NCH, vol. CVIII, no. 2405, 13 Dec 1913, p. 839; *Han-t'ou-yuan [sic] Village v. Liu Chia Yen T'en [sic] Village*, NCH, vol. CVIII, no. 2405, 13 Sept 1913, p. 839, Wen Ch'uan T'ang, 3 Sept 1913.

If a Chinese wishes to become the owner of a piece of land, the simple process is to enter into possession and bring it under cultivation. When he has done this he applies to the district magistrate, who issues a proclamation setting forth the facts, and if the older owner wishes to retain title or recover what may have been lost, he must come forward and resume the cultivation of the land. If this is not done on his part within a reasonable time, the applicant is granted a title deed ...⁵⁹

During the first decade of the lease, there had been at least one case heard in the magistrates' court in which the principle regarding waste land had already been applied. Unlike the *Hsing-nan* case, in this dispute, one of the parties claimed a customary grazing right. This was the dispute between the neighbouring villages of Hsi-lao-tai and Tung-lao-t'ai. Johnston, who heard the case, described it as one which had presented 'manifold difficulties', regarding which he had received about a dozen petitions from those with an interest in its outcome. The case necessitated several sittings of his court and a personal inspection of the land in dispute. The land in question was a large area of flat land which had previously been under the sea. The Miao family of Hsi-lao-t'ai village claimed ownership to the exclusion of the other village, evidenced, they argued, by a 16th century red deed showing ownership of a tract of land near the sea. The plaintiffs, villagers of Tung-lao-t'ai, on the other hand, claimed a right to graze cattle on the same tract of land. They claimed that the red deed did not refer to the disputed land and that, on the basis of custom, the disputed tract of land was held in 'common' ownership. As 'common' land, the plaintiffs and others had the right to graze their cattle, cut grass or collect firewood on the land. The Wen-teng magistrate, whom Johnston had consulted, confirmed his own view that most, if not all, of the land in dispute would have been covered by the sea at the time - 344 years earlier when the red deed was issued. He suggested the following course of action based on Chinese law: declare the whole area to be government land, have it measured immediately, put the land to auction, and measure the land at three-yearly intervals. Johnston proposed a 'less drastic step' that the land should be considered waste land, but that the villagers of Hsi-lao-t'ai were, for a small rent, to be allowed to remain in possession of the parts of the land they had already cultivated. Boundary stones were to be put in place by the government. Johnston also suggested to the Commissioner that the rest of the land should be leased on short leases to the two villages on condition that the soil was undisturbed and that no buildings were erected

⁵⁹ T.R. Jernigan, *China in Law and Commerce* (New York: Macmillan Co, 1905), 135.

on the land.⁶⁰ The Commissioner agreed to these suggestions and boundary stones were later put in place.⁶¹

The action of the British government in this dispute, based on the advice of the Chinese magistrate, was consistent with customary principles reported by Jernigan⁶² and quoted above, if it is presumed that, instead of transferring the land in an absolute sale, the government was at liberty to lease it. In 1919, the Commissioner passed the Government Waste Lands Ordinance,⁶³ section 2 of which confirmed that 'all unoccupied land, whether originally waste or formerly cultivated but abandoned through famine, civil war or otherwise, which by Chinese law or custom is deemed to be public property and to vest in the State' was government waste land. Furthermore, 'all occupied land originally waste land and for which no legal document of title is held by the occupier' was also government waste land.' The Ordinance made it lawful for the Commissioner to make, alter and revoke rules for the regulation of such land and, in particular, rules for the issue of licences to occupy and develop such lands.⁶⁴

The advice of the Chinese magistrate concerning the measurement of the land at intervals reflected general practice elsewhere. Hoang mentions the measurement of new land formed on the shore of a lake, river or the sea every five years or the annual measurement of land which has been washed away.⁶⁵ In the case of the land in this dispute, the measurement every three years is probably due to the fact that the land was not recently reformed.

Direct recognition of customary grazing rights in a dispute had also been given in a magistrate's decision in a case begun around 1905. This was a case first heard by Johnston not long after his appointment as District Officer and Magistrate. A man by the name of Yü I-tung (*Yu Yidong*),⁶⁶ who had previously been sacked from his position as headman of Shuang-ssü-k'uang village, had purchased a tract of land for

⁶⁰ Johnston to Lockhart, 10 Jan 1905: CO 873/205.

⁶¹ Lockhart to Johnston, 11 Jan 1905: CO 873/205.

⁶² See text at n. 59.

⁶³ Ord. 6 of 1919: CO 841/1.

⁶⁴ Government Waste Lands Ordinance, 1919, s. 3, Ord. 6 of 1919: CO 841/1.

⁶⁵ Pierre Hoang, 'Notions Techniques sur la Propriété en Chine' (condensed version in English published in two parts), *China Law Review*, 1922-24, vol. 1, 90-96 and 232-244, relevant portions of which are quoted in Jernigan, 151.

⁶⁶ Yü I-tung is also discussed in ch. 4.

which he was able to show a title deed.⁶⁷ After the purchase, he prohibited villagers of Chiang-chia-k'ou from grazing their cattle on his land. Johnston found wholly in favour of Yü on the basis of his title deed. During Johnston's absence from the territory, the cattle grazers petitioned the other magistrates for a reversal of the judgment. Although wary of those who tried to have their cases reopened, in 1909 and 'in the light of a far more intimate acquaintance with local customs', Johnston confirmed Yü's ownership. However, grazing rights, in this case unchallenged by successive landowners over several decades or longer, were customary rights which, were they to be extinguished, should attract compensation. He later wrote that in this case there was

not only evidence of villagers from at least half a dozen neighbouring villages but also the evidence of the very man ... from whom Yü I-tung had bought the land. This former owner of the land stated in court with the utmost definiteness that the contention of the villages of Chiang-chia-k'ou was correct, that he himself when owner of the land had never interfered with their prescriptive rights of pasturage, and that in selling the land to Yü I-tung he had no intention of depriving them of these rights even if he had the power to do so.⁶⁸

Yü was thus ordered by the court to allow the villagers of Chiang-chia-k'ou to graze their cattle there after the silkworm season, during the period preceding the sowing of wheat, and after Yü had cut firewood for the year.⁶⁹

Johnston's method of dealing with the competing claims of cultivators and cattle grazers in the case of *Tung-lao-t'ai* v. *Hsi-lao-t'ai*, chiefly by respecting the status quo ante, should be noted. In a number of cases decided by the High Court and discussed below, the judgments only went as far as to declare that the land was waste land.⁷⁰ It is not clear how the government actually resolved the competing claims of cultivators and grazers. The *Tung-lao-t'ai* and Yü I-tung cases suggest that grazing rights, where long-established, would have been taken into account, not least in the applications dealt with by Johnston either in his capacity as District Officer or as Registrar of the High Court. The likelihood that grazing rights would have been taken into account is further suggested by a disagreement between Johnston and the High Court Judge.

⁶⁷ The court record of the case has not survived. Johnston's recollection is that the case was first heard in 1905: CO 873/309.

⁶⁸ Johnston to Lockhart, 15 Sept 1910, CO 873/309.

⁶⁹ *Ibid.*

⁷⁰ See n. 58.

The dispute was sparked off by the case of *He P'u Wan v. The Hsia chuang Village*.⁷¹ Litigation over a stretch of land along a river close to the sea began some time in 1912. The villagers of Hsia-chuang had used this land to graze their cattle for about a century unchallenged by anyone. P'u-wan villagers had been cutting grass from that same tract of land and grazing their mules and donkeys there. In 1911, the villagers of Hsia-chuang had planted willow trees on a river bank close to the sea to protect the bank from flooding and had also erected boundary stones, with the intention, P'u-wan villagers thought, to cultivate the area. P'u-wan villagers were able to show that their ancestors had cultivated the land about a hundred years earlier. At first instance, Johnston found in favour of the cattle grazers and prohibited both parties from cultivating the land. The disgruntled villagers of P'u Wan then removed large quantities of turf for which action several of them were ordered to provide security against future conduct. Four men who refused to do so were imprisoned for contempt of court.

Bourne J. overturned Johnston's decision on the basis that he had erred in not allowing either side to prove ownership of the disputed land and in not allowing the parties to apply to the government for leave to cultivate. The High Court examined 41 title deeds dated between 1576 and 1856 adduced by P'u-wan. Hsia-chuang had no title deeds or land tax receipts in relation to the tract of land. A difficulty, pointed out by the judge, was that the deeds produced by P'u-wan did not show clearly the portions of the tract to which each deed related. Without clearer evidence of proprietorship or cultivation, he declared the land to be government waste land. Would-be cultivators could apply to either purchase or lease the land. Applications would be decided as follows:

The ancient proprietor has the first claim: the adjoining proprietor the next claim: the strangers who offer to pay land tax come last and amongst them the Government will grant the land to the highest bidder. In this case the P'uwan village claim that any individual family in their village is entitled to any parcel of land in virtue of an old title or of having paid land tax or otherwise, the individual in question can apply to the District Magistrate. On proof of title or payment of land tax the Magistrate may issue an order vesting the parcel in the applicant.

Pending such applications, Bourne J. ordered the parties to return to their 1911 position, with both sides grazing their animals as they had done. The recently planted willow trees were to be left undisturbed.

⁷¹ *He P'u Wan v. The Hsia chuang Village*, NCH, vol. CV, no. 2356, 5 Oct 1912, p. 69.

Two other cases heard in the High Court in 1913 appear to have been decided in a very similar way.⁷² Neither case is reported in detail but, in both of them the common grazing land over which the parties claimed rights was declared to be government waste land. The parties were advised to seek government permission for cultivation, pending which, common grazing was to continue.

After Bourne's judgment in 1912, P'u-wan villagers had taken possession of the tract pending their application as the would-be cultivator but the dispute between the two villages continued into the following year. In taking possession, they were acting consistently with the prescribed action described by Jernigan as quoted above.⁷³ In May of 1913, Johnston wrote to the Commissioner saying that he was meeting with P'u-wan villagers who had continued to bully the villagers of Hsia-chuang and would, if necessary, threaten them with payment for extra policing in the village or with imprisonment unless they could find security against good behaviour. Under procedures which are not clear from the record, the High Court Judge heard the P'u-wan case again. The very brief report of the High Court's judgment in 1913 suggests that Bourne may not have done more than to restate the principle that the land was adjudged to be waste land belonging to the government and cultivators could apply to the government for authority to cultivate the land.⁷⁴

Bourne's treatment of the land as waste land, at least in the dispute between the villagers of P'u-wan and Hsia-chuang, where cultivation had been abandoned, is consistent with the definition of such land given in Jernigan.⁷⁵ Johnston, however, whilst not saying that the judge was wrong in principle, was highly critical of Bourne's approach. Before the case was heard by the High Court in 1913, he told the Commissioner that the judge must in future be persuaded to give 'very clear and definite judgments, and not leave details to be settled by the Hua-wu-ssu' (Senior District Officer). The 1912 judgement on the P'u-wan case, he said, was in parts 'almost contradictory.' It is true that Bourne's judgment may have given the P'u-wan

⁷² *Hai Chuang Village v. Lu Tao-k'on* [sic], *Tien shang, Ao Shang Villages*, Bourne J, 29 Aug 1913, *NCH*, vol. CVIII, no. 2405, 13 Sept 1913, p. 839; *Han-t'ou-yuan Village v. Liu Chia Yen T'en Village*, Wen Ch'uan T'ang, 3 Sept 1913, *NCH*, vol. CVIII, no. 2405, 13 Sept 1913, p. 839. All four parties in the former case had grazing rights over a tract of land but the plaintiff now wished to cultivate the land. In the latter case, both parties had used the ground for grazing but one party now sought to cultivate the land.

⁷³ See text to n. 59.

⁷⁴ *P'u Wan Village v. Hsia Chuang Village*, 3 Sept 1913, *NCH*, vol. CVIII, no. 2405, 13 Sept 1913, p. 839.

⁷⁵ Jernigan, 135.

villagers hope that the deeds produced in court entitled them to the land. Bourne had said that

Some of these [deeds] seem to me to have applied to parcels of land within the tract; but how many do so, and where the parcels are situated it is impossible for me to decide in the time at my disposal, even if these questions are capable of decision at all.⁷⁶

It may be that Johnston had wished for a declaration by the court as to which of the competing claims should be recognised. From the administrative point of view, Bourne's judgments in all three of the grazing cases simply transferred to the district officer the question of whether cultivation should be given priority over customary grazing rights. At the same time, however, Johnston's reading of the judgment is that it implied that cultivation should be given priority. For example, in the 1912 P'u-wan judgment, the judge had said that 'it is the interest of the people that land should be cultivated.' Johnston attributed the actions of the P'u-wan villagers subsequent to the 1912 judgment to this bias.⁷⁷ It is true that Bourne did not indicate that the customary rights of grazers would be taken into account by the government. Johnston thought that grazing rights were inherently weaker because they were not subject to written proof. We saw above how, in the Yü I-tung case, Johnston himself had, at first, ignored such rights. He felt strongly that, where grazing had been practised undisturbed for a long time, a customary or prescriptive right could arise which, if extinguished, should be compensated. His final criticism of the High Court's judgment is that, in privileging cultivation, the judge had failed to take into account the circumstances of the territory. Johnston later wrote that in Weihaiwei, fields cannot be cultivated without cattle, and cattle required grass on which to feed. It may be that Johnston's greater proximity to the territory gave him a particular perspective on the balance to be struck between cultivators and grazers. However, it is unlikely that the judge's position was as extreme as Johnston took it to be. Indeed, whether in response to such criticism or not, in 1913, in an appeal against the decision of the magistrate, Bourne J. upheld the right to graze cattle claimed by one of the parties, emphasising that the rights were not to be disturbed.⁷⁸ Unfortunately, the report is too brief to provide any further insight into how the competing rights were assessed.

⁷⁶ *He P'u Wan v. The Hsia chuang Village*, Judgment of Bourne J., read out by Johnston, *NCH*, vol. CV, no. 2356, 5 Oct 1912, p. 69.

⁷⁷ Johnston to Lockhart, 10 May 1913, *SLPNLS*, vol. 9.

⁷⁸ *Teng Yueh-hsiang v. Yu Ying-chun*, 4 Sept 1913, *NCH*, vol. CVIII, no. 2405, 13 Dec 1913, p. 839.

One last land dispute of interest should be mentioned. In 1921, the village of Pei-shang-kuang petitioned the magistrate to stop the defendants, described in the records as 'the poor', from coming onto their land to cut the grass and to collect wood for fuel. The defendants argued that they had a customary right to 'a second raking' of grass after the 1st of the 10th moon each year on any of the hill slopes adjacent to their villages, even on lands which were privately owned. The plaintiffs did not dispute the customary right of raking grass but claimed the right to determine the date after which the raking should be permitted on their lands at their convenience. They had refused to fix any particular date. Their petition included the complaint that the defendants had stolen grass because they had gone onto the land before the villagers of Pei-shang-kuang had cut the grass for the first time. The defendants argued that they had gleaned for fuel a month after the date when the hill slope should have been open to others. They accused the plaintiff village of unreasonable delay in cutting their grass and thus inflicting hardship on the poor. In some years, the plaintiffs left their grass uncut until the New Year. The magistrate, Hardy Jowett, interviewed four district headmen to find out whether there was a customary right as claimed by the defendants. The district headmen agreed that landowners had the right to cut the grass and to a first raking thereafter. In some cases, the watchmen of the fields also had a right to rake grass. The poor from any village were allowed to rake grass on any hill or plain after the 1st of the 10th moon even if the grass had been left uncut by the owners. The only exception was the village of Li Kou,⁷⁹ where the lands were open only after the later date of the winter solstice.⁸⁰ In the light of these statements, the magistrate determined that the defendants' arguments should be upheld. Customs similar to the one recognised by the court in this case were reported by Kroker for Jiangxi province under which landowners in mountainous areas were obliged to allow people from neighbouring areas to collect firewood and also to announce the date after which such was allowed.⁸¹ Kroker also mentions another example from the same province of a landowner permitting others onto his land to search for fruit from the camphor tree.

⁷⁹ This would have been a reference to either the village of Chien-Li-Kou or Hou-Li-Kou either of which would probably have been referred to as Li Kou by the people of the locality. Indeed the two villages have now merged into the single village of Li Kou.

⁸⁰ Jowett, Junior District Officer, Minute, 26 Jan 1921: CO 873/626.

⁸¹ Edward Kroker, 'The Concept of Property in Chinese Customary Law', *Transactions of the Asiatic Society of Japan*, 1959, vol. 7, (3rd series), 123-146, at 144-145.

Appeals and Rehearings

Under the Order, appeals in civil cases heard in the High Court lay to the Supreme Court of Hong Kong.⁸² Subject to time limits, there was a right of appeal in cases involving more than \$500⁸³ and, in other cases, the High Court could grant leave to appeal.⁸⁴ The time limit was three months from the date of the decision of the High Court. If the appeal was made between three and six months of the decision, leave from the Supreme Court was required.⁸⁵ After six months had elapsed, no leave could be obtained.⁸⁶ In some circumstances, cases appealed to the Supreme Court of Hong Kong could be appealed to the Privy Council. It is almost certain that no appeals were ever made using these procedures; the petty nature of most civil disputes, the high cost of appealing, the absence of lawyers in the territory and the probable ignorance of the appeals procedures amongst litigants⁸⁷ in Weihaiwei were, no doubt, factors. However, defeated litigants, such as the villagers of Chiang-chai-k'ou discussed above, often attempted to have old disputes re-litigated. Magistrates frequently complained of the added burden of petitions from dissatisfied litigants. Litigants took the opportunity of the absence of a magistrate from the territory to petition the acting magistrate, or petitioned the High Court Judge during one of his visits to the territory. An extreme example of the persistence of litigants is the dispute between the villages of Lin-chia-yuan and Wen-ch'üan-tang.⁸⁸ In 1911, the villagers of Lin-chia-yuan brought a dispute over the ownership of land in the river bed at Wen-ch'üan-tang to the magistrate. Carpmael, Acting Magistrate, dismissed the petition after a hearing. The following year, the same dispute came before Johnston. Johnston refused to interfere with Carpmael's decision but advised the villagers of Lin-chia-yüan that they could bring an appeal to the Judge. An appeal was brought in 1913 but Bourne J. found that the plaintiffs had failed to prove that they had title to the land and,

⁸² WOIC, art. 68(1).

⁸³ *Ibid.*, art. 68(1).

⁸⁴ *Ibid.*, art. 68(2).

⁸⁵ *Ibid.*, art. 69(1).

⁸⁶ *Ibid.*, art. 69(2).

⁸⁷ Some litigants, such as Yü I-tung, asked for leave to appeal to the Supreme Court but no leave could be given as more than six months had lapsed since the Magistrate's decision which had been delivered on 21 Oct 1909.

