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11 Can. J.L. & Soc. 63 1996

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# The Paradox of Hong Kong Colonialism: Inclusion as Exclusion\*

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**Abstract** — *This paper examines the British legal policy in Hong Kong which preserved Chinese customary law as a subtle and indirect form of social control. The initial takeover of Hong Kong by the British in 1841 was motivated by economic interest in China. Hong Kong was to be developed into an entrepôt under a laissez-faire government. In order to pacify the local subjects and the Chinese government, English law was applied to British subjects but the local Chinese were governed by Chinese customary law. Gradually, the interpretation of customary law by English judges and common law courts transformed and even created a new understanding of this law. The preservation of customary law had the paradoxical effect of ousting the local narrative. One hundred and fifty-six years have passed; Hong Kong has fulfilled the British dream of being a flamboyant commercial centre. However, in less than 150 days, Hong Kong will be elevated from the status of a British colony to that of “special administrative region” of China. Nonetheless, the rhetoric of laissez-faire government continues to be reflected in the policy of “high degree of autonomy.” The fate of Hong Kong is certainly unknown. Hopefully, the study of its past experience will shed some light on its future.*

**Résumé** — *Dans le présent article, l'auteure passe en revue les diverses lois britanniques qui, sous le couvert de maintenir le droit coutumier chinois, visaient à exercer un contrôle social. La prise de Hong Kong par les Britanniques en 1841, motivée par des intérêts économiques, avait pour objectif de faire de l'île un entrepôt et un port franc. Pour pacifier les habitants et le gouvernement chinois, on y instaura un régime juridique en vertu duquel les sujets britanniques étaient régis par le droit anglais et les indigènes par le droit coutumier chinois. Peu à peu, l'interprétation du droit coutumier chinois élaborée par les juges anglais des cours de common law a transformé celui-ci, échafaudant une nouvelle approche du droit coutumier. Paradoxalement, donc, le maintien officiel du droit coutumier a eu pour effet de déposséder les autochtones de leurs coutumes séculaires. Cent cinquante-six ans plus tard, le rêve des Britanniques s'est matérialisé; Hong Kong est aujourd'hui un centre*

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\* I am much indebted to my colleague, Dr. Bart Rwezaura, and my friend, Dr. Stephen O'Leary for their valuable comments and time.

*commercial florissant. Mais dans moins de cent cinquante jours, la colonie acquerra le statut de territoire autonome (zone administrative spéciale) qui jouira, selon les termes du gouvernement chinois, d'un large degré d'autonomie, laissant présager le maintien d'un régime de libéralisme économique. Toutefois, le sort de Hong Kong demeure, à ce jour, incertain. Peut-être son passé peut-il nous éclairer sur son avenir?*

### Introduction

After 156 years of colonial rule, Hong Kong has proven to be a glamorous place. It has achieved one of the world's fastest rates of economic growth in the past 30 years. It is famous for breeding business elites without producing eminent political figures who arguably might have represented the local population in resisting British rule.

Hong Kong may be said to be a perfect embodiment of paradoxes. It has inherited the law and order of the British rule without the libertarian dimension of the common law tradition.<sup>1</sup> It has become a meeting point for the West and the East without fully integrating either tradition. More recently, its people have come to enjoy voting but without the power that goes with it.<sup>2</sup>

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1. The claimed "virtues" of the common law system can be defined as the principles of equality before the law, separation of powers, due process of law and respect for human rights. Hong Kong has concentration of power in the executive branch. It has a non-representative government. The Hong Kong Government restricted freedom of the media and did not encourage public criticism. Under section 27 of the *Public Order Ordinance* (Cap.245, Laws of Hong Kong, 1987 ed.), anyone who "maliciously publish in any local newspaper false news which is likely to cause alarm to the public or ... disturb public order" was punishable by two-year imprisonment. This was repealed after much protest in 1989. The *Bill of Rights Ordinance* (Cap. 383, Laws of Hong Kong, 1991 ed.) was only introduced in 1991 as an instrument to regain confidence in Hong Kong after the Tiananmen massacre in China.
  2. From 1844 to 1984, all members of the Legislative Council were appointed. It was only in 1991 that the government introduced direct election. The slogan used by the government was "Vote: it's power in your hands!" Election is a cardinal feature of democracy. It enables public interest to be represented, renders the government accountable to the people and realizes the dream of sovereignty of the people. However, the constitutional framework of 1991 was not designed to actualize the slogan of votes with power. In 1991, Hong Kong had 18 directly elected members out of 60 in the Legislative Council. From 1995 on, half of the composition is elected by functional constituencies, which is far from the ideal of universal suffrage. For further discussion see R. Kwok *et al.*, eds., *Votes Without Power* (Hong Kong: Hong Kong University Press, 1992).

This paradox is also replicated within Hong Kong's legal system. This paper will look at the seemingly neutral policy of the retention of Chinese customary law which, in fact, contributed to the exclusion of the Chinese narratives.

*Prima facie*, the carving out of an exclusive area of law under the so-called protected or reserved realm of Chinese customary law was an act of respect for local customs and practice. As time went by, however, the interpretation of Chinese law in English common law courts gradually diminished the scope of application of Chinese customary law.

Britain's intentional development of Hong Kong into a commercial centre under the principle of *laissez-faire* government has contributed to Hong Kong's economic prosperity, but its people are excluded from the decision making process. In the end, Hong Kong is left in a state of indeterminacy, facing an identity crisis in the run-off to 1997 when the sovereignty over the colony will revert to China. The 1843 rhetoric of *laissez-faire* government has been reiterated in the 1990s in the new policy of "high degree of autonomy" with the promise that the legal system will remain unchanged for 50 years. Thus, although the status of Hong Kong will be elevated from a colony to a special administrative region (SAR), it is not known to what extent Hong Kong can fully integrate with its homeland. Hopefully, the study of Hong Kong's past experience will shed some light on Hong Kong's future path.

This paper is organized in the following manner: first, a brief outline is given of the historical background, starting from Britain's initial takeover of Hong Kong. In the second part, the policy of limited home rule for the locals expressed in the form of retention of customary law will be discussed. In order to illustrate when the ousting of the local narratives is deemed to happen, a comparative study on the British style of ruling in Malaysia<sup>3</sup> will be included. Finally, this paper will end with a note on a new form of legal pluralism for Hong Kong's future government.

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3. Though the experience of other British colonies is very similar to that of Hong Kong in regard to the