⁸⁸ The facts which follow appear in the Commissioner's Address to the people of Lin-Chia-Yuan, 6 Dec 1915: Acc 4138/45, *SLPNLS*.

therefore, the land was waste land belonging to the government.⁸⁹ Subsequently, still unhappy with the situation, the Lin-chia-yüan villagers petitioned Johnston for a rehearing of the case. No rehearing was granted. In 1914, when Bourne J was in the territory, they petitioned him directly. Bourne confirmed that the case was closed. Undeterred, in the following year, the villagers sent a petition by post to the Acting Judge, Wilkinson, in Shanghai. By December 1915, the administration had had enough of the villagers of Lin-chia-yüan. The Commissioner ordered the representatives of the village to appear before him. In his address to them, he pointed out that they had exhausted the patience of the government and that they were wrong to think that the government was weak since it had indulged them by entertaining their repeated petitions over the years.⁹⁰

With cases such as this, it is not surprising to find judgments that finished with exhortations to the plaintiff 'to live peacefully with his neighbours avoiding all stirring up of trouble, strife and litigation.'⁹¹ When parties indicated erroneously that their case had been litigated previously, the court did not miss the opportunity to point out that the case was a fresh one, for fear of encouraging the re-opening of old cases.⁹²

Given the disuse of the appeals procedure and the tendency to re-litigate, a new law was passed in 1913 to provide a right which was 'practically equivalent ... to a right of appeal.'⁹³ The Rehearings Ordinance, 1913⁹⁴ allowed civil cases to be reheard by the Commissioner or Judge if certain conditions were satisfied. Section 3 of this Ordinance gave a right of rehearing, without the need for leave, where the amount or value in dispute was \$100 or more or in any case where leave was given by the magistrate, provided that the application, in both cases, was made within the stated time limits of 14 days of an interlocutory order or one month of a final order. There was also the right of appeal in other cases with leave from the Commissioner or Judge, so long as the application was made within 6 months of a final order. How

⁸⁹ *Lin Chia Yuan Village v. Wen Chuan Tang Village*, Wen Ch'uan T'ang, 3 Sept 1913, *NCH*, vol. CVIII, no. 2405, 13 Sept 1913, p. 839. This report is very brief and contains few facts relating to the dispute.

⁹⁰ Commissioner's Address to the people of Lin Chia Yuan, 6 Dec 1915: Acc 4138/45, *SLPNLS*.

⁹¹ Moss to Lockhart, 4 Jan 15, Judgment in the case of *Chang K'ai t'ai v. Chang Wen t'ai*, appeal of Magistrate's decision, Commissioner, sitting as Judge of the High Court, Acc 4138/45, *SLPNLS*.

⁹² *Ibid.*

⁹³ Burdett to Commissioner (Lockhart), 12 Aug 1920, CO 873/608, quoting from an earlier despatch on the subject.

⁹⁴ CO 841/1.

many cases were reheard as a result of these provisions is not recorded but minutes in a file dealing with the question of amendments to the Ordinance indicate that the number of applications for rehearing were small in comparison with the number of civil cases dealt with.⁹⁵ Some of the reheard cases, mostly cases concerning land, were amongst those reported in the *Herald*.⁹⁶

Despite the small number of applications made under the Rehearings Ordinance, a few years after its promulgation the Senior District Officer, Burdett, expressed misgivings about the Ordinance.⁹⁷ He urged the Commissioner to introduce a rule of court requiring leave in all cases and granting leave only in certain circumstances. New rules of court⁹⁸ which provided, inter alia, that applications for rehearing had to 'state in full the grounds of objection on the part of the applicant to the decision of the Magistrate who had heard the case', were introduced. These rules also imposed fees, allowed conditions to be attached to leave, provided for payment into court of security for costs and other minor matters. The Senior District Officer's further suggestion that the Ordinance should be amended to require the petition to state specific grounds of appeal did not find favour with the Commissioner who thought that the new rules should be tried for a period of time before amendments to the Ordinance were considered.⁹⁹ The Rehearings Ordinance appears to have survived until the end of the lease without amendment.

Mediation

Alongside the courts, the government encouraged the mediation of civil disputes by village headmen or other influential villagers. There were two chief observations about the volume of civil cases: too many trivial disputes were reaching the courts and a proportion of the cases were old disputes disguised as new ones. Mediation was seen as an answer to both these problems. The objective of the government was not

⁹⁵ Burdett to Lockhart, 12 Aug 1920 and Lockhart, 15 Sept 1920: CO 873/608.

⁹⁶ *Ch'i Jih-ts'eng v. Ch'i Tien-chu*, H. M. High Court At Weihaiwei, Bourne J., 29 Aug 1913; *Ts'ung Jun-sheng v. Ts'ung Chia-chi*, Wen Ch'uan T'ang, 3 Sept 1913, Bourne J., (appeal from decision of the Magistrate); *Teng Yueh-hsiang v. Yu Ying-chun*, Wen Ch'uan T'ang, 4 Sept 1913, Bourne J (appeal from decision of the District Magistrate, Moss); all reported in *NCH*, vol. CVIII, no. 2405, 13 Sept 1913, p. 839.

⁹⁷ Burdett to Commissioner (Lockhart), 12 Aug 1920, CO 873/608.

⁹⁸ CO 873/608.

⁹⁹ Burdett, 14 Sept 1920 and Lockhart, 15 Sept 1920, CO 873/608.

only to deflect trivial cases from arriving at the courts but also to resolve disputes with greater finality through what was often referred to as 'peace talking'. As to achieving greater finality, it was believed that, in mediation, neither disputants lost face. In contrast,

a decision of a Court even if absolutely just tends to lead to perpetual feuds between the parties: and the party which lost the case will probably go on bringing it up for years to come in the hope of getting his case revived or a previous judgement reversed.¹⁰⁰

It was also thought that the underlying causes of a dispute might be more easily dealt with. Petitions rarely mentioned the real cause of a dispute.

In encouraging 'peace talking', the government's efforts were focused on the headmen. Mediating village disputes was one of the traditional roles of the headman and the government was keen to encourage the continuation of this function. Opinion amongst officials on their effectiveness in this role was, however, divided. In an early report, Walter, the Government Secretary, was unimpressed, finding them neither 'capable' nor 'influential': 'Over and over again cases have been referred to them to settle and report and the answer has been that they are unable to report and settle.'¹⁰¹ Johnston, however, was a defender of the system, addressing the point about the ineffectiveness of the village headmen by blaming the magistrate for returning to the headmen those cases that he had previously failed to settle and those in which the particular headman had an interest.¹⁰²

It was in part to strengthen mediation that the post of District Headman was introduced in 1906. The government thought that giving a small salary to the district headmen would heighten their sense of responsibility with regard to the settlement of disputes. It was also intended to provide district headmen with prestige in order to lend weight to their decisions, thus promoting the cessation of otherwise ongoing disputes. As discussed earlier, it is entirely possible that the system of village and district headmen suffered from structural tensions, in that those appointed to the posts were seen as agents of the government and thus treated with some suspicion.¹⁰³ Little information is available on the effectiveness of the district headmen in mediating disputes apart from a report of the Acting Magistrate for the South District in 1909

¹⁰⁰ Annual Report for 1909 by the SG, CO873/292.

¹⁰¹ Draft Annual Report for 1902, 1 March 1903, p. 28 [printed version], CO873/97, a file bearing a cover wrongly entitled Weihaiwei Marriage Ordinance.

¹⁰² Report of the SG, Annual Report for 1904, app. 1, CO 873/163.

¹⁰³ See ch. 4, 'Effectiveness of the headmen'.

stating that many of them had kept petty disputes from reaching his court or had helped settle cases which had been begun in the his court.¹⁰⁴

By keeping the cost of litigation low, however, the government unwittingly undermined mediation. Disputes settled through mediation had to be followed by feasts provided by the parties, presided over by the village headman or other influential person.¹⁰⁵ This made mediation more costly than litigation, especially during periods when the cost of living was high.¹⁰⁶

The forgoing discussion has assumed that mediation and litigation were separate and distinct. The differences between the two are beyond the scope of this work but it is observable that, in practice, the boundary between the two was fluid. A case begun in the magistrates' court might be referred to a headman for mediation. Cases which had either not been resolved through mediation or in which one party remained dissatisfied could end up in court. Another point to note is that Johnston and other magistrates sometimes recommended to the parties a settlement along particular lines after hearing preliminary statements from the parties and their witnesses. Such means were felt to have achieved some success - in the sense of a longer-lasting solution.¹⁰⁷

As with those charged with an offence, the vast majority of litigants only experienced the civil justice system at the Magistrates' Courts. Though they were not shy when it came to petitioning the officials again and again, it was the magistrates with whom most litigants would have associated the system of civil justice. As observed earlier, the office of the British magistrate shared with the Chinese district magistrate the combination, in the same person, of both judicial and administrative roles. The point that the British magistrate occupied a position vis-à-vis the inhabitants of his division similar to that of a Chinese district magistrate - the father-mother official (*fumuguan*)

¹⁰⁴ Report on South District during 1908, E. Carpmael, CO 873/280.

¹⁰⁵ See LDNC, 122 - a dispute over a tree for the purpose of making a coffin was settled by the intervention of the neighbours in which the man seeking the tree was eventually given it, but had to provide a feast for those who mediated.

¹⁰⁶ This was thought to have been the case in 1923 when many cases were not settled through mediation.

¹⁰⁷ Report for the South District, Departmental Reports for 1908, CO873/280.

- towards the people in his district was not lost on Johnston. He expressed his role thus:

being in theory the father of his district, [the Magistrate] must not merely hold the balance between his people when they come to him with their quarrels; he must not merely punish the offender and vindicate the cause of the oppressed: he must also instil into the minds of his "children," by word and example, a submissive reverence for the doctrines of the ancient sages, which include proper respect for tradition, a dutiful obedience to all properly-constituted authority, whether in family or in State, and with neighbours and strangers.¹⁰⁸

Likewise, the Chinese inhabitants of Weihaiwei appear to have approached the British magistrate as the equivalent of the Chinese district magistrate they would have known prior to the lease.¹⁰⁹ It is perhaps the similarity in the position and the approach of the magistrates that led the Chinese of the territory to bring their disputes to the British magistrate. Another reason which may account for the popularity of the courts of Weihaiwei is the fact that the system in Weihaiwei offered none of the drawbacks associated with the Chinese civil justice process. For example, petitions could be handed in on any day of the month and all year round; fees are likely to have been lower than the combination of official and unofficial fees payable at the Chinese district magistrate's *yamen*; and long delays were probably not a feature of the system in Weihaiwei.¹¹⁰ Furthermore, magistrates in Weihaiwei were not subject to the pressures under which their Chinese counterparts worked. The British magistrate who made a wrong decision in law might have his decision overturned by the High Court but he did not face the career repercussions which were part of the bureaucratic system in which the Chinese district magistrate worked. Also absent in Weihaiwei was the conceptual opposition to litigation mentioned by John R. Watt in his

¹⁰⁸ LDNC, 122.

¹⁰⁹ In 1905 the Commissioner reported that Johnston had been presented with a scroll by local people on which was inscribed the phrase 'the father and mother of the people': Annual Report for 1904, CO 874/163.

¹¹⁰ Petitions could only be received on six days in each month and then not at all during the busiest of the farming months – the 4th to the 7th months of the lunar calendar: see Rosser H. Brockman, 'Commercial Contract Law in Late Nineteenth-Century Taiwan' in Jerome Cohen, R. Randle Edwards and Fu-mei Chang Chen (eds), *Essays on China's Legal Tradition* (Princeton: Princeton University Press, 1980), 76-136, 92ff. The restriction of certain days of the month is also mentioned in Brennan, 50. There is also no evidence to suggest that litigants in Weihaiwei risked torture, as is suggested for the civil litigation process in China. For proverbial sayings indicating some of the hazards of litigation see Sybille Van der Sprenkel, *Legal Institutions in Manchu China* (London: Athlone Press, 1962), app. 3.

monograph on the late imperial Chinese district magistrate and the inconsistent approach of the government to litigation.¹¹¹

Indeed, in Weihaiwei, the magistrates and the government attended to civil litigation in earnest. It was the magistrates who changed the practical procedures for handing in petitions and made efforts to stamp out bribery. In court, rules of procedure and evidence were adapted to the circumstances of the territory. The government resisted the introduction of petition fees, banned petition writers and opened a second Magistrates' Court in a remote village. The Commissioner passed the Rehearings Ordinance when it was realised that disappointed litigants did not have any practical option but to try to have their cases relitigated.

The question is why the administration of Weihaiwei, whose resources were already stretched, chose to be so involved in the hearing of civil disputes, to the extent of regarding access to justice for the ordinary villager a priority. The answer to this question appears to lie in the realisation that in an administration supported by what was, for most of the lease, a limited police force, the settlement of seemingly petty disputes was necessary. It had been seen how some disputes, if not nipped in the bud, could have festered into larger disputes involving entire villages which threatened the peace of the territory. In 1905, one of the two criminal cases heard in the High Court had resulted from a land dispute between two villages which had been embroiled in litigation. The two principal families of the two villages met at the disputed land and a fight ensued. One man died and nine others were hospitalised for their various injuries. A murder charge was preferred, but later reduced to manslaughter for which the defendant was convicted and imprisoned for one year.¹¹² That same year, two cases of 'stirring up litigation' were recorded.¹¹³ Providing an adequate forum for litigation was also an effective way of keeping in touch with the people of the territory. Another explanation may be the interest in Chinese law and custom of individual magistrates such as Johnston and Walter. The chapter devoted to civil litigation and the numerous references to Chinese law and custom in *Lion*, and the

¹¹¹ Watt, 212, where he describes how officials 'disapproved strongly' of litigation yet 'did not prohibit it'. Watt also points out that the conceptual opposition to litigation was shaped by the sayings of Confucius and others on the grounds that it was a threat to social harmony.

¹¹² Draft Annual Report 1905, Commissioner to Earl of Elgin and Kincardine, Principal SSC, 28 Apr 1906, CO521/9.

¹¹³ *Ibid.*

time and effort he was prepared to put into his court work suggests that this was an area amongst his responsibilities which Johnston found interesting.



15. Liukung Island, looking West, c. 1902.



16. A street within the walled city of Weihai.



17. A postcard sent to an address in Middlesex on 19 May 1911 bearing a Liukung postmark.



18. Postcard showing King's Hotel, Port Edward.

CHAPTER 7

DEALING WITH SUICIDE

It is an old maxim 'hurry no man's cattle' and this applies particularly to the Chinese; as the more you hurry them the less you get from them. However, in looking back at efforts over a ten year period some progress had, it was felt, been achieved. But in this case for the last ten years the Government has been steadily enforcing the report of suicides and the majority of the people have at last understood that the reason for this is the desire to save life.¹

Throughout the period of the lease, the government of Weihaiwei was troubled by the number of suicides occurring in the territory. It regretted the loss of life and instituted measures, including requiring the report of suicides. Despite being remarkably well-informed about the nature of suicide in China, government action was limited to rescuing those who had attempted suicide and encouraging the report of suicide rather than tackling its causes.

Suicide in the territory

Suicide as a social problem was a concern from 1902 at the latest. In that year, the Government Medical Officer reported that a proportion of the cases of poisoning he had treated had been self-inflicted.² In the Annual Report for 1904, three suicides, all of them committed by women, were mentioned. Each of them had swallowed a sulphurous solution obtained by dissolving the heads of matches in water.³ Magistrates thereafter included suicides that came to their attention in the annual returns for police and criminal cases. The graph in Figure 6 below shows a rise in the number of reported suicides, peaking in 1914 before a general falling off for the rest of the lease period, rising again only towards its end.

¹ Report of the District Officer, Departmental Reports for 1911, CO 873/335.

² Annual Report of the Acting Colonial Surgeon, CO 521/4.

³ Annual Report for 1904, CO 873/163.

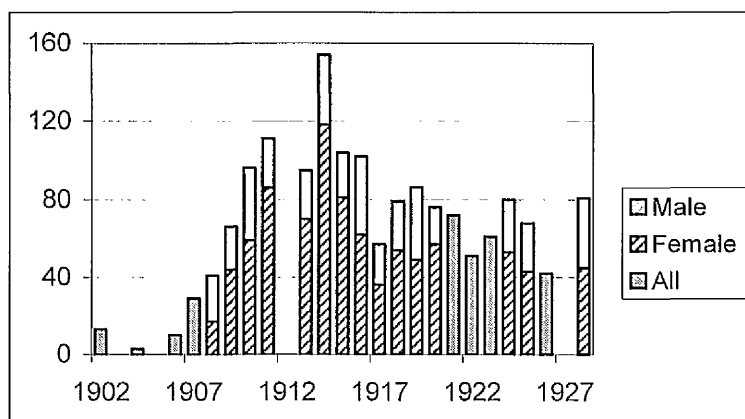


Figure 6. Number of suicides and attempted suicides⁴

As many scholars since Durkheim⁵ have pointed out, suicide statistics need to be used with caution. Douglas, for example, thought suicide statistics unreliable for research into the social meaning of suicide because the process of recording suicides was too greatly affected by differences in medical training and in the definition of suicide applied.⁶ The suicide statistics for Weihaiwei call for a few comments.

1. Under-reporting of suicide

Although the government made the reporting of suicides obligatory, the population of the territory remained reluctant, at least initially, to report such deaths. The prosecutions for failure to report a suicide probably represented only a small fraction of the concealed suicides. It is difficult to determine the degree of under-reporting. The government thought that the real figures for 1909 and 1910, for instance, should have been about 10% higher than the number of cases that came to their notice, but this was no more than a guess. Besides, the rate of under-reporting may not have been constant throughout the period. Given that there was no similar obligation to report a suicide under Qing law, it is entirely possible that the rate of under-reporting was highest in the early years of British occupation, decreasing gradually as the government's exhortation to report suicides became more widely known. In this sense, the District Officer's boast quoted at the start of this chapter was justified.

⁴ The table below shows figures for suicide, collected, with the exception of the figures for 1918 and 1919, from government annual reports.

⁵ E. Durkheim, *Suicide: a study in sociology*, transl. by John A. Spaulding and George Simpson (London: Routledge and Keegan Paul, 1952).

⁶ See Jack D. Douglas, *The Social Meanings of Suicide* (Princeton: Princeton University Press, 1967).

2. Impact of policing

The growth in the size of the police force was undoubtedly a factor affecting the number of suicides recorded.⁷ As the police force expanded and police posts were established in villages far from the territory's main town and administrative capital of Port Edward, the added government surveillance, patchy as it was, would in itself have accounted for some of the increase in the figures. The impact of this expansion on the statistics may have been magnified by the fact that villagers were exhorted to go to the nearest police post upon discovering a suicide. Policing is also relevant to the apparent north-south disparity in the number of suicides. There were at one time, four times as many police posts in the South Division than in the North Division. This almost certainly accounted in good part for the greater number of suicides recorded for the South⁸ even when the uneven distribution of the population is taken into account.⁹ The figures for 1914 for example, show 115 suicides in the South and only 39 in the North Division.

Division	Number of suicides	Rate per 100,000 population	Number of police posts	Estimated population
North	39	78	1	50,000
South	115	115	4	100,000

Figure 7. Suicide statistics for 1914

3. Lack of uniformity in government reports of suicide

The inconsistent practice amongst officials and between years in returning the figures for suicide should also be noted. Apart from a brief period during the 1920s, police and criminal cases were not reported in accordance with a template, making comparisons between years difficult. A few examples suffice. First, the records itemised successful suicides, attempted suicides and cases of failure to report suicides separately, but this was by no means the rule. Second, the degree of detail provided on suicides also varied from one year to the next and from one officer to the next. The

⁷ For the size of the police force and its expansion see Figure 4 in ch. 4 above.

⁸ A similar observation that the presence of a police constable on the beat increased the reporting rates for suicide in England, particularly in the urban areas is made in Olive Anderson, *Suicide in Victorian and Edwardian England* (Oxford: Clarendon Press, 1987), 23.

⁹ The South division had twice the population of the North division.

most detailed reports included, in one case, month by month figures, separated by gender. There was also at least one table in which suicides were broken down with reference to the method used. In general, the returns were more detailed in the last decade of British rule than they were in the first decade. Third, as can be seen from Figure 6, the gender breakdown for the total number of suicides was not always reported. Also missing from the statistics is the age of the victims and their marital status. In *Lion*, Johnston states that the majority of those committing suicide were either young married women or young widows.¹⁰ His estimate that over 90% of suicides were by women is not borne out by the statistics but it prompts the question of whether more female than male suicides were concealed. Fourth, while separate returns were often made for Liukung, the North Division and the South Division, this was not always the case. Between 1906 and 1916 for example, it is possible that figures for only one of the two divisions of the territory were reported. It is also unclear whether the figures for the North Division in every case included suicides committed on the island. Theoretically, the island was a part of the North Division, but because it had its own police court which was visited by the Magistrate for the North Division to hear cases, the police inspector responsible for Liukung usually provided a separate return for police cases heard in this court. Double counting cannot be ruled out. Lastly, it is necessary to take into account increases in population, and the ratios of males to females generally, and also to look at the rate of suicide rather than the raw data of incidents. Unfortunately population data is available only for the years 1911 and 1921, years in which official censuses were taken. We do know from these censuses that the territory had more women than men, accounted for, in the main, by the greater longevity of women and the fact that some men were forced to find employment outside the territory, sometimes quite far away. In looking at Figure 6 above, the growth in population also needs to be taken into account.

The deficiencies of suicide statistics have led some scholars to advise abandoning the use of such statistics altogether. Less extreme sceptics acknowledge that suicide statistics reveal less about suicide than they do about the legal and social processes involved in the production of the statistics but continue to make qualified use of them. Olive Anderson, for example, has pointed out that, in historical research, taking into account the inaccuracies, statistics would still allow 'very marked trends,

¹⁰ *LDNC*, 224.

differences in scale, or relationships'¹¹ to be taken seriously, especially when combined with other corroborating evidence. In the context of the study undertaken here, the officially generated statistics are relevant since the government addressed these statistics (along with other non-statistical information) when determining its policies with regard to suicide. What was apparent to government officials was that women were more prone to suicide than men and that the numbers resorting to suicide peaked in the mid-1910s. Subject to the qualifications mentioned above, two broad observations can still be made from those statistics. First, the greater likelihood of women committing suicide in comparison with men is in conformity with the pattern for Chinese societies¹² but in contrast with the pattern known or assumed in the West.¹³ Second, the general pattern of the total number of suicides falling off after the 1910s is consistent with that presented by Margery Wolf in her study of suicide in Taiwan.¹⁴

Attempts at understanding suicide in China

The terrible waste of life through suicide was often bemoaned in government annual reports and other internal memoranda. Some suicides appeared to have been committed 'in a fit of pique',¹⁵ triggered by incidents as mundane as an argument with a husband or mother-in-law.¹⁶ Although there was a general sense of bewilderment that self-destruction was so often resorted to, attempts were made to locate the deeper causes of suicide. 'The friction of daily life in China, the monotony of the long laborious daily round with its narrow and unlovely outlook on life';¹⁷ dissatisfaction with married life leading to extra-marital romantic attachments;¹⁸ in the case of men,

¹¹ Olive Anderson, 14.

¹² See the writings of J. Dyer Ball, discussed later in this article.

¹³ Most nineteenth-century commentators on suicide claimed that male suicide was three or four times more common than female suicide.

¹⁴ Margery Wolf, 'Women and Suicide in China' in Margery Wolf and Roxane Witke (eds), *Women in Chinese Society* (Stanford: Stanford University Press, 1975).

¹⁵ Annual Report for 1906, CO 873/239.

¹⁶ Annual Report for 1906, CO 873/239.

¹⁷ Report of the SG, Annual Report for 1906, CO 873/239.

¹⁸ Report of the Junior District Officer, Annual Reports for 1920, CO 873/627.

the inability to repay debts;¹⁹ and pressure put on young widows to remarry were all canvassed as possibilities. Intense grief was not ruled out. Johnston wrote of four suicides which he thought had been induced by grief. Two of these involved a widow²⁰ while the third was the suicide of a young widower. In the fourth case a mother grieving for her daughter committed suicide.²¹ Another contributing factor was thought to be the lack of retribution for suicide in the religious beliefs of the people in the territory. At worst, those who committed suicide became wandering spirits who could only find rest by prompting someone else to commit suicide. Thus villagers in Weihaiwei expected a suicide within two years of a previous unexplained suicide.²²

Other remarks made by Johnston on the subject of suicide in China show that he was aware that suicide and attempted suicide were not offences.²³ He knew of the imperial edicts granting honour to suicides and of the building of monuments to commemorate widows who remained chaste or who chose to accompany their husbands in death.²⁴ In the leased territory of Weihaiwei itself chaste widows were honoured by the people. In one such case, the government added its own congratulations to those concerned.²⁵ Johnston's understanding took into account the historical roots of suicide in Chinese society²⁶ and he certainly understood that suicide could be a way of bringing trouble on others,²⁷ especially when a married woman committed suicide. He mentioned how, even if in her life a married woman's natal family paid her scant attention, in her suspicious death they would be anxious to show that 'blood is thicker than water.'²⁸ The death might be brought to the attention of the

¹⁹ A peak in male suicide figures just before Chinese New Year was observed by Johnston, this being the customary time for the repayment of loans: Report of the District Officer, Departmental Reports for 1911, CO 873/335.

²⁰ *LDNC*, 244-5.

²¹ *Ibid.*, 247-8.

²² *Ibid.*, 222.

²³ *Ibid.*, 223.

²⁴ *Ibid.*, 223.

²⁵ In 1920 the Senior District Officer suggested to the Commissioner that the government send formal letters of congratulation to two women honoured as virtuous widows in the village of Meng-Chia-Chuang after Inspector Jennings had reported that a village ceremony had taken place: CO 873/590.

²⁶ *LDNC*, 225.

²⁷ See the 'doorstep' suicide discussed in the text below.

²⁸ *LDNC*, 210.

Magistrate or at the very least they would insist that the other family held a sufficiently lavish funeral for their daughter.²⁹

Johnston and others also tried to gauge public opinion on suicide and concluded that, with some exceptions, the act was not condemned by the community. The exceptions were when a young woman committed suicide without providing her husband with an heir or while she was still nursing an infant.³⁰ On widow suicide he summed it up thus:

A woman undoubtedly performs a meritorious act in following her husband to the spirit-world, but her relations are fully justified in preventing her, and indeed are obliged to prevent her, from throwing away her life if they know of or guess her intention. If her husband has died leaving to her the care of his aged parents who have no other daughters-in-law to look after them, or if she has young children who require her care, she does wrong to commit suicide, though the children are sometimes ignored. The highest praise is reserved for a woman who temporarily refrains from destroying herself in order that she may devote herself to her husband's parents and her own offspring, but who, when they are dead or independent of her care, then fulfils her original desire and sacrifices herself to the spirit of her dead husband.³¹

The absence, apart from the exceptions mentioned above, of societal condemnation should not be read as a suggestion that family members encouraged or supported the act of suicide, or that individual life was dispensable. As indicated above, a person determined to commit suicide usually had to carry out the act before his or her plans were discovered.

Johnston further understood that a suicide was often committed in such a manner as to point the finger at the oppressor. He mentioned a 'doorstep' suicide reported by a man whose younger brother had committed suicide at the home of his wife's father because his wife had ill-treated him. The court dismissed the petition of the older brother for the right to have the widow remarried, keeping the proceeds as solatium, but ordered the widow's natal family to bear the funeral expenses, a solution which seemed to Johnston to satisfy public opinion.³²

²⁹ *Ibid.*, 210.

³⁰ District Officer's Report, Departmental Reports for the year 1907, CO 873/265.

³¹ *LDNC*, 225.

³² *Ibid.*, 209.

Published materials on suicide

It is almost unnecessary to mention that Lockhart, Johnston and other key officials had studied the major works on China available at the time. In the case of Johnston and Lockhart, both men took an interest in the social and religious life of the Chinese beyond that called for by duty. Amongst the jottings made by Lockhart in his private notebooks are references to J. Dyer Ball's *Things Chinese*.³³ In this work's short section on suicide, Ball notes that most suicides were committed by women and summarises what he saw as the causes of suicide 'particular to the Chinese'.³⁴ Although his list of causes may lack refinement by the standards of today's scholarship on suicide in China, nonetheless Ball's summary represents the assumptions and conclusions on the subject at the time. He mentions the polygamous nature of Chinese marriages and states that being replaced in the affections of a husband or ill treated by a more senior woman in the household were frequent causes of suicide. Ball saw that suicide was a marriage avoidance strategy amongst young women faced with the potentially polygamous nature of marriage. The second cause he identifies is the practice of a form of *sati* amongst the Chinese or a refusal of the widow to go on living after the death of her husband. Particular mention was made of the practice of widows in the Fuzhou region jumping off bridges. The third and fourth causes were the lack of deterrence in Buddhism against the act of suicide and the 'slight esteem in which human life is held', while the final cause was the revenge that could be achieved through a well-planned suicide:

Ghosts to annoy the man; the necessity of purchasing a coffin at least, and trying to hush up the matter with the relatives by money freely given, the dangers of squeezes from official underlings and of the interference of the officials themselves ... and lastly, the trouble which may be brought by his enemy in a future state of existence - these all render such a mode of revenge one of the most effective that can be taken.³⁵

Marriages in Weihaiwei were rarely plural, and it is thus not surprising that this did not feature in the thinking of Johnston and others when it came to suicide in the territory. Ball's point about suicide by young women to avoid marriage was also of little application to Weihaiwei. Although there may have been individuals desirous

³³ J. Dyer Ball, *Things Chinese* (London: Sampson Low, Marston, 1892) Suicide was often encountered by Christian missionaries in China: see Adele Fielde, *Pagoda Shadows* (Boston: Corthell, 1884), especially the biographies of women in chs XIX and XXVIII.

³⁴ J. Dyer Ball, *Things Chinese*, 5th edn rev. by E. C. Werner (Shanghai: Kelly and Walsh, 1925), 622.

³⁵ *Ibid.*, 624.

of avoiding marriage, this part of China, unlike other parts, did not experience marriage resistance movements.³⁶

In Qing law, suicide was not without consequence. The focus of the law, however, was not so much on the person who had committed suicide but on the person who had instigated it. It was an offence for a person, with a view to accomplishing an objective such as a marriage, repayment of a debt or the transfer of property, to make violent or fearful threats which alarmed another to the extent the person threatened or alarmed took his own life.³⁷ There was no provision in the Qing penal code - the *Da Qing Lu Li* - which made suicide an offence. The cases involving suicide discussed in the 19th century work on Qing criminal law by Alabaster³⁸ do not show the suicide's corpse, estate or family suffering any legal consequences for the suicide.³⁹ Neither do these cases show punishment ordered against a person for attempting suicide. Instead, the examples demonstrate how, in some situations involving a suicide, a person could be found to be complicit in a murder. Alabaster suggests that responsibility for the suicide in such cases is to be distinguished from the offence of causing suicide by violent or fearful threats. Thus looking on without trying to prevent a suicide and assisting in or participating in a suicide pact was punishable. Later scholarship on Qing criminal law also suggests that these acts or omissions were apparently treated as instances of complicity in self-murder.⁴⁰ Although there is no suggestion that suicide was a criminal offence, in these instances at least, suicide was considered self-murder.⁴¹

³⁶ See for instance, the study of marriage resistance and delayed transfer marriages in Southern China by Janice E. Stockard, *Daughters of the Canton Delta* (Hong Kong: Hong Kong University Press, 1992).

³⁷ Sir George Thomas Staunton, *Ta Tsing Leu Lee* (London: T. Cadell and W. Davies, 1810), 321.

³⁸ Alabaster, *Notes and Commentaries on Chinese Criminal Law and Cognate Topics* (Taipei: Ch'eng-Wen, 1968), 304-307. For first publication details in 1899 see bibliography.

³⁹ *Ibid.*, 304-307.

⁴⁰ See the cases discussed in M.J. Meijer, *Murder and Adultery in Late Imperial China* (Leiden: E.J. Brill, 1991), 20-21. See also M.J. Meijer, 'Criminal Responsibility for the Suicide of Parents in Ch'ing Law' in Wilt L. Idema (ed.), *Leyden Studies in Sinology* (Leiden: E.J. Brill, 1981), 109-137.

⁴¹ After the fall of the Qing dynasty, the Republican Government authorised the continuation of laws previously in force and the Provisional Criminal Code on 10 March 1912 subject to the avoidance of laws which were repugnant to the republican form of government. In 1923, the following article was announced: 'whoever instigates any person to commit suicide, or takes the life of any person with his consent, shall be punished with imprisonment for a period from the 2nd to the 4th degree [from 1-10 years]. Whoever aids any person to commit suicide, or takes the life of any person at his request, shall be punished with imprisonment for a period from the 3rd to the 5th degree [3-15 years]. Whoever commits any offence under this Article in consequence of an agreement made with the deceased to die together may be exempted from punishment': art. 320 of the Provisional Criminal Code of the

Amongst the works on suicide in imperial China written decades after the end of British rule in Weihaiwei is a short but often cited work by Hsieh and Spence.⁴² In it, classical literature, historical, and legal sources are surveyed before concluding that suicide was not in itself a deviant act. It was neither unlawful nor socially censured. Indeed, suicide had received state encouragement⁴³ from Ming times, if not earlier.

The historical sources demonstrated that suicide had begun as a public act of loyalty owed by men to a particular dynasty. When a dynasty came to a close, some men committed suicide to avoid transferring their loyalties to the succeeding dynasty. This same behaviour was later seen in the relationship between a master and servant and, later still, became a part of the loyalty owed by a widow to her dead husband. Such loyalty included maintaining and defending a chaste widowhood,⁴⁴ if necessary, by committing suicide.

Although widow chastity was an ideal shared by ordinary people,⁴⁵ for the poor, however, it was rarely viable. The added incentives to remain a chaste widow provided by the widow's property rights in Ming and Qing laws⁴⁶ were lessened considerably if there was little or no property over which rights could be exercised. Moreover, poor widows often remarried in contravention of the ban on remarriage during the three-year mourning period⁴⁷ when liquidation of their dead husband's debts was an economic imperative.⁴⁸ Magistrates often treated such widows with leniency by reading into the widow's actions the motive of honouring their deceased

Republic of China, published by the Commission on Extraterritoriality, Peking, 1923. Note how this article continued the instigator emphasis and other aspects of Qing law.

⁴² A.C.K. Hsieh and J. Spence, 'Suicide and the Family in Pre-modern Chinese Society' in Arthur Kleinman and Tsung-yi Lin (eds), *Normal and Abnormal Behavior in Chinese Culture*, 2nd edn (Dordrecht: Reidel, 1981), 29-47. For a more detailed study of law, particularly property law and suicide see Matthew H. Sommer, *Sex, Law, and Society in Late Imperial China* (Stanford: Stanford University Press, 2000), ch. 5. Some of the most recent scholarship on women and suicide in Ming and Qing times is published in Paul S. Ropp *et al* (eds), *Passionate Women* (Leiden: E.J. Brill, 2001).

⁴³ Hsieh and Spence, 45.

⁴⁴ For a work explaining the development of the cult of widow chastity from the Sui dynasty until the Qing dynasty see M. Elvin, 'Female Virtue and the State in China', *Past and Present*, 1984, vol. 104, 111-152.

⁴⁵ 'Democratization' of female virtue and a spread of its popularity occurred during the Ming and Qing periods, encouraged by a lowering of the threshold requirements for those seeking state recognition of virtuous widowhood: see Elvin, 123ff.

⁴⁶ See discussion in text below.

⁴⁷ Sir George Thomas Staunton, *Ta Tsing Leu Li* (London, T. Cadell and W. Davies, 1810), 112-113 and William C. Jones, *The Great Qing Code* (Oxford: Clarendon Press, 1994), 126-127.

⁴⁸ Sommer, 184.

husbands.⁴⁹ The relevant Qing sub-statute provided that, if a widow without a son maintained her chastity, she should receive her husband's share of the property, a son and heir to her husband being later adopted by the family. If she remarried, her first husband's family was authorised to determine the disposition of the widow's property and her original dowry.⁵⁰ As Sommer cautions,

[w]e need not ascribe any great evil to in-laws who eyed a young widow's property; they simply wished she would begin a new life elsewhere, so that their brother's assets could improve their own standard of living, however marginally ...⁵¹

This was often the case where land had been splintered into small plots as a result of the equal division of estates amongst all sons, as was normally required in Chinese law. Forcing a widow to remarry was a crime⁵² but, if the widow could be persuaded to remarry, no crime was committed.

Suicide is relevant in this context because the penalties for forcing remarriage were structured in such a way that, by committing suicide rather than maiming herself, the widow ensured that the severest of penalties would be applied to those who forced her to remarry.⁵³ This hierarchy of penalties and the widow's own desire to remain chaste provided two dimensions to the act of suicide where it was committed in response to pressure to remarry.

The inclusion of the law as a source of data by Hsieh and Spence and the focus on law in the study by Sommer contribute significant insight into suicide. As mentioned earlier, suicide was not an offence; putting pressure on a person, with the result that he is driven to take his own life, was. This explains why dying on the doorstep of an enemy formed a part of an individual's 'interpersonal strategy'.⁵⁴ It also explains why a woman, lacking avenues to pursue her claims during her life, was more likely to resort to suicide than a man was. In suicide, she found a way of bringing trouble upon her in-laws who may have been ill-treating her or who may have been plotting to block her aspirations to become a chaste widow.

⁴⁹ *Ibid.*, 186-187.

⁵⁰ G. Jamieson, *Chinese Family and Commercial Law* (Hong Kong: Vetch & Lee, 1970), 14.

⁵¹ Sommer, 167.

⁵² *Ibid.*, 113 and Jamieson, 36.

⁵³ Jamieson, 36-37; Staunton, 113, 321 and Jones, 127, 282.

⁵⁴ Hsieh and Spence, 16.

In comparing these relatively recent findings with the thoughts of those in Weihaiwei on the subject of suicide, the extent of the government's collective understanding is remarkable. Gathering together the observations made by Johnston and other government officials, it is observable that the fact that suicide was neither unlawful nor socially censured was understood. They further understood that suicide had a particular history in China, that more women than men resorted to suicide, that suicide was an important interpersonal strategy, and that remarriage of a widow was a major cause of suicide.

In the rest of this chapter, the government's response to suicide in Weihaiwei is explored. The regret at the number of lives lost through suicide led the government to introduce various measures. Yet, the scope of government intervention was limited. Why this should have been so given the authorities' remarkably full understanding of suicide in China is also addressed.

Suicide and the law in Weihaiwei

The authorities in Weihaiwei reported that they did not treat suicide and attempted suicide as crimes.⁵⁵ This was explained as a policy adopted in deference to Chinese law, wherein, it was assumed, suicide was not a crime. The Chinese residents of Weihaiwei had, after all, been used to Chinese law. Thus, it would not be fair or appropriate, it was implied, to treat suicide as a crime. In Weihaiwei, attempted suicides were sometimes followed by an inquiry which could result in the would-be suicide being ordered to provide security against repetition, usually by supplying one or more guarantors. Magistrates thought that ordering security was an effective measure, appealing, so they assumed, to the Chinese notion of 'face'.⁵⁶ We also know that more frequent than the action taken against those who had attempted suicide was action taken against village headmen for failure to report a suicide. By 1906, at the latest, village headmen were obliged by the government to report suicides and threatened with fines or imprisonment for not reporting or concealing a suicide in their village. The obligation to report a suicide was probably imposed on all, not just headmen, though prosecutions of headmen were a more frequent occurrence than the prosecution of ordinary villagers. The government acted with a measure of sensitivity

⁵⁵ District Officer's Report, South Division, Annual Reports for 1914, CO 873/435.

⁵⁶ District Officer's Report, Departmental Reports for the Year 1911, CO 873/335.

and restraint in its efforts to encourage the reporting of suicides. Post-mortem examinations were held only in cases of suspicious death, as it was felt that there would be even greater reluctance to report suicides if post-mortems were held as a matter of course.⁵⁷ Where the suicide was successfully rescued, similar restraint was applied. In 1911, for instance, inquiries were held in only thirteen of the thirty-two cases of successful rescues.⁵⁸ Another example of restraint occurred in relation to the failure of headmen to report suicides. The magistrates felt that dealing with headmen severely might be counter-productive.⁵⁹

During the time of the Weihaiwei lease, suicide was a felony in English law if committed deliberately by a person in his right mind. Attempted suicide was also a crime.⁶⁰ Whilst forfeiture of property had ceased to be a penalty for felonies in 1870,⁶¹ a finding of suicide continued to have some legal consequences. The fact that suicide was still a crime was taken into consideration in the public policy rule that a criminal should not profit from his own crime.⁶² Those who attempted suicide could be prosecuted and, if found guilty, fined, imprisoned,⁶³ put on probation or discharged with or without conditions. In practice, unless the would-be suicide was a known criminal, magistrates in England exercised their discretion, using binding over orders or releasing persons, particularly young women, to the care of relatives after extracting a promise not to repeat the attempt. Information on the practice of magistrates in metropolitan areas showed that those who attempted suicide were usually remanded for a week during which they were visited by the prison chaplain and surgeon.⁶⁴ Approving the practice of the Metropolitan Police and urging the same on all police forces the Home Office directed, in 1921, that attempted suicide should

⁵⁷ Report of the SG, Annual Report for 1906, CO 873/239. If forensic investigations were required, samples were sent to Shanghai to be examined. See for instance *R. v Wang and Hsieh* (1912), discussed at length in ch. 5. Magistrates acting as coroners and the government medical officers may have known of H.A. Giles, 'The Hsi Yuan Lu, or Instructions to Coroners', *China Review*, 1874, vol. 3, 159-172, in which, inter alia, the coroner is given instructions on distinguishing a suicide from an unlawful killing.

⁵⁸ Report of the District Officer, Departmental Reports for 1911, CO 873/335.

⁵⁹ *Ibid.*

⁶⁰ Suicide and attempted suicide remained crimes until abolished by the Suicide Act, 1961.

⁶¹ 33 and 34 Vict. c. 23.

⁶² *Beresford v Royal Insurance* [1938] A.C. 586, HL and *Gray v Barr* [1971] 2 Q.B. 554, in which the Court of Appeal stated that public policy was not static and that it could march ahead of criminal law.

⁶³ See *Rex v Crisp* 7 C.A.R. 173 (1912) and *Rex v Mann* [1914] 2 K.B. 107, both mentioned in Glanville Williams, *The Sanctity of Life and the Criminal Law* (London: Faber & Faber, 1958), 249.

⁶⁴ See Olive Anderson, 295.

only be prosecuted exceptionally.⁶⁵ In ecclesiastical law, the suicide could be buried with other protestant liturgy but not the full Church of England burial rites. Coroners' juries had long been avoiding the consequences of secular and ecclesiastical law by returning a verdict of suicide whilst temporarily insane.

Although the action taken by the authorities in Weihaiwei against those who attempted suicide is recorded, the position of suicide in law was never clearly articulated. Furthermore, no discussion with the Crown Advocate or amongst the officials in the territory appears to have taken place. The action taken is consistent with two possibilities. First, under article 19 of the Order, the authorities rejected the application of English law on suicide on the grounds that the circumstances of Weihaiwei did not admit such law, at least with regard to the Chinese of the territory. This would have been consistent with the decision of the Privy Council in *Advocate-General of Bengal v. Ranee Surnomoye Dossee* (1863),⁶⁶ in which Lord Kingsdown recognised that suicide in non-Christian countries was an act which derived its moral character from the circumstances in which the act was committed so that sometimes it was 'blameable', whilst in other circumstances it was 'justifiable', 'meritorious', 'or even an act of positive duty.'⁶⁷ The only difficulty with this possibility is that attempted suicide would likewise not have been a crime. The prosecution of attempted suicide would have had to be founded on some other law. There was certainly no ordinance making attempted suicide an offence.

The second possibility is that English law on suicide was not rejected. Suicide and attempted suicide were crimes in Weihaiwei but enforcement of the law was carried out selectively. Enforcing the law in the case of successful suicides would not, after all, have amounted to much. Strictly speaking, suicide would have had to have been recorded along with other crimes. As mentioned above, suicide figures appeared in the returns made for 'police and criminal cases.' In practice, there were no consequences for the estate of the deceased. The public policy cognisance of suicide was not likely to have had any practical application in Weihaiwei and the withholding of Church of England burial rites was hardly applicable in a territory with few

⁶⁵ This circular is mentioned in Glanville Williams, 249.

⁶⁶ [1963] 2 Moore NS 22.

⁶⁷ *Ibid.*, at 64.

converts to Christianity.⁶⁸ Selective enforcement is more clearly observable in relation to attempted suicides. The records do not show any persons being sentenced to imprisonment for attempted suicide but, as mentioned above, some would-be suicides did end up in court.

The second of the two possibilities provides a tidier fit for the policy and practice of the authorities, justifying as it does, the prosecution, as mentioned above, of those who attempted suicide. It remains accurate to say that the authorities gave little thought to the legal intricacies; it is most likely that the Weihaiwei authorities were not aware that their policy aims could have been achieved through the application rather than the rejection of English law.

Rescue efforts

Beyond using the law to deter further suicide attempts and to encourage the reporting of suicides, the government instituted preventative measures through public education, instructing the police in life-saving techniques and the employment of a medical assistant.

1. Educating the villager and training the police

Villagers were issued with simple instructions on how to deal with suicide attempted by 'the usual methods in vogue at the time',⁶⁹ namely poisoning by arsenic, opium or heads of matches dissolved in water and hanging by rope. They were told to go to the nearest police post upon discovering a suicide. This was important in that the police had been trained in resuscitation techniques and quantities of emetics were kept in the police posts. The government thought that their notices in simple terms on what to do in the case of poisoning had been effective on at least a few occasions.⁷⁰ One of the police inspectors was able to report that 23 lives were saved in 1914, many of these as a consequence of a villager going to the nearest police post for an emetic.⁷¹

⁶⁸ Lord Kingsdown made this point in relation to Hindus and Muslims in *Adv.-Gen. of Bengal v Ranee Surnomoye Dossee* (1863), *Ibid.*, at 63.

⁶⁹ Report of the SG, Departmental Reports for the year 1908, CO 873/280.

⁷⁰ Report of the SG, Departmental Reports for 1909, CO 873/292.

⁷¹ 11 Jan 1915, Report by Inspector Whittaker, Annual Reports for 1914, CO 873/435.

2. Medical Assistance

In May 1911, the government increased its efforts by appointing a medical assistant, one Mr Ma, at a newly established hospital in Wen-ch'üan-tang, the town in which the Senior District Officer resided. Suicide was high on the list of Ma's priorities and villagers were duly informed of his appointment and role. Ma had some twenty years experience in medical work at an American missionary hospital in Tsinan. Prior to the establishment of the Wen-ch'üan-tang hospital, he had already acquired a reputation in the south-eastern extremes of the territory for his energy in suicide rescue work. It would seem that both Ma and the government were anxious that most of his energies be spent on saving lives rather than in treating the sick. When the hospital proved popular, a form of means testing for drugs dispensed to patients was introduced on Ma's suggestion. The idea was to deter the mildly ill so as to preserve enough time to attend to attempted suicides. That year alone, Ma was responsible for saving 32 of the 35 suicide attempts reported in time. This was a large increase from the year before his arrival when only ten lives were saved. Yet greater success in saving lives was anticipated with the decrease in the use of rope and its replacement by matches, a trend that was already noticeable. On average, death from drinking match heads took ten days and provided greater opportunity for rescue. With Ma's arrival, the government repeated its warning to headmen of severe consequences if they failed to report suicides and attempted suicides, particularly those from poisoning which stood the best chance of reversal, if reported in time. By the end of 1911, there were two convictions for failure to call for medical assistance on discovery of a suicide attempt.⁷² When Ma died several years later, the government erected a monument to honour his work.⁷³

Beyond reporting and rescue

The measures discussed so far were aimed at either encouraging the reporting or the rescue of suicides. Beyond these efforts, the government's record was unimpressive. As can be glimpsed in the sections which follow, little was done to alter the social conditions in which women in Weihaiwei found it necessary to resort to suicide.

⁷² The source for all of the forgoing on the work of Mr Ma is the Report of the District Officer, Departmental Reports for the Year 1911, CO 873/335.

⁷³ Johnston to Lockhart, 9 Dec 1917, *SLPNLS*, vol. 10.

There was, initially, some concern for the plight of widows but the discussion amongst the officers of the government became mired in the difficulties of distinguishing between what was legitimate and what was not under Chinese law and custom. Progressive policies in the area of education and the social custom of foot-binding might have empowered women and reduced the incidence of suicide. In both, government intervention was negligible.

1. Protecting women

The Protection of Women and Girls Ordinance, 1905,⁷⁴ made it an offence to traffic in women for the purposes of prostitution and slavery. One of its sections, section 26, made it a crime to 'by force, take away or detain against her will any woman with the intent to marry or cause her to be married'. It was soon after this Ordinance had been passed that the Government Secretary, Walter, acting on information received from a district headman on the common practice of families remarrying their widows, usually against the widow's wishes, suggested to the Commissioner that a proclamation should be drafted on the subject of the remarriage of widows.⁷⁵ Taking the view that such a practice should not be tolerated, the Commissioner gave instructions for a proclamation to be drafted.⁷⁶ Unfortunately, the file remained dormant for over three years until Walter raised the question again, this time with Johnston.⁷⁷ Walter doubted the correctness, from the point of view of what was permitted under Qing law, of a prohibition on the selling of widows in remarriage since he understood that the family of the deceased husband probably had a right to make the marriage contract and to receive money from the transaction. Cases of widow remarriage were also likely to vary in their facts so that no single rule against it was likely to be effective. The problem of distinguishing between transactions involving women that could be tolerated and those that could not, along with the difficulties in establishing consent in the context of a patriarchal family system in China, are discussed further below. Although laws which contravened Chinese law and custom could be passed under the Order in Council, what is apparent from this file is that there was a desire to respect the traditional practices of the Chinese and to ensure that such practices were not

⁷⁴ Ord. 5 of 1905, CO 841/1.

⁷⁵ Walter to Lockhart, 14 June 1906, CO 873/223.

⁷⁶ Lockhart to Walter, 14 June 1906, CO 873/223.

⁷⁷ Walter to Johnston, 21 Jan 1910, CO 873/233.

made offences without very good reasons. Johnston agreed that no rule was needed for the reason that the Protection of Women and Girls Ordinance, with its section 26, was in existence.⁷⁸ The limits of section 26 soon became apparent.

Although detailed information on prosecutions brought under the Women and Girls Ordinance is not available, it is clear that section 26 posed some problems. In particular, detention or removal by force had to be established. As Walter noted, a widow who had been ill-treated by her in-laws often consented to a remarriage on the basis that 'escaping from the frying pan into the fire would be welcome'.⁷⁹ The requirement of forced detention was equally a barrier to successful prosecution in other situations, including those where a stranger, rather than the family of the widow's deceased husband, was accused of selling the woman. In *R. v. Pui Fu Ko*,⁸⁰ the defendant was detained for selling a widow to a man in search of a wife. Prior to this transaction, the widow had been offered to, and refused by, another man. As far as can be ascertained from the records, the woman was not at any time held against her will. There was, in fact, evidence that she was happy with the arrangement. Since she was not trafficked for prostitution nor forced into the marriage, the Protection of Women and Girls Ordinance could not be used.⁸¹ Officers of the government found this unsatisfactory and were determined to stamp out what they characterised as a 'bartering of human flesh' where women were sold 'like so many cows'.⁸² Johnston's view was expressed in a minute to the Acting Commissioner:

... it seems extraordinary that there is no British law under which we can punish men who hawk strange women (that is, women with whom they are connected by no bonds of relationship or family friendship) round the Territory for sale to the highest bidder: or that such men can escape all punishment if only the woman in question can be persuaded to say that she *does not mind* being hawked about and offered for sale.⁸³

The Crown Advocate had earlier advised that there was no offence for which the defendant could be prosecuted since the objective was not prostitution. The detention by force, required under section 26 of the Protection of Women and Girls

⁷⁸ Johnston to Walter, 24 Jan 1910, CO 873/233.

⁷⁹ Walter to Commissioner, 14 June 1906, CO 873/223.

⁸⁰ Unreported. The source of these facts is a minute in CO 873/287.

⁸¹ Another provision which might have been considered similarly required forcible taking or detention and the intention to sell the detained person or as a ransom: Offences Against the Person Ordinance, 1905, s. 44.

⁸² Walter to Wilkinson, undated, CO 873/287.

⁸³ Johnston to Walter, 11 Aug 1909, CO 873/287.

Ordinance, was also absent from the facts of the case. In addition, he could not see how the case of *Puin* involved anything other than concubinage and warned against giving too much weight to the fact that money changed hands or to the presence of a third party who received money for his services. Money, wrote the Crown Advocate, changed hands even in legitimate marriages.⁸⁴

Finding this unsatisfactory and being determined to convict the defendant, the opinion of the Chinese magistrate of the contiguous district of Wen-teng was sought. His view was that, if the activity in *Puin* had occurred in Chinese jurisdiction, it would have been punishable.⁸⁵ The reply received from the Magistrate of Wen-teng strengthened the resolve of Johnston and Walter to prosecute and provided a moral justification for taking action against Puin. Since there was no specific law in Weihaiwei upon which a charge could be brought, the defendant was banished from the territory under section 4(1) of the Banishment and Conditional Pardons Ordinance, 1905,⁸⁶ on the grounds of being a threat to the peace of the territory. Even with the difficulties experienced in this case, legislation was not pursued. Instead, a case by case approach was recommended by the Government Secretary.⁸⁷

Where the facts of the case provided evidence of forced detention and the intention to sell the woman into prostitution, prosecution under the Protection of Women and Girls Ordinance was more straightforward. In *R. v Wang and Liu* (1915)⁸⁸ the defendants were arrested by the police near a village on the border after the police became suspicious of the passengers inside the defendants' mule cart. In the cart were two women from Peking and two young girls. The women, who had not expected to be sold, claimed Liu had duped them. They asked to be released and, at the expense of the government, were put on a steamer bound for Tientsin. It was not clear whether the women were to be sold as wives or as prostitutes. The girls, whose stories did not emerge coherently except for the fact that they were from Peking or near Peking, were delivered into the care of a charitable institution.⁸⁹ Both defendants

⁸⁴ Wilkinson to Walter, 20 July 1909, CO 873/287.

⁸⁵ Johnston to Walter, 11 Aug 1909, CO 873/287.

⁸⁶ Ord. 6 of 1905 as amended by Ord. 3 of 1906, both in CO 841/1.

⁸⁷ Walter to Johnston, 20 Jan 1910, CO 873/287.

⁸⁸ Unreported but the facts are given in enc. to Commissioner to Combe, Acting Consul, Chefoo, 11 Aug 1916, CO 873/480.

⁸⁹ For the relevant powers of the SG for the removal of women and girls, see ss 34-36 of the Protection of Women and Girls Ordinance, 1905, CO 841/1.

were convicted of trafficking women, at least one of them being sentenced to six months imprisonment. The defendants were almost certainly charged with offences under the Women and Girls Protection Ordinance.⁹⁰

These cases show that the Protection of Women and Girls Ordinance, with its requirements of either prostitution or forced detention was too narrow in scope to cover the activity or activities the authorities were keen to stamp out. Where Johnston was concerned, both *Puin* and *Wang and Liu* were cases of trafficking of women by a broker for the purposes of selling them as wives, prostitutes or possibly as slave girls. The last of these were girls from destitute families given in adoption to families of means. Their adoptive families usually married them off when they reached marriageable age but, during their childhood, many were treated as domestic servants.⁹¹ Both *Puin* and *Wang and Liu* involved action against brokers who did not seem to have been engaged by a family seeking the arrangement of a marriage. The fact that some of these women might have ended up in the hands of a broker as a result of being sold by their families or with the woman's collusion was not raised. If it had been raised, the legal complexities would have multiplied and the magistrates in Weihaiwei might have found it less easy, in effect, to apply Qing penal law.

In their discussion of the problem, it appears that the British authorities were unable to emerge from the intricacies of consent and voluntarism and to distinguish legitimate traditional social practices from offences. Nor were they able to get to the point where they could distinguish between traditional social practices that they were willing to tolerate and those they would not condone. The Crown Advocate's caution that the fact of money changing hands was not indicative of a socially undesirable practice must have been obvious to most of the officials in Weihaiwei who had any

⁹⁰ The offence is not recorded in the file.

⁹¹ Slave-girls do not appear to have been discussed between the officials, but there were some in Weihaiwei in the households of the prosperous few. See *LDNC*, 215, at which Johnston refers to the 'so-called slaves ... generally brought in as young girls from poor parents and guardians for the purposes of domestic service'. His almost positive account of the condition of such slave-girls suggests that at least up till the time of the publication of *LDNC*, the practice was not perceived by the government as a social evil. Johnston relates the facts of a civil dispute between a petitioner who had inherited a slave-girl from his adoptive mother. The girl had been loaned by her mistress to a family who subsequently had her betrothed to one of its sons. The petitioner sought the return of the girl. The court allowed the girl to decide to whom she should go and she elected to stay with the family she had been loaned to. There is considerable literature on a very similar, if not identical, institution in southern China and elsewhere where such girls were referred to by the Cantonese term *mui tsai*. See Maria Jaschok, *Concubines and Bondservants* (Hong Kong: Oxford University Press, 1988), Suzanne Miers, 'Mui Tsai Through the Eyes of the Victim' and M. Jashok, 'Chinese "Slave" Girls in Yunnan-Fu' both in Maria Jaschok and Suzanne Miers (eds), *Women and Chinese Patriarchy* (London: Zed Books, 1994).

contact with the Chinese population. Walter's earlier mentioned views, on the difficulty of establishing lack of consent, hint at the difficulties of defining the offensive activity. Indeed, as Elizabeth Sinn reminds us, within the patriarchal nature of Chinese society, children could be sold by their fathers, and wives, concubines and daughters could be temporarily pledged to others.⁹² Women could share in this understanding. In this situation a test based on 'consent' is unlikely to have been useful. The most extreme case is that of a woman who submits to a transfer because in her understanding this is what she must do. Less extreme may be the woman who colludes in the sale or transfer as part of her personal strategy. In these circumstances, she is inaccurately portrayed purely as a victim and returning her to her family or husband would not advance her interests. In 19th century Hong Kong, Sinn has shown how the Chinese community leaders were concerned that the law was too widely defined, criminalising, as they saw it, both good and evil forms of the trafficking of women.⁹³ We do not have any information as to whether similar arguments were raised in Weihaiwei but from the perspective of the British officials, the law was too narrowly defined. It failed to capture abominable forms of trafficking. However, so long as action could be taken against 'strange men' who hawk women, they saw no reason to introduce new laws. By taking action against those who sold women with whom they had no family ties and by not taking similar action against families selling widows, the British authorities in Weihaiwei were, like the Chinese community leaders in Hong Kong, also defining the offence on the basis of patriarchy.

At the time the question of forced widow remarriage was under consideration in Weihaiwei, the propensity of young widows to commit suicide had already come to the attention of the government. Yet this understanding of suicide was not enough to lead to any direct or proactive protection of widows. The idea of issuing a proclamation against forced re-marriage was rejected and few cases of ill-treatment of daughters-in-law or widows were investigated. By and large, dealing directly with the source of pressure on widows, i.e., their in-laws, was avoided. The single recorded conviction for 'cruelty to daughter-in-law' contrasts sharply with the larger number of prosecutions for failure to report a suicide.⁹⁴ Even when the Women and Girls

⁹² Elizabeth Sinn, 'Chinese Patriarchy and the Protection of Women in 19th-century Hong Kong' in Jaschok and Miers (eds), 141-170, at 142.

⁹³ *Ibid.*, 145-147.

⁹⁴ Report of the District Officer, Departmental Reports for the Year 1911, CO 873/335.

Protection Ordinance proved to be too narrow in ambit, no new laws were introduced. Yet, the discussion above on distinguishing between acceptable and unacceptable behaviour when the pressure on widows came only from their relatives and in the context of patriarchy shows how difficult it would have been to draft an appropriate law. A law might have been introduced to allow a widow to take her inheritance with her, thus giving her an important lever in her relations with her deceased husband's family and removing the most important factor which encouraged them to try to have her re-married. However, in the light of the general attitude of the government, it is not reasonable to expect them to have introduced a law in direct challenge to Chinese law and custom. They might have legislated the statute in the *Da Qing Lu Li* under which it was an offence to cause suicide by alarming or threatening a person⁹⁵ or the sub-statute under which it was an offence for the relatives of a widow to force her to enter into another marriage.⁹⁶ A milder step would have been to issue a proclamation or notice, warning the people of the territory that the government took a dim view of families putting pressure on their widows to remarry. As mentioned above, this was once suggested, but not accomplished.

2. Education

Social reform for girls through education might have had an impact on suicide but here, government efforts were again very limited. In 1927, the government acknowledged that its impact on education had been 'insignificant' and 'insufficient attention' had been devoted to education, something they hoped to remedy if rendition of the territory was further delayed.⁹⁷ The government's record on education for girls was even worse than the overall record. A government free school for boys - the Huang Jen Free School for Boys - had been established in 1904 in Port Edward but its enrolment was small. Even in 1911 the daily average attendance was only ten. Numbers increased dramatically in 1912 to a daily average attendance of 70 as a result of the republican revolution⁹⁸ and, by 1927, there were about 200 boys

⁹⁵ Staunton, 321, Jones, 282.

⁹⁶ Staunton, 113.

⁹⁷ Annual Report for 1927, Annual Colonial Reports No. 1408, Johnston to Colonial Office, 28 May 1928, CO 521/41.

⁹⁸ Annual Report for 1912, enc. to Commissioner to Colonial Office, 27 May 1913, CO 521/14.

attending this school.⁹⁹ Chinese girls in the territory had no equivalent school. A school - the Shun Te School - set up by the Anti-Foot-Binding Society, which had established a branch in the territory in 1906, received help from the government in the form of an unused barracks and half the school's budget for the short duration from 1909 until 1911.¹⁰⁰ Government funding was later withdrawn after the school began admitting girls with bound feet. The enrolment of this school was small; it had 21 pupils in 1912 and 28 pupils in 1913.¹⁰¹ The gap between male and female literacy rates was large. The 1921 Census data showed that, of the 13,966 Chinese who said they could read and write, only 227 were females.¹⁰² By the mid-1920s, there were at least five other schools for girls¹⁰³ but the total enrolment of these schools in 1925 was still only 168.¹⁰⁴

3. Foot-binding

When it came to foot-binding, the government was most reluctant to lead the way. Despite the fact that agriculture was the dominant occupation in Weihaiwei, foot-binding was practised. In 1906, Lockhart asked the Government Secretary to ascertain what reaction the government could expect if they were to 'abolish this cruel practice' and whether the Chinese magistrates of the two adjacent districts had recently received instructions on the prohibition of foot-binding.¹⁰⁵ The attitude of the government was that it would prohibit foot-binding only if there was support for prohibition amongst the Chinese in the territory. Influenced by the example of the Imperial Chinese Government, the government of Weihaiwei decided that it too would not prohibit the custom but would instead merely exhort the people to abandon what it felt was a deeply entrenched custom.¹⁰⁶

⁹⁹ Annual Report for 1927, Annual Colonial Reports No. 1408, Johnston to Colonial Office, 28 May 1928, CO 521/41.

¹⁰⁰ Draft Annual Report for 1912, Lockhart to Colonial Office, 27 May 1913, CO 521/14.

¹⁰¹ CO 873/655.

¹⁰² CO 873/649.

¹⁰³ These were the Convent School at the Roman Catholic Mission, the Port Edward School for Girls run by the Protestant Mission, a Plymouth Brethren Mission School, a school in Nan Chu Tao and a fifth school just outside the North gate of Weihai City.

¹⁰⁴ Annual Report for 1925, Russell Brown to SSC, 17 March 1926, CO 521/28.

¹⁰⁵ Lockhart to SG, 20 March 1906, CO 873/218.

¹⁰⁶ Walter to Lockhart, 7 and 10 May 1906; Lockhart to Walter, 10 May 1906, CO 873/218.

The government does not appear to have taken further measures against foot-binding until 1913 when the Anti-Foot-Binding Society submitted a petition signed by 304 village headmen, urging the government to renew its efforts.¹⁰⁷ At this point, the government still thought it too early to make foot-binding a punishable offence but was prepared to issue a fresh proclamation on the subject.¹⁰⁸ The government proclamation appears to have been met with opposition from some villagers, mainly those who saw in it the threat to enforce the proclamation by law. As a result it was withdrawn and replaced with a more mildly worded exhortation.¹⁰⁹

In 1921, the Senior District Officer twice addressed the district headmen about the practice of foot-binding.¹¹⁰ The district headmen were more or less agreed on a draft proclamation. This proclamation probably denounced the evil of foot-binding, indicating that penal measures were to be introduced. No laws were in fact introduced. On the whole, government officials seemed persuaded by local views such as those conveyed by a village headman that, if the people of Weihaiwei ceased to bind their feet, they would only be the objects of ridicule for setting a fashion for the rest of Shantung.¹¹¹ In 1923 there was evidence that local opposition to a ban on foot-binding persisted, mainly because parents thought that daughters with natural feet would have fewer prospects of marriage. This came to light when the Senior District Officer received a complaint from a European resident that the prospective in-laws of a young woman had forced the young woman to re-bind her feet.¹¹² The Senior District Officer met with the father of the girl and informed him that he was free to unbind the feet of his daughter.¹¹³

In the twilight of British rule, headmen continued to report difficulties in persuading villagers to abandon the custom. Unlike the practice of wearing the queue, the custom of foot-binding was not dying out. Government policy continued to be

¹⁰⁷ Ching, President of the Anti-Foot-Binding Society to Walter, 16 June 1913, CO 873/373.

¹⁰⁸ Resume on Commissioner Files on Foot-binding, 17 Jan 1922, attachment, Burnett to Jamieson of same date, CO 873/655.

¹⁰⁹ For details of the opposition to the proclamation, the misunderstanding over the introduction of penal measures, local suspicion over who had influenced the government in this matter and action taken to quell fears see CO 873/373.

¹¹⁰ Mentioned in Resume on Commissioner Files on Foot-binding, 17 Jan 1922, attachment, Burnett to Jamieson of same date, CO 873/655.

¹¹¹ *Ibid.*

¹¹² Jowett to Blunt, 9 Feb 1923, CO 873/655.

¹¹³ Jowett, 15 Feb 1923, CO 873/655.

conservative. In 1929, with the Chinese Nationalist Government reforms affecting the rest of Shantung province, the Government of Weihaiwei still insisted that they could not enforce these reforms in the territory.¹¹⁴ Thus it was that, by the time the British left in 1930, foot-binding was still prevalent and still lawful.

Government officials in Weihaiwei possessed, collectively, an understanding of suicide in China which was quite remarkable for its time. Led by scholar-administrators such as Lockhart and Johnston, the government knew, through scholarship on China and day to day experience in Weihaiwei, nearly everything that is understood today about suicide in late Imperial China. Yet, this knowledge was not translated into measures to reduce the number of people resorting to suicide. The government's most effective measures lay in encouraging the reporting of suicide and in the rescue of those who attempted suicide. Government officials appeared eager to be seen observing Chinese law, in which suicide was not a crime. In practice at least, suicide was not followed by legal consequences but attempted suicide and the failure to report a suicide were susceptible to the criminal justice processes. Restraint and sensitivity towards local feeling, seen in the avoidance of unnecessary post-mortems and discretion in prosecuting instances of failure to report, permeated government action.

Beyond the requirement to report and rescue efforts, the government acted conservatively and was reluctant to tackle the underlying causes of suicide. These would have involved a level of interference with the Chinese inhabitants and a degree of intrusion into life in the village which was not, by and large, the practice of the government. The government was also loath to introduce measures which did not meet with consent. Hence, despite the limits of the Protection of Women and Girls Ordinance, 1905, further protective legislation was not passed. Particular lacunae in the law were filled, on a case by case basis, by applying the substance of Qing penal law. The Protection of Women and Girls Ordinance was, moreover, not of much use in protecting women from abuse within the household. The cases that posed the greatest difficulties were those where any action, if taken, would be against the widow's in-laws. Few, if any such cases were prosecuted. Efforts could have been

¹¹⁴ CO 873/767.

more directly targeted at the ill-treatment of women, especially daughters-in-law, rather than on the re-marriage of widows, but this too, would have involved interfering with relations within the family. The appearance in the records of only one prosecution for ill-treatment of a daughter-in-law suggests that the law enforcement agencies shied away from involvement unless it was impossible to ignore the ill-treatment. It was when no family members were implicated, such as in *Wang and Liu* where the broker was acting purely out of self-interest rather than on behalf of two families, that the government found it easiest to intervene. Despite official lament, a reluctance to interfere in the lives of the Chinese or to introduce measures which were unpopular, as well as other general factors which shaped government action such as resource constraints, conspired to produce a conservative response to suicide.

CONCLUSION

We saw in chapter 2 how the Colonial Office, prior to the final draft of the Weihaiwei Order, had commissioned a report on the circumstances then existing in the territory. This report informed the process of drafting the Order in Council and also the process, then underway, of deciding upon arrangements for the administration of the territory and its future development under the Order. Despite making some allowance for local conditions, the Order introduced a legal system that was a break from the pre-existing legal system. It introduced a court system previously unknown in the territory in which the procedure of English courts was to be followed and, subject to ordinances passed by the territory's Commissioner, the courts were to apply English substantive laws. Only in civil disputes between the Chinese, were the courts to apply Chinese law and custom. This was the only significant concession in an otherwise unfamiliar system of law.

Despite the overwhelming break with the system of law under the Qing, the legal system introduced to Weihaiwei appears to have caused little difficulty for the government of the territory. This is significant, not least because the law played an important part in the relationship between the government and the governed. Through the law, for instance, the government was able to demonstrate its interest in the territory's ordinary villagers. Through the processes of law reform, it consulted local headmen, and often heeded their advice.

The Order in Council may have signalled a break from the past yet the impact of its provisions was softened in a number of ways, so that the legal system which affected the Chinese of the territory contained more that was familiar than the Order itself suggested. The foregoing chapters provide a number of examples of how this came about. Some were deviations from the Order; others merely reasonable interpretations of the Order. In yet others, the softening occurred through the arrangements made for the administration of justice. In further examples, reforms were made to the Order in response to local conditions and the needs of the territory.

Criminal law

Article 19 of the Order limited crimes in Weihaiwei to acts or omissions constituting a crime either under English law or a local ordinance. No direct application of Chinese penal law was allowed. Yet, as we saw in chapter 7, when action was taken against a man for selling a woman in the territory, it was justified on the basis of Chinese law.

No new ordinance was passed to ban such activity, nor was the prosecution expressly founded on a principle of English criminal law. Other examples include the prosecutions for unfilial conduct and breaches of village regulations. Again, these were not done pursuant to an ordinance, a specific English statute or a principle of the common law.

Chinese law and custom

In civil disputes between the Chinese, the Order allowed the courts to apply Chinese law and custom and such law was applied in a large number of cases concerning land, marriage and adoption. Moreover, the application of Chinese law and custom was not limited, as a reading of the Order might suggest, to civil disputes between the Chinese. Chinese law and custom also determined the outcome of criminal cases, in that a criminal case might require the prior determination of a right in Chinese law and custom. An example of this is the theft case, heard in 1921, and discussed in chapter 6, which turned on the question of whether the poor had a customary right to glean for fuel on land which they did not own.

Sources of law

A way in which the effect of the Order was mitigated was the continuation of village regulations to which the government not merely acquiesced, but sometimes even lent the weight of their official approval. Such regulations were also recognised by the courts. The impact of the common law as a source of law was also reduced through selective application or discretionary prosecution. Here, the example of suicide might be recalled; the authorities saw themselves as departing from English law in order to respect Chinese law.

Procedure in the Magistrates' Courts

In the magistrates' courts, departures from the procedure of the English courts took the form of frequent ad hoc modifications of English laws of evidence and procedure. Most litigants and accused in Weihaiwei were tried by a magistrate without even the assistance of Chinese assessors. Procedure in the magistrates' courts was all the more significant because few Chinese saw any other court in the territory either because their offences were too minor or their disputes too petty, or because they did not use the procedure for appealing the decision of the magistrate. Of the cases that could

have been heard by the High Court, many of them were tried by the magistrates exercising delegated powers.

The Magistrates

Aside from the specific comments above, the unfamiliar nature of the system of law introduced by the Order was - for most litigants and accused - mitigated by the structural similarity between the British magistracy and the Chinese district magistracy. As we saw, the British magistrate was the central figure of the legal system. By coincidence rather than planning, the British magistrates occupied a position vis-à-vis the people of the territory that was very similar to that which a Chinese district magistrate would have occupied. The Chinese district magistrate was the official at the most basic level of the Chinese bureaucracy and therefore closest to the people. He was part of the Qing bureaucracy in which there was no separate and independent judiciary. The British magistrate was similar in his proximity to the villagers of the territory. Unlike the remoter figure of the Commissioner, the magistrates had many reasons to tour the villages. Furthermore, each magistrate simultaneously held an administrative post. Since his Chinese counterpart was an administrative official, this contributed significantly to the resemblance between the two.

Village justice

A final example of how the full impact of the system introduced by the Order was mitigated can be made with reference to the way in which local forms of justice were recognised. The Order did not provide for the recognition of local forms of justice nor did the adoption of such forms of justice, discussed though they were in the Swettenham report, feature in the discussions on the administration of the territory. Yet there was a largely unrecorded realm of justice in which village headmen mediated civil disputes and also maintained order in the village, sometimes through dealing with petty offences, including breaches of village regulations. The headman's role in mediating civil disputes was officially encouraged by the government but his role in dealing with petty crime was not officially acknowledged.

Law enforcement

When it came to law enforcement, although the Weihaiwei police force did reach reasonable numbers, its presence amongst the villagers is likely to have remained slight, as a result of which policing within the villages probably remained in the hands of headmen or other influential persons.

Priorities of the government

The Chinese inhabitants' experience of law and the administration of justice in Weihaiwei was also affected by the priority accorded by the authorities to particular aspects of the legal system. For instance, importance was attached to stamping out bribery and corruption and to ensuring the delivery of justice without undue delay. These are particularly observable in the attitudes of the magistrates towards civil litigation. The example of civil litigation also demonstrates the commitment of the authorities to Chinese law and custom and the importance they attached, despite overstretched resources, to intervening in the everyday disputes of the Chinese. The use of the system of village headmen by the government was clearly another priority, despite the gradual realisation that headmen were not an effective substitute for a sizeable police force. These priorities contrasted with the lack of interest shown when it came to aspects of the criminal justice system such as the jury, the presence of legal counsel, and radical law reforms. In general, little interest was taken in legal issues, except when raised by the High Court Judge or the Crown Advocate. This is not surprising, given that none of the magistrates and other officials were legally trained.

Taken together, the Chinese inhabitants' experience of law and the administration of justice under the British was one in which the full impact of the legal system introduced by the Order was considerably lessened. Indeed, it afforded the Chinese some continuity with the past. Subject to qualifications, this was true by virtue of the application of Chinese law and custom, the headmen system, the continued recognition of village regulations, the mediation of some civil disputes and the punishment of offences occurring in the village. Perhaps one of the most significant continuities was the magistrate, who was sufficiently familiar in role and position to the Chinese district magistrate for the Chinese to identify as their 'father mother' official. If we return to Seidman's schema, the transformation from alien legal system to the more familiar one experienced by the inhabitants of Weihaiwei might be put thus: the legal system as it was experienced (the 'output'), was a product

of the Order (the 'inputs') as it was transformed by the Colonial Office, the local authorities in Weihaiwei, and other pressures and influences (the conversion process).

Though this has not been the main focus of this work, some remarks may be made regarding the conversion process. It is a process which can be observed from looking at how the law was put into operation, the policies and conditions that shaped the law and its practice and the impact of those whose influence in the territory was greatest. A question which might be asked is why the impact of the legal system introduced by the Order was softened?

Continuities with Qing law and the lack of law reform may reasonably attract two explanations. The first, which may conveniently be termed the 'Chinese territory' explanation, emphasises the status of Weihaiwei as a Chinese territory. It might be argued that, because the territory was considered to be Chinese territory, little importance was attached to English law and legal institutions. The fact that the majority of the people in Weihaiwei were not British subjects was a further reason for not insisting on the introduction of certain aspects of English law. Consequently, the introduction of law reform and the insistence, in practice, of a legal system truer to the English legal system, were not priorities. Had Weihaiwei been regarded as ceded territory, it may be argued that bolder steps would have been taken to ensure that English law was applied in its full rigour. The Chinese inhabitants would simply have been expected to adapt to the new legal system and indeed to appreciate it as one of the benefits of British rule.

The second explanation is the idea roughly encapsulated by the term 'British mandarins'. This idea is present in the biographical works on Lockhart and Johnston and in the main work of history on Weihaiwei. It may be argued that British mandarins such as Lockhart and Johnston carried out their duties consciously imitating the Confucian scholar-administrator. This idea is given credence by a speech that Johnston made to the people of Weihaiwei just before rendition. He said that the British government had never tried to turn the inhabitants of Weihaiwei into Englishmen but that, in over thirty years of administering Weihaiwei, the people of the territory had turned some of its British administrators into Chinese.¹ The view that Weihaiwei was run by British mandarins suggests that its officials were interested in preserving Chinese institutions and traditions, including Chinese law and traditions

¹ Commissioner's speech at the Government Offices, Weihaiwei, 29 Sept 1930: *SLPNLS*, vol. 64.

that may have been undergoing change in other parts of China. Examples of Lockhart, Johnston and others acting in ways they thought appropriate to the Confucian scholar-administrator role are not difficult to find. We saw that Johnston finished his judgements with quotations from the classics or other Chinese works and that the people of the territory referred to him as the father-mother official, using the term - *fumuguan* - which would have been used to refer to the Chinese district magistrate. Johnston was not alone in using Chinese sayings. In 1910, in an address to district headmen which mentioned, *inter alia*, the 'litigious spirit' of the people, Lockhart reminded them of the sayings: 'Inform against a man once and there will be enmity for three generations. Nine lawsuits out of ten should be settled by arbitration.'² Another example was the desire to make laws through proclamation rather than through ordinances, arguing that the people of the territory were used to being ruled by edict or proclamation. The example of the British magistrates consulting nearby Chinese magistrates on questions of law and justifying their actions by reference to the opinion of a Chinese magistrate might also be cited as an example of the so-called mandarin tendency.

Both the Chinese territory and British mandarins explanations have, of course, inherent weaknesses and each fails to capture completely the many ways in which the impact of the system introduced by the Order in Council was mitigated. The Weihaiwei Order's provisions were those that could have been bestowed upon a colony. Aside from the invocation of the Foreign Jurisdiction Act, jurisdiction without sovereignty did not, in itself, have any consequences for the system of law bestowed upon a territory. Third, officials in Weihaiwei rarely invoked the status of the inhabitants of Weihaiwei as Chinese subjects or the fact that the territory was Chinese territory as reasons for pursuing a particular policy. Neither did this fact lead them to adopt measures to ensure that Weihaiwei was marching in step with legal and social changes in the neighbouring areas under Chinese jurisdiction. An example of this is the failure to act on the question of foot-binding discussed in chapter 7.

Like the Chinese territory explanation, the British mandarins explanation contains weaknesses. That individual magistrates imitated the Chinese district magistrate is not disputed. However, it is clear that their knowledge of Chinese law and custom was not always sufficient for them to copy Chinese law and procedure

² Commissioner's address to district headmen on 8 Apr 1910, Lockhart to SG, 1 Apr 1910, CO 873/299.

completely. We saw in chapter 7 that the collective knowledge on a subject such as suicide in China possessed by officials in Weihaiwei was impressive. In other areas of the law, their knowledge of relevant law was not necessarily as comprehensive and as we saw, headmen and Chinese assessors were not always able to fill the gaps in the magistrates' knowledge. Furthermore a magistrate such as Johnston sometimes ignored the opinion of the neighbouring Chinese magistrate. Yet stronger evidence of the shallow interest in preserving Chinese law was the absence of any acknowledgement that the procedures of the courts of Weihaiwei differed from the procedures of Chinese courts. When discussing the propensity of disappointed litigants to petition the courts repeatedly, no mention was ever made of the fact that the concept of finality was absent from the Qing system of civil justice. Likewise, the Qing system of obligatory review was not acknowledged. The Weihaiwei system of criminal justice, in comparison, lacked procedures for the supervision of the magistrates' decisions. Death penalties, not least, were carried out with few pauses for review.

Even if we assume that the magistrates and other officials had a good working knowledge of Chinese law and custom, and intended to apply Chinese law, it is fair to conclude that changes, however subtle, inevitably occurred. We saw in chapter 4, for instance, that the government repeatedly said that the British authorities had not invented the village headman system. However, in co-opting village headmen, the authorities unwittingly caused a lessening of their influence. A similar point may be made in relation to the application of Chinese law and custom. Though it is difficult to ascertain from the available records, it is entirely possible that, in land disputes, rights which had not been exercised for a long time and may thus have been ignored by a Chinese magistrate, may have been enforced, thus disturbing the settled rights of the parties.

Geo-politics, parsimony, conservatism and pragmatism

Thus, though of some use, neither the 'Chinese territory' nor the 'British mandarins' theories can fully account for the law and its administration in Weihaiwei. What then are the factors that can help account for the conversion of the legal system introduced by the Order in Council into that which affected the inhabitants of the territory? A number of themes have arisen in the course of looking at various aspects of the territory's system of law. They may be tentatively sketched as follows. The first is the focus of local officials on the Chinese inhabitants of the territory. This is true of the

criminal justice system and the civil litigation processes. It is also true of the policies of the government when it came to thinking about the policing needs of the territory. The second is the parsimony with which the territory was run. The lack, for a number of years, of a police force of sufficient strength for the population of the territory, has been commented on. Another example is the lack of staff. This necessitated the appointment as magistrate of an official who also carried an administrative role. The third is the conservatism of key officials. Here, conservatism covers both a tendency towards the status quo as well as an 'orientalist' tendency in which the Chinese, in the minds of British officials, possessed characteristics which marked them out as a group.³ These characteristics informed and influenced the process of policy-making and were invoked to justify decision-making based on the needs of 'the Chinese'. A fourth theme is the pragmatism of the government. Ways of co-opting local structures may have appealed to the conservative mindset of the British mandarin but this also involved making a virtue out of a necessity, given that the small administration relied for its authority on co-operation rather than coercion.

The 'Chinese territory' and 'British mandarins' ideas are to be found within these themes. Their impact, however, was less direct than might be supposed. For instance, whilst it is true that Weihaiwei was not a showcase for the benefits of British rule and English law, its failure to benefit from the application of English law and the introduction of legal institutions to a greater extent is more fully explained by the territory's failure to develop economically and, as a consequence, its failure to attract a sizeable European community. Both of these causes can be traced to the uncertainties over the lease and, ultimately, to the lack of reasons, other than the geo-political one, for the British decision to obtain the lease of the territory. The legal status of Weihaiwei was not a cause but was itself a consequence of the geo-political circumstances under which Weihaiwei was leased. It will be remembered that the acquisition of Weihaiwei in 1898 was hardly an auspicious occasion and that the status of Weihaiwei as Chinese territory was inextricably linked to the limited reasons for obtaining the territory and to the agreement that the lease was contingent on Russian presence in Port Arthur. As we saw, this led to much uncertainty which, in turn, was responsible for the reluctance of Europeans to invest in the territory. The

³ No more is intended by the use of the word 'orientalist' as is defined in the text. A discussion of aspects of the legal history of Weihaiwei with reference to the work of Edward Said and others is left to be pursued on another occasion.

presence of a larger number of European businesses in Weihaiwei with trading links to Chinese businesses would, in time, have allowed English contract and commercial law to play a more significant role. As it was, the courts seldom had the opportunity to apply such law. The limited purpose for which the territory was obtained also explains why the British government was quick to provide Germany with the assurance that no railway linking Weihaiwei and the interior would be built. This and the lack of public expenditure in the territory, it has been assumed, stymied its growth as a commercial port. There is, moreover, no evidence to suggest that legal policy within Weihaiwei was constrained by the territory's status as Chinese territory. The many continuities with the past appear to have been motivated by other reasons. From the point of view of the relations between the government and the people of the territory, a criminal justice system without lawyers or the jury appears to have worked reasonably well. The same focus on the needs of the Chinese was observed in the shaping of procedure in the magistrates' courts, in law-making, in policing, trial and punishment, and in civil justice.

The 'British mandarins' factor is not, however, irrelevant. Lockhart and Johnston were certainly conservative. They did not welcome change in the Chinese community of the territory and were thus not minded to encourage, let alone impose, policies that would interfere with the Chinese way of life. We saw, in the example of foot-binding,⁴ that the government did not lead the way in encouraging the anti-foot-binding movement and when asked to legislate the prohibition of the practice, in the absence of widespread support within the territory, it refused to do so. Law was not, in general, used instrumentally to effect change. On the question of forced remarriage of widows, there was similarly little appetite for tackling the problem head-on rather than relying on an ordinance aimed at a quite different type of activity. Lockhart's view that the 'uneducated rustics' of the territory were better governed by proclamations or other simple executive edicts rather than ordinances is revealing. It shows his view that, in some respects at least, governing the Chinese through methods they understood was better than imposing a form of law which, in their lack of sophistication, they would not understand. During his prior appointment in the New Territories, Lockhart was once criticised by Blake, the Governor of Hong Kong, for actions he had taken which were not in accordance with the law. Lockhart had given

⁴ See ch. 7.

orders to burn down the houses of those who had murdered a man whom the government had appointed to hoist the British flag in the New Territories. Lockhart thought it useless to follow the usual procedure in criminal cases, namely, that of carrying out an investigation, charging the suspects and trying them in court. He insisted that this was the right course of action to take because these procedures and methods were ones which the Chinese understood. Furthermore, he said, if they had waited to follow the procedures, the evidence required for a conviction might not have been forthcoming and this would have had disastrous consequences for an administration which was still establishing its authority in the newly acquired area.⁵ Lockhart also wanted to take retaliatory measures against a village which had burnt down a police matshed erected by the government. The villagers claimed that the location of the shed offended the principles of *feng shui*. In reality, the destruction of the matshed was an act of resistance by the villagers to the British take-over of the New Territories. Although there were no similar incidents during Lockhart's service in Weihaiwei, there were, nonetheless, deviations or attempted deviations from the law which were done in the name of Chinese law or custom, the established manners of the people or the conditions and circumstances of the Chinese inhabitants of the territory. It should be noted briefly that the conservatism of the officials in Weihaiwei was not so crude as to have led them to impose 'Chinese punishments' such as the cangue as had been done elsewhere earlier. In chapter 1, we saw how, prior to the Colonial Office taking over responsibility for the territory, the early British authorities in Weihaiwei had resorted to cutting off the queue of a man who had ignored a prohibition against selling liquor on Liukung island. Such punishments were never again considered by the government once Lockhart arrived in 1902. However, conservatism should not be allowed to conceal the possibility that officials were often motivated by pragmatic considerations. The government did not have the means to enforce unpopular legislation and widespread disobedience of the law would have damaged its authority in the eyes of the people.

The interest in Chinese law and custom and the application of such law by successive magistrates has been referred to above. Subject to what has already been mentioned about unwittingly changing Chinese law and custom in the course of

⁵ See Peter Wesley-Smith, *Unequal Treaty 1898-1997*, rev. edn (Hong Kong: Oxford University Press, 1998), 95ff and Shiona Airlie, *Thistle and Bamboo* (Hong Kong: Oxford University Press, 1989), 100ff.

applying it, without doubt the application of Chinese law formed one of the main continuities with the system of law prior to the British lease. However, such continuity was not unique to Weihaiwei and it is therefore accounted for by other explanations. The common law had recognised the *lex situs* as the law governing rights to land and had long recognised the concept of a personal law, particularly in issues relating to the family such as marriage, divorce, and adoption. The extent to which such personal law was recognised differed across the British overseas territories and dependencies but the principle was nonetheless well established by the time of the lease of Weihaiwei. Thus, rather than emanating from the fact that Weihaiwei was Chinese territory or from the propensity of local officials to behave like Chinese officials, the application of Chinese law and custom in Weihaiwei was part of a tradition of pluralism in the common law. What is noteworthy here is that, in Weihaiwei, there was no pressure to lessen the ambit of applicable Chinese law and custom. Elsewhere and at different times, colonial judges were responsible for denying a role to customary law. In Weihaiwei, judges of similar background and training had few opportunities to have such an impact since the cases heard by a professional judge were few in number.

In looking at the adoption and revitalisation of the system of village headmen, the government was motivated by a number of factors, one of which was parsimony. We saw how the use of the headman system appealed to Lockhart because this was one way in which a pre-existing social structure would be continued. The system of headmen was also intended as a means of enabling the authorities to keep an eye on the villages whilst avoiding a more costly police force. Village headmen received no salary from the government and, at least initially, this system averted the need for more police. Other motivations included the realisation that, as long as the administration remained small, it was important to have the loyalty of the headmen. Without this, village and district headmen might have been a rallying point for resistance to British rule. In the circumstances, it was politically astute to co-opt headmen. In chapter 6, we asked why a government whose resources were stretched was nonetheless interested in the petty civil disputes of the villagers of Weihaiwei. We saw that there was interest in applying Chinese law and custom but that the answer to the question probably lay in the need to maintain order in the territory. Without access to the courts, the petty disputes might have escalated into serious outbreaks of disorder, as some did, particularly when villagers from one village were in a dispute with those of another. When examining the introduction of the jury and

counsel for the defence in the territory it was clear that the Crown Advocate and High Court Judge, on the one hand, and the Colonial Office, on the other, held opposing views. The Colonial Office was strongly of the view that 'a place like Weihaiwei' was not a territory for the more elaborate aspects of the English legal process. The view of the local authorities in Weihaiwei, i.e. the Commissioner and the magistrates, though not expressed, came closer to the position taken by the Colonial Office than to the position taken by *Fiat Justitia*, or the less extreme view of the High Court Judge and the Crown Advocate. Lockhart and other officials did not think that the territory had any need for lawyers in court, even though the people of the territory were accustomed to having the assistance of petition writers in formulating their pleas. So far as they were concerned, the criminal justice system worked satisfactorily, in that they had not experienced any resistance from the people of the territory, aside from the prisoners who went on a hunger strike to protest the inadequacy of their rations. As we saw in chapter 5, the convictions of Wang and Hsieh for murder after a trial without either jury or defence counsel seems not to have produced any bad feeling in the villages toward the authorities.

It appears, therefore, that the conversion process was one in which circumstances and several motivations transformed the 'input' into the 'output'. Local considerations such as costs and the pragmatic need to rule by consent rather than coercion were, on balance, probably more important than lofty ideals such as the virtues of the common law, the rule of law, the separation of powers and, not least, the motivations of the British mandarin. In highlighting the ways in which the 'input' was diluted, as mentioned above, the dilution took the form of continuities with the pre-existing legal system. This should not eclipse the bare fact that many parts of the legal system were a dramatic break from the past. In criminal law especially, English law dominated. Paradoxically, in this area of the law, the impression from the records is that the people of the territory accepted English law. In civil justice, we saw how litigants, by petitioning the courts with previously litigated disputes, exposed the need for a system of appeals which the ordinary villager embroiled in litigation could use. In criminal law, the forms of resistance, if there were any, are too subtle to be detected. The Chinese inhabitants of the territory were not passive. As seen in chapter 6, they were quick to take advantage of the better access to civil justice and to exploit the system.

The conversion process produced a system of law that appears to have met with the consent of most of the inhabitants of the territory. The Chinese of Weihaiwei

used the courts for their civil disputes and registered few complaints about the criminal justice system. Even the comparative swiftness of that system, with its few checks, if it disconcerted some, was not the subject of disgruntlement, not even, it would appear, in the wake of the death sentences in 1912. In civil litigation, the comparative efficiency of the courts was almost certainly appreciated by litigants, alongside the lesser costs and reduced risks of having to make unofficial payments. In matters of law reform, there were no complaints that the law lagged behind or marched ahead of popular feeling, apart from members of specific interest groups such as the Anti-Foot-Binding Society. Where the police force was concerned, as was observed in chapter 4, the relatively peaceful nature of the territory probably meant that the police put their efforts into policing the boundary of the territory rather than intruding into the villages of Weihaiwei. Villagers were certainly not slow to complain of the behaviour of the police. If law and the administration of justice is seen as an important interface between government and the governed, the legal system in Weihaiwei which emerged from the conversion process contributed to the cordial relations between the government and people of Weihaiwei.

Bibliography

Main official sources used

The National Archives of the UK (TNA): Public Record Office (PRO).

Colonial Office Series

CO 521 Weihaiwei, Original Correspondence
CO 873 Weihaiwei, Commissioner's Files
CO 771 Weihaiwei, Register of Out-letters
CO 774 Weihaiwei, Government Gazettes
CO 841 Weihaiwei Acts
CO 882 Confidential Prints (Eastern)
CO 380/183 Letters Patent, Commissions, Warrants etc. Iraq, Palestine, Wei Hai Wei etc. covering 1906-1927

Foreign Office Series

FO 17 General Correspondence, China Series
FO 228 Correspondence, China
FO 881 Confidential Prints

Treaties and Orders in Council

Treaties, Conventions, &c., between China and Foreign States: China, the Maritime Customs, III - Miscellaneous Series, No. 30, 2nd edn, 2 vols (Shanghai: Inspectorate General of Customs, 1917).

Hertslet, Godfrey E.P., and Parker, Edward, *Hertslet's China Treaties*, 3rd edn, 2 vols (London: H.M.S.O., 1908).

MacMurray, John V.A. (ed.), *Treaties and Agreements With and Concerning China, 1894-1919, vol. I: Manchu Period (1894-1911)* (New York: Oxford University Press, 1921).

Private papers

Stewart Lockhart Papers, National Library of Scotland, Edinburgh.

Books, articles, newspapers and other sources

Airlie, S., 'Lockhart, Sir James Haldane Stewart (1858-1937)', *Oxford Dictionary of National Biography* (Oxford: Oxford University Press, 2004)
[<http://www.oxforddnb.com/view/article/63594>, accessed 5 Dec 2005].

Airlie, Shiona, *Reginald Johnston: Chinese Mandarin* (Edinburgh: NMS, 2001).

Airlie, Shiona, *Thistle and Bamboo: The Life and Times of Sir James Stewart Lockhart* (Hong Kong: Oxford University Press, 1989).

Airlie, S.M., *An Ardent Collector: An Exhibition of the Stewart Lockhart Collection* (Edinburgh: Merchant Company Education Board, 1982).

Alabaster, E., 'Dips into an Imperial Law Officer's Compendium', *Monumenta Serica*, 1936, vol. 2, 426-436.

Alabaster, E., 'Notes on Chinese law and practice preceding revision', *Journal of the North China Branch of the Royal Asiatic Society*, 1906, new series, vol. 37, 83-149.

- Alabaster, Ernest, *Notes and Commentaries on Chinese Criminal Law and Cognate Topics: with special relation to ruling cases, together with a brief excursus on the law of property* (London: Luzac, 1899; repr. Taipei: Ch'eng-Wen, 1968).
- Alexandrowicz, C.H., *An Introduction to the History of the Law of Nations in the East Indies: 16th, 17th and 18th centuries* (Oxford: Clarendon Press, 1967).
- Alford, William P., 'Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China', *California Law Review*, 1984, vol. 72, no. 6, 1180-1256.
- Anderson, David M. and Killingray, D. (eds), *Policing the Empire: Government, Authority and Control, 1830-1940* (Manchester: Manchester University Press, 1991).
- Anderson, Olive, *Suicide in Victorian and Edwardian England* (Oxford: Clarendon Press, 1987).
- Anon, Book Review, 'Asia. A Journey Across China. "From Peking to Mandalay." by R.F. Johnston, M.A., F.R.G.S.', *The Geographical Journal*, 1908, vol. 32, 164-165.
- Anon, Book Review, 'Northern China, "Lion and Dragon in Northern China." by R.F. Johnston', *The Geographical Journal*, 1911, vol. 37, 306-307.
- Atwell, Pamela, *British Mandarins and Chinese Reformers: the British Administration of Weihaiwei (1898-1930) and the Territory's Return to Chinese Rule* (Hong Kong: Oxford University Press, 1985).
- Baker, J.H., *An Introduction to English Legal History*, 3rd edn (London: Butterworths, 1990).
- Baker, J.H., *An Introduction to English Legal History* (London: Butterworths, 1971).
- Ball, J. Dyer, *Things Chinese; or, Notes connected with China* (London: Sampson Low, Marston, 1892; 5th edn rev. by E.C. Werner, Shanghai: Kelly and Walsh, 1925).
- Barlow, H.S., *Swettenham* (Kuala Lumpur: Southdene, 1995).
- Barnes, A.A.S., *On Active Service with the Chinese Regiment: a record of the operations first Chinese Regiment in North China from March to October 1900* (London: Grant Richards, 1902).
- Beresford, Lord Charles, *The Break-up of China: with an account of its present commerce, currency, waterways, armies, railways, politics, and future prospects* (London: Harper, 1899; repr. Wilmington: Scholarly Resources, 1972).
- Bernhardt, Katherine and Huang, Philip C.C., *Civil Law in Qing and Republican China* (Stanford: Stanford University Press, 1994).
- Bickers, R., 'Johnston, Sir Reginald Fleming (1874-1938)', *Oxford Dictionary of National Biography* (Oxford: Oxford University Press, 2004) [<http://www.oxforddnb.com/view/article/34212>, accessed 5 Dec 2005].
- Bickers, R., ' "Coolie Work": Sir Reginald Johnston at the School of Oriental Studies, 1931-1937', *Journal of the Royal Asiatic Society*, 1995, series III, vol. 5, 385-401.
- Bodde, Derk, *Essays on Chinese Civilization* (Princeton: Princeton University Press, 1981) edited by Charles Le Blanc and Dorothy Borei.
- Bodde, Derk, 'Age, Youth and Infirmary in the Law of Ch'ing China' in Jerome Cohen, R. Randle Edwards and Fu-mei Chang Chen (eds), *Essays on China's Legal Tradition* (Princeton: Princeton University Press, 1980), 137-169.
- Bodde, Derk and Morris, Clarence, *Law in Imperial China: exemplified by 190 Ch'ing dynasty cases (translated from the Hsing-an hui-lan) with historical, social, and juridical commentaries* (Cambridge, Mass.: Harvard University Press, 1967).
- Boulais, G., *Manuel du Code Chinois*, 2 vols (Chang-hai: Mission Catholique, 1923-24).
- Brenan, Byron, 'The Office of District Magistrate in China', *Journal of the North China Branch of the Royal Asiatic Society*, 1897-8, vol. XXXII, 36-65.

- Bridge, F.R., Review of *British Policy in China, 1895-1902* by L.K. Young, *The English Historical Review*, 1972, vol. 87, 841-843.
- Brierly, J.L., *The Law of the Nations*, 6th edn, Sir Humphrey Waldock (ed.) (Oxford: Clarendon Press, 1963).
- Brockman, Rosser H., 'Commercial Contract Law in Late Nineteenth Century Taiwan' in Jerome Cohen, R. Randle Edwards and Fu-mei Chang Chen (eds), *Essays on China's Legal Tradition* (Princeton: Princeton University Press, 1980), 76-136.
- Brownlie, Ian, *Principles of Public International Law* (Oxford: Clarendon Press, 1966).
- Bruce-Mitford, C.E., *The Territory of Wei-hai-Wei* (Shanghai: Kelly and Walsh, 1902).
- Brunnert, H.S. and Hagelstrom, V.V., *Present Day Political Organization of China* (Shanghai: Kelly and Walsh, 1912) rev. by N.Th. Kolesoff; transl. by A. Beltchenko and E.E. Moran.
- Bryan, R.T., *An Outline of Chinese Civil Law* (Shanghai: Commercial Press, 1925).
- Buck, David D., 'Educational Modernization in Tsinan: 1899-1937' in Mark Elvin and G. William Skinner (eds), *The Chinese City Between Two Worlds* (Stanford: Stanford University Press, 1974), 171-212.
- Burge, W., *Burge's Commentaries of Colonial and Foreign Laws*, 6 vols (London: Sweet and Maxwell, 1914).
- Burgess, John S., *The Guilds of Peking* (New York: Columbia University Press, 1928).
- Buxbaum, David C., 'Some Aspects of Civil Procedure and Practice at Trial Level in Tanshui and Hsinchu from 1789 to 1895', *Journal of Asian Studies*, 1971, vol. 30, pt 2, 255-279.
- Caflish, Lucius, 'Unequal Treaties', *German Yearbook of International Law*, vol. 35 (Berlin: Duncker & Humblot, 1992), 52-80.
- Chan Lau Kit-Ching, *Anglo-Chinese Diplomacy 1906-1920* (Hong Kong: Hong Kong University Press, 1978).
- Chen Ching-chih, 'The Japanese Adaptation of the pao-chia system in Taiwan, 1895-1945', *Journal of Asian Studies*, 1975, vol. 34, no. 2, 391-416.
- Chen, Edward I-te, 'Japanese Colonialism in Korea and Formosa: a comparison of the systems of political control', *Harvard Journal of Asiatic Studies*, 1970, vol. 30, 126-58.
- China Weekly Review (ed.), *Who's Who in China*, 4th edn (Shanghai, China Weekly Review, 1931).
- Chiu, Hungdah, 'Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties' in Jerome Alan Cohen (ed.), *China's Practice of International Law: some case studies* (Cambridge, Mass.: Harvard University Press, 1972), 239-267.
- Chü T'ung-tsu, *Law and Society in Traditional China* (Paris: Mouton, 1965).
- Chü T'ung-tsu, *Local Government under the Ch'ing* (Cambridge, Mass.: Harvard University Press, 1960).
- Chung-li Chang, *The Chinese Gentry: studies on their role in nineteenth-century Chinese society* (Seattle: University of Washington Press, 1955).
- Clifford, Sir Hugh Charles and Swettenham, Frank Athelstane, *A Dictionary of the Malay Language: Malay-English* (Taiping, Perak: Government Printing Office, 1894-1902).
- Coates, Austin, *Myself A Mandarin: Memoirs of a Special Magistrate* (Hong Kong: Oxford University Press, 1968).
- Cohen, Jerome Alan, 'Chinese Mediation on the Eve of Modernization', *California Law Review*, 1966, vol. 54, 1201-1226.
- Cohen, Paul A. and Schrecker, John E. (eds), *Reform in Nineteenth-Century China* (Cambridge, Mass.: East Asian Research Center, Harvard University, 1976).

- Crook, Isabel and David, *Revolution in a Chinese Village: Ten Mile Inn* (London: Routledge and Kegan Paul, 1959).
- Dicks, Anthony, 'Treaty, Grant, Usage or Sufferance? Some Legal Aspects of the Status of Hong Kong', *The China Quarterly*, 1983, vol. 95, 427-455.
- Doolittle, J., *Social Life of the Chinese: with some account of their religious, governmental, education, and business customs and opinions, with special but not exclusive reference to Fuhchau* (New York: Harper, 1865).
- Douglas, Jack D., *The Social Meanings of Suicide* (Princeton: Princeton University Press, 1967).
- Dunning, Sir Leonard, 'Discretion in Prosecution', *The Police Journal*, 1928, vol. 1, pt 46, 39-47.
- Durkheim, E., *Suicide: a study in sociology*, transl. by John A. Spaulding and George Simpson (London: Routledge and Kegan Paul, 1952).
- Edkins, J., *Chinese Currency* (Shanghai: Presbyterian Mission Press, 1901).
- Elias, T. Olawale, *British Colonial Law: a comparative study of the interaction between English and local laws in British dependencies* (London: Stevens, 1962).
- Elvin, M., 'Female Virtue and the State in China', *Past and Present*, 1984, vol. 104, 111-152.
- Fairbank, John King (ed.), *The Chinese World Order: Traditional China's Foreign Relations* (Cambridge, Mass.: Harvard University Press, 1968).
- Fassbender, Bardo, 'Sovereignty and Constitutionalism in International Law' in Neil Walker (ed.), *Sovereignty in Transition* (Oxford: Hart, 2003), 115-143.
- Fei Hsiao Tung (Fei Xiaotong), *Chinese Village Close-Up* (Beijing: New World Press, 1983).
- Fielde, Adele, *A Corner of Cathay: studies from life among the Chinese* (New York: Macmillan, 1894).
- Fielde, A.M., *Pagoda Shadows: studies from life in China*, 5th edn (Boston: Corthell, 1884).
- Franck, H.A., *Wandering in Northern China* (New York: The Century, 1923).
- Gallin, B., 'Mediation in Changing Chinese Society in Rural Taiwan', *Journal of Asian and African Studies*, 1967, vol. 2, 77-90.
- Giles, H.A., 'The Hsi Yuan Lu, or Instructions to Coroners', *China Review*, 1874, vol. 3, 159-172.
- Gooch, G.P. and Temperley, Harold (eds), *British Documents on the Origins of War* (London: HMSO, 1927-1938), vol. 1.
- Gowen, Robert J. and Davis, Clarence B., 'The British at Weihaiwei: a case study in the irrationality of Empire', *The Historian*, 2000, vol. 63, 87.
- Gray, John Henry, *China: a history of the laws, manners and customs of the people*, 2 vols (London: Macmillan, 1878).
- Guide to Wei-hai-wei* ([n. p.]: Office of the Weihaiwei Commissioner, 1933).
- Gull, B. Manico, 'The Story of the Chinese Labour Corps', *The Far Eastern Review*, April 1918, vol. 15, no. 4, 125-35.
- Hall, William Edward, *A Treatise on the Foreign Powers and Jurisdiction of the British Crown* (Oxford: Clarendon Press, 1894).
- Hall, William Edward, *A Treatise on International Law*, 3rd edn (Oxford: Clarendon Press, 1890).
- Halsbury, Earl of, *Laws of England*, vol. XXV (London: Butterworth, 1913).
- Hare, G.T., *Notes on the Family Law and Usages and on the Criminal Code of the Chinese* (Kuala Lumpur, 1904).

- Hare, G.T. (ed.), *The Hokkien Vernacular*, 2 vols (Singapore: Singapore Government Printing Office, 1897-1904).
- Hare, G.T., *A Text Book of Documentary Chinese: selected and designed for the special use of members of the Civil Service of the Straits Settlements and the protected native states* (Singapore: Singapore Government Printing Office, 1894).
- Hare, G.T., *The Wai Seng Lottery* (Canton: [n. pub.], 1894).
- Harfield, Alan, *The British and Indian Armies on the China Coast 1785-1985* (Farnham: A. and J. Partnership, 1990).
- Harris, Seymour Frederick, *Principles of the Criminal Law*, 10th edn, by Charles L. Attenborough (London: Stevens & Haynes, 1904).
- Harrison, Judy F., 'Wrongful Treatment of Prisoners: A Case Study of Ch'ing Legal Practice', *Journal of Asian Studies*, 1964, vol. 23, 227-244.
- Hayes, J.N., 'The Pattern of Life in the New Territories in 1898', *Journal of the Hong Kong Branch of the Royal Asiatic Society*, 1962, vol. 2, 75-102.
- Hewlett, Sir Meyrick, *Forty Years in China* (London: Macmillan, 1943).
- Hoang, Pierre, 'Notions Techniques sur la Propriété en Chine' (condensed version in English published in two parts), *China Law Review*, 1922-24, vol. 1, 90-96 and 232-244.
- Hong Kong China Mail, *Who's Who in the Far East*, 1906-7.
- Hooker, M.B., *The Personal Laws of Malaysia* (Kuala Lumpur: Oxford University Press, 1976).
- Hooker, M.B., *Legal Pluralism: an introduction to colonial and neo-colonial laws* (Oxford: Clarendon Press, 1975).
- Hooker, M.B., 'Private International Laws and Personal Laws', *Malaya Law Review*, 1968, vol. 10, 55-67.
- Hooker, M.B., *A Sourcebook of Adat, Chinese Law and the History of the Common Law in the Malayan Peninsula* (Singapore: Malaya Law Review Monograph No. 1. Faculty of Law, University of Singapore, 1967).
- Hsia, C.L., *Studies in Chinese Diplomatic History* (Shanghai: Commercial Press, 1926).
- Hsiao, Kung-chuan, 'Compromise in Imperial China', *Parega Occasional Papers on China*, no. 6 (Seattle: School of International Studies, University of Washington Press, 1979).
- Hsiao, Kung-chuan, *Rural China: imperial control in the nineteenth century* (Seattle: University of Washington Press, 1960).
- Hsieh, A.C.K. and Spence J., 'Suicide and the Family in Pre-modern Chinese Society' in Arthur Kleinman and Tsung-yi Lin (eds), *Normal and Abnormal Behavior in Chinese Culture*, 2nd edn (Dordrecht: Reidel, 1981), 29-47.
- Hsu, F.L.K., *Under the Ancestors' Shadow: chinese culture and personality* (London: Routledge and Kegan Paul, 1949).
- Huang, Philip C.C., *Civil Justice in China: representation and practice in the Qing* (Stanford: Stanford University Press, 1996).
- Jackson, R.M., 'The Incidence of Jury Trial During the Past Century', *Modern Law Review*, 1937, vol. 1, 132-144.
- Jamieson, G., *Chinese Family and Commercial Law* (Shanghai: Kelly and Walsh, 1921; authorised reissue Hong Kong: Vetch and Lee, 1970).
- Jaschok, Maria and Miers, Suzanne (eds), *Women and Chinese Patriarchy: submission, servitude and escape* (London: Zed Books, 1994).
- Jashok, M., 'Chinese "Slave" Girls in Yunnan-Fu: Saving (Chinese) Womanhood and (Western) Souls, 1930-1991' in Maria Jaschok and Suzanne Miers (eds), *Women and*

- Chinese Patriarchy: submission, servitude and escape* (London: Zed Books, 1994), 171-197.
- Jaschok, Maria, *Concubines and Bondservants: a social history* (Hong Kong: Oxford University Press, 1988).
- Jearey, J.H., 'Trial by Jury and Trial with the Aid of Assessors in the Superior Courts of British African Territories: I', *Journal of African Law*, 1960, vol. 4, pt 3, 133-146.
- Jenkyns, Sir Henry, *British Rule and Jurisdiction Beyond the Seas* (Oxford: Clarendon Press, 1902).
- Jennings, Robert and Watts, Arthur (eds), *Oppenheim's International Law*, 9th edn, vol. I (London: Longman, 1992).
- Jenyns, R. Soame, 'Johnston, Sir Reginald Fleming 1874-1938', *Dictionary of National Biography* (Oxford: Oxford University Press, 1995).
- Jernigan, T.R., *China in Law and Commerce* (New York: Macmillan, 1905).
- Johnson, W., 'Group Criminal Liability in the T'ang Code' in Dieter Eikemeier and Herbert Franke (eds), *State and Law in East Asia: Festschrift Karl Büniger* (Wiesbaden: Harrassowitz Verlag, 1981).
- Johnston, R.F., 'Obituary Notice, James H. Stewart Lockhart', *Journal of the Royal Asiatic Society*, 1937, 391-3.
- Johnston, Reginald F., *Twilight in the Forbidden City* (London: Victor Gollancz, 1934).
- Johnston, R.F., *Lion and Dragon in Northern China* (London: John Murray, 1910).
- Jones, William C., *The Great Qing Code* (Oxford: Clarendon Press, 1994).
- Jones, W., 'Studying the Ch'ing Code – the Ta Ch'ing Lu Li', *American Journal of Comparative Law*, 1974, vol. 22, 330-364.
- Joseph, P., *Foreign Diplomacy in China, 1894-1900: a study in political and economic relations with China* (London: Allen & Unwin, 1928).
- Keeton, G.W., *The Development of Extraterritoriality in China*, 2 vols (London: Longmans, 1928).
- Kotenev, A.M., *Shanghai: Its Mixed Court and Council* (Shanghai: North-China Daily News and Herald, 1925).
- Kroker, Edward, 'The Concept of Property in Chinese Customary Law', *Transactions of the Asiatic Society of Japan*, 1959, vol. 7, (3rd series), 123-146.
- Lamont-Brown, Raymond, *Tutor to the Dragon Emperor: the life of Sir Reginald Fleming Johnston at the court of the last emperor of China* (Stroud, Gloucestershire: Sutton, 1999).
- Langer, W.L., *Diplomacy of Imperialism, 1890-1902* (New York: A.A. Knopf, 1935), vol. II.
- Lauterpacht, H., *Private Law Sources and Analogies of International Law* (London: Longmans, 1927).
- Lawrence, T.J., *War and Neutrality in the Far East* (London: Macmillan, 1904).
- Lee, Luke T., *Consular Law and Practice*, 2nd edn (Oxford: Clarendon Press, 1991).
- Lee, Luke T., *China and International Agreements: a study of compliance* (Leiden: Rule of Law Press, 1969).
- Lee, Sing and Kleinman, Arthur, 'Suicide as Resistance in Chinese Society', Elizabeth J. Perry and Mark Selden, *Chinese Society: change, conflict and resistance* (London: Routledge, 2000), 221-240.
- Legg, L.G. Wickham (ed.), *Dictionary of National Biography, 1931-40* (London: Oxford University Press, 1949).

- Leong Wai Kum, 'Common Law and Chinese Marriage Customs in Singapore' in A.J. Harding (ed.), *The Common Law in Singapore and Malaysia* (Singapore: Butterworths, 1985), 175-194.
- Lethbridge, Henry J., 'Sir James Haldane Stewart Lockhart: colonial civil servant and scholar', *Journal of the Hong Kong Branch of the Royal Asiatic Society*, 1972, vol. 12, 55-88; republished in Henry J. Lethbridge, *Hong Kong: Stability and Change* (Hong Kong: Oxford University Press, 1978), 130-162.
- Lethbridge, H.J., 'Hong Kong Cadets, 1862-1941', *Journal of the Hong Kong Branch of the Royal Asiatic Society*, 1970, vol. 10, 36-56; republished in Henry J. Lethbridge, *Hong Kong: Stability and Change* (Hong Kong: Oxford University Press, 1978), 31-51.
- Liao Tai-ch'u, 'Rural Education in Transition: a Study of old-fashioned Chinese schools (Szu-Shu) in Shantung and Szechwan', *Yenching Journal of Social Studies*, 1949, vol. 4, no. 2, 19-67.
- Lin Shao-Yang, *A Chinese Appeal to Christendom Concerning Christian Missions* (London: Watts, 1911).
- Lindley, M.F., *The Acquisition and Government of Backward Territory in International Law: being a treatise on the law and practice relating to colonial expansion* (New York: Longmans, Green, 1926).
- Lo Hui Min and Bryant, Helen, *British Diplomatic and Consular Establishments in China: 1793-1949*, vol. II, Consular Establishments 1843-1949 (Taipei: SMC Publishing, 1988).
- Macauley, Melissa A., 'Civil and Uncivil Disputes in Southeast Coastal China, 1723-1820' in Kathryn Bernhardt and Philip C.C. Huang (eds), *Civil Law in Qing and Republican China* (Stanford: Stanford University Press, 1994), 85-121.
- MacCormack, Geoffrey, 'Assistance in Conflict Resolution in Imperial China', *Transactions of the Jean Bodin Society*, 1996, vol. LXIII, 111-153.
- MacCormack, Geoffrey, *The Spirit of Traditional Chinese Law* (Athens, Ga.: University of Georgia Press, 1996).
- MacCormack, G. 'General Principles of Liability in the Late Ch'ing Law of Homicide', *Asia Pacific Law Review*, 1992, vol. 1, 13-31.
- MacCormack, Geoffrey, 'Cultural Values in Traditional Chinese Law', *Chinese Culture*, 1991, vol. 32, no. 4, 1-11.
- MacCormack, Geoffrey, 'Suicide in Traditional Chinese Law', *Chinese Culture*, 1991, vol. 32, no. 2, 33-47.
- MacCormack, Geoffrey, *Traditional Chinese Penal Law* (Edinburgh: Edinburgh University Press, 1990).
- MacDonald, Ronald St. John (ed.), *Essays in Honour of Wang Tieya* (Dordrecht: Martinus Nijhoff, 1994).
- Mani, Lata, *Contentious Traditions: the debate on sati in colonial India* (Berkeley: University of California Press, 1998).
- Mann, Susan, 'Widows in the Kinship, Class and Community Structures of the Qing Dynasty China', *Journal of Asian Studies*, 1987, vol. 46, 37-56.
- Martin, W.A.P., *A Cycle of Cathay; or, China, south and north, with personal reminiscences* (Edinburgh: Oliphant, Anderson and Ferrier, 1896).
- McAleavy, H., 'Chinese Law' in J. Duncan M. Derrett (ed.), *An Introduction to Legal Systems* (London: Sweet & Maxwell, 1968), 105-130.
- McCordock, R. Stanley, *British Far Eastern Policy 1894-1900* (New York: Octagon Books, 1976).

- McKnight, Brian E., *The Quality of Mercy: amnesties and traditional Chinese justice* (Honolulu: University Press of Hawaii, 1981).
- Meijer, M.J., *Murder and Adultery in Late Imperial China: a study of law and morality* (Leiden: E.J. Brill, 1991).
- Meijer, M.J., 'Criminal Responsibility for the Suicide of Parents in Ch'ing Law' in Wilt L. Idema (ed.), *Leyden Studies in Sinology* (Leiden: E.J. Brill, 1981), 109-137.
- Meijer, Marinus Johan, 'The Price of a Pai-lou', *T'oung Pao*, 1981, vol. 67, 288-304.
- Merry, Sally Engle, 'Legal Pluralism', *Law and Society Review*, 1988, vol. 22, 869-896.
- Metzger, Thomas A., *The Internal Bureaucracy of Ch'ing Bureaucracy* (Cambridge, Mass.: Harvard University Press, 1973).
- Miers, Suzanne, 'Mui Tsai Through the Eyes of the Victim: Janet Lim's story of bondage and escape' in Maria Jaschok and Suzanne Miers (eds), *Women and Chinese Patriarchy: submission, servitude and escape* (London: Zed Books, 1994), 108-121.
- Miners, Norman, *Hong Kong under Imperial Rule, 1912-1941* (Hong Kong: Oxford University Press, 1987).
- Miners, N.J., 'A Tale of Two Walled Cities: Kowloon and Weihaiwei', *Hong Kong Law Journal*, 1982, vol. 12, 179-202.
- Möllendorff, P.G. von, *The Family Law of the Chinese* (Shanghai: Kelly and Walsh, 1899).
- Morse, Hosea Ballou, *The Gilds of China: with an account of the gild merchant of Co-hong of Canton* (London: Longmans, 1909).
- Morvay, Werner, 'Unequal Treaties' in *Encyclopedia of Public International Law*, published under the auspices of the Max Planck Institute for Comparative Public Law and International Law under the direction of Rudolf Bernhardt, vol. 7 (Amsterdam: North-Holland, 1984), 514-517.
- Munn, Christopher, *Anglo-China: Chinese People and British rule in Hong Kong 1841-1880* (Richmond, Surrey: Curzon, 2001).
- Nish, I.H., 'The Royal Navy and the Taking of Weihaiwei, 1898-1905', *The Mariner's Mirror*, 1968, vol. 54, 39-54.
- Nish, Ian H., *The Anglo-Japanese Alliance: the diplomacy of two island empires, 1894-1907* (London: Athlone Press, 1966).
- Norem, R.A., *Kiaochow Leased Territory* (Berkeley: University of California Press, 1936).
- North-China Herald and Supreme Court and Consular Gazette*, 1898-1930.
- O'Connell, D.P., *International Law*, 2nd edn (London: Stevens, 1970), vol. 1.
- Ocko, Jonathan K., 'I'll Take it All the Way to Beijing: Capital Appeals in the Qing', *Journal of Asian Studies*, 1988, vol. 47, no. 2, 291-315.
- Oppenheim, L., *International Law: A Treatise* (London: Longmans, 1905), vol. 1.
- Otte, T.G., 'Great Britain, Germany, and the Far-Eastern Crisis of 1897-8', *The English Historical Review*, 1995, vol. 110, 1157-1179.
- Parker, Edward Harper, *Comparative Chinese Family Law* (Hong Kong: China Review, 1879).
- Pelcovits, Nathan A., *Old China Hands and the Foreign Office* (New York: Published under the auspices of the American Institute of Pacific Relations by King's Crown Press, 1948).
- Phang, Andrew Boon Leong, *The Development of Singapore Law: historical and socio-legal perspectives* (Singapore: Butterworths, 1990).

- Rawski, Evelyn, 'Economic and Social Foundations of Late Imperial Culture' in David Johnson et al, *Popular Culture in Late Imperial China* (Berkeley: University of California Press, 1985), 3-33.
- Rickett, W., 'Voluntary Surrender in Chinese Law', *Journal of Asian Studies*, 1971, vol. 30, 797-814.
- Roberts-Wray, Kenneth, *Commonwealth and Colonial Law* (London: Stevens, 1966).
- Ropp, Paul S., Zamperini, Paola and Zurndorfer, Harriet. T. (eds), *Passionate Women: female suicide in late imperial China* (Leiden: E.J. Brill, 2001).
- Rumpf, Christian, 'Territory, Leased' in *Encyclopedia of Public International Law* (Amsterdam: North-Holland, 1987), vol. 10, 507-509.
- Russell, William Oldnall, *A Treatise on Crimes and Misdemeanors*, 7th edn, by William Feilden Craies and Leonard William Kershaw, 3 vols (London: Stevens, 1909).
- Schofield, A.B., *Dictionary of Legal Biography, 1845-1945* (Chichester: Barry Rose Law Publishers, 1998).
- Schrecker, John E., *Imperialism and Chinese Nationalism: Germany in Shantung* (Cambridge, Mass.: Harvard University Press, 1971).
- Schurmann, H.F., 'Traditional Property Concepts in China', *Far Eastern Quarterly*, 1956, vol. 15, 507-516.
- Seidman, Robert B., 'The Reception of English Law in Colonial Africa Revisited', *Eastern Africa Law Review*, 1969, vol. 2, 47-85.
- Shiga, Shūzō, 'Criminal Procedure in the Ch'ing Dynasty', *Memoirs of the Research Department of the Toyo Bunko*, 1974, vol. 32, 1-45 and 1975, vol. 33, 115-138.
- Shiga, Shūzō, 'Some Remarks on the Judicial System in China: historical development and characteristics', *Journal of Asian and African Studies*, 1967, vol. 2, 44-53.
- Sinn, Elizabeth 'Chinese Patriarchy and the Protection of Women in 19th-century Hong Kong' in Maria Jaschok and Suzanne Miers (eds), *Women and Chinese Patriarchy: submission, servitude and escape* (London: Zed Books, 1994), 141-170.
- Smith, Arthur H., *Village Life in China: a study in sociology* (New York: Fleming H. Revell, 1899; repr. New York: Haskell, 1968).
- Smith, Arthur Henderson, *Chinese Characteristics* (New York: Fleming H. Revell, 1894; 5th edn rev. Edinburgh: Oliphant, Anderson and Ferrier, 1900).
- Sommer, Matthew H., *Sex, Law, and Society in Late Imperial China* (Stanford: Stanford University Press, 2000).
- Staunton, Sir George Thomas, *Ta Tsing Leu Lee: being the fundamental laws and a selection from the supplementary statutes of the penal code of China* (London: T. Cadell and W. Davies, 1810).
- Stewart Lockhart, J.H., 'The Marriage Ceremonies of the Manchus', *Folk Lore*, 1890, vol. 1, pt 4, 480-492.
- Stockard, Janice E., *Daughters of the Canton Delta: marriage patterns and economic strategies in South China* (Stanford: Stanford University Press, 1989; repr. Hong Kong: Hong Kong University Press, 1992).
- Sun, E-tu Zen, 'The Lease of Wei-hai Wei', *Pacific Historical Review*, 1950, vol. 19, 277-283.
- Swettenham, Sir Frank Athelstane, *The Real Malay: pen pictures* (London: Lane, 1900).
- Swettenham, Sir F.A., *Malay Sketches* (London: John Lane, 1895).
- Swettenham, Frank A., *Vocabulary of the English and Malay Languages, with notes* (Singapore: Government Printing Office, 1881).

- Tachi, Sakutarō, 'Legal Aspects of Leased Territories', *Contemporary Japan*, 1932, vol. 1, 23-29.
- Tan, Carol G.S., [forthcoming] 'Between Law and Culture in the Leased Territory of Weihaiwei', The Chinese Legal History Society (ed.), *Chinese Culture and the Rule of Law* (Beijing: Social Sciences Literature Press, 2006).
- Tan, Carol G.S., 'Courts and Laws in Weihaiwei: an alien legal system mitigated', *Chungguksa Yongu: The Journal of Chinese Historical Researches*, 2006, vol. 44, 33-73.
- Tan, Carol G.S., 'Hurry No Man's Cattle: British rule and suicide in China', *The Journal of Legal History*, 2005, vol. 26, 279-304.
- Tan, Carol G.S., 'Lawyers, Trial by Jury and Other Aspects of Criminal Justice in the Leased Territory of Weihaiwei', *Hong Kong Law Journal*, 2004, vol. 34, 637-659; Chinese transl. by Fang Fang and Wang Yi Qiang, 'Ying Zu Weihaiwei de Wing Shi Shen Pan', *Global Law Review*, 2005, vol. 27, 541-552.
- Tan, Carol G.S., 'Going to Court in Weihaiwei: some support for civil litigation during the Qing' in Ian Edge, *Comparative Law in Global Perspective* (New York: Transnational Publishers, 2000), 271-292; Chinese transl. by Zhao Lanyi and Su Yigong, 'Qingdai Jiansong Wai Zheng Weihaiwei Yingguo Fating de Huaren Minshi Susong', *Global Law Review*, 2002, vol. 24, 350-360.
- Tarring, Sir Charles James, *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: Stevens and Haynes, 1887).
- The Chinese Supreme Court Decisions Relating to General Principles of Civil Law, Obligations and Commercial Law*, transl. by F.T. Cheng (Peking: The Commission on Extra-territoriality, 1923).
- The Hot Springs, Weihaiwei* ([n. p.]: [n. pub.], c. 1904).
- Tung, L., *China and Some Phases of International Law* (London: Oxford University Press, 1940).
- Tung, William L., *China and the Foreign Powers: the impact of and reaction to unequal treaties* (Dobbs Ferry, N.Y.: Oceana Publications, 1970).
- Tyau, Min-ch'ien T.Z., *The Legal Obligations Arising Out of Treaty Relations between China and Other States* (Shanghai: Commercial Press, 1917; repr. Taipei: Ch'eng-Wen, 1966).
- Tyler, W.F., *Pulling Strings in China* (New York: Richard R. Smith, 1930).
- Van der Sprenkel, S., *Legal Institutions in Manchu China: a sociological analysis* (London: Athlone Press, 1962).
- Van der Valk, M.H., *Interpretations of the Supreme Court at Peking, years 1915 and 1916. Translations, notes and introduction* (Batavia: Sinological Institute, Faculty of Arts, University of Indonesia, 1949).
- Vandermeersch, Léon, 'An Enquiry into the Chinese Conception of the Law' in S.R. Schram (ed.), *The Scope of State Power in China* (London: SOAS, University of London, 1985), 3-25.
- Verzijl, J.H.W., *International Law in Historical Perspective, vol. 3: State Territory* (Leiden: A.W. Sijthoff, 1968-98).
- Vidmar, Neil (ed.), *World Jury Systems* (Oxford: Oxford University Press, 2000).
- Wade, E.C.S. and Phillips, G. Godfrey, *Constitutional Law* (London: Longmans, 1931).
- Wakeman Jr., Frederic and Grant, Carolyn, *Conflict and Control in Late Imperial China* (Berkeley: University of California Press, 1975).
- Walter, Ann, *Getting an Heir: adoption and the construction of kinship in late imperial China* (Honolulu: University of Hawaii Press, 1990).

- Wang Yeh-chien, *Land Taxation in Imperial China, 1750-1911* (Cambridge, Mass., Harvard University Press, 1973).
- Watt, John R., *The District Magistrate in Late Imperial China* (New York: Columbia University Press, 1972).
- 'Weihaiwei: its value as a naval station', *Blackwood's Magazine*, June 1899, vol. 165, 1069.
- Wesley-Smith, Peter, *Constitutional and Administrative Law in Hong Kong* (Hong Kong: Longman Asia, 1994).
- Wesley-Smith, Peter, *The Sources of Hong Kong Law* (Hong Kong: Hong Kong University Press, 1994; repr. 1996).
- Wesley-Smith, Peter, *Unequal Treaty 1898-1997: China, Great Britain and Hong Kong's New Territories* (Hong Kong: Oxford University Press, 1980, rev. edn Hong Kong: Oxford University Press, 1998).
- Who Was Who, 1916-1928*, 4th edn (London: Adam and Charles Black, 1967).
- Who Was Who, 1929-1940* (London: Adam and Charles Black, 1947).
- Who's Who in China, 1918-1950*, 3 vols (Hong Kong: China Materials Center, 1982).
- Whyte, Sir Frederick, *China and Foreign Powers: an historical review of their relations*, 2nd and rev. edn (London: Oxford University Press, 1928).
- Wilkinson, Hiram Parkes, *The Family in Classical China* (Shanghai: Kelly & Walsh, 1926).
- Williams, Glanville, *The Sanctity of Life and the Criminal Law* (London: Faber & Faber, 1958).
- Williams, Samuel W., *The Middle Kingdom: a survey of the geography, government, literature, social life, arts and history of the Chinese empire and its inhabitants*, rev. edn, 2 vols (London: W.H. Allen, 1883).
- Williamson, Rev. Alexander, *Journeys in North China, Manchuria, and Eastern Mongolia; with some account of Corea* (London: Smith, Elder, 1870).
- Willoughby, Westel W., *China at the Conference: A Report* (Baltimore: Johns Hopkins Press, 1922).
- Willoughby, Westel W., *Foreign Rights and Interests in China*, rev. and enlarged edn, 2 vols (Taipei: Ch'eng-wen, 1966).
- Wolf, Margery, 'Women and Suicide in China' in Margery Wolf and Roxane Witke (eds), *Women in Chinese Society* (Stanford: Stanford University Press, 1975), 111-141.
- Wood, Frances, *No Dogs and Not Many Chinese: treaty port life in China 1843-1943* (London: John Murray, 1998).
- Wood, W.A.R., *Consul in Paradise: sixty-nine years in Siam* (London: Souvenir Press, 1965).
- Wright, Arnold and Cartwright, H.A. (eds), *Twentieth Century Impressions of Hong Kong, Shanghai and Other Treaty Ports of China, their history, people, commerce, industries, and resources* (London: Lloyd's Greater Britain Publishing Company, 1908).
- Yang, Martin C., *A Chinese Village: Taitou, Shantung Province* (New York: Columbia University Press, 1945).
- Young, L.K., *British Policy in China, 1895-1902* (Oxford: Clarendon Press, 1970).
- Zelin, Madeleine, 'Merchant Dispute Mediation in Twentieth-Century Zigong, Sichuan' in Kathryn Bernhardt and Philip C.C. Huang (eds), *Civil Law in Qing and Republican China* (Stanford: Stanford University Press, 1994), 249-286.

Appendix

Text of the Peking Convention between Great Britain and China respecting Wei-Hai Wei

Signed between the United Kingdom and China, confirmed by ratifications exchanged at London on 5th October 1898 : -

In order to provide Great Britain with a suitable naval harbour in North China, and for the better protection of British commerce in the neighbouring seas, the Government of His Majesty the Emperor of China agree to lease to the Govt of HM the Queen of Great Britain and Ireland Wei-hai-wei, in the Province of Shantung, and the adjacent waters, for so long a period as Port Arthur shall remain in the occupation of Russia.

The territory leased shall comprise the Island of Liu Kung, and all the islands in the Bay of Wei-hai-wei, and a belt of land 10 English miles wide along the entire coast-line of the Bay of Wei-hai-wei. Within the above-mentioned territory leased, Britain shall have sole jurisdiction.

Great Britain shall have in addition the right to erect fortifications, station troops, or take any other measures necessary for defensive purposes at any points on or near the coast of the region east of the meridian, 121° 40' east of Greenwich, and to acquire on equitable compensation within the territory such sites as may be necessary for water supply, communications, and hospitals. Within that zone Chinese administration shall not be interfered with, but no troops other than Chinese or British shall be allowed therein.

It is also agreed that within the walled city of Wei-hai-wei, Chinese officials shall continue to exercise jurisdiction, except so far as may be inconsistent with naval and military requirements for the defence of the territory leased.

It is further agreed that Chinese vessels of war, whether neutral or otherwise, shall retain the right to use the waters herein leased to Great Britain.

It is further understood that there will be no expropriation or expulsion of the inhabitants of the territory herein specified, and that if land is required for fortifications, public offices, or any official or public purposes, it shall be bought at a fair price.

This convention shall come into force on signature. It shall be ratified by the Sovereigns of the two countries, and the ratifications shall be exchanged in London as soon as possible.

In witness thereof the Undersigned, duly authorised thereto by their respective Governments, have signed the present Agreement.

Done at Peking in quadruplicate (four copies in English and four in Chinese), the 1st day of July, in the year of our Lord 1898, being the 13th day of the 5th moon of the 24th year of Kuang Hsu.

(L.S.) CLAUDE MACDONALD

(L.S.) Seal of the Chinese Plenipotentiary

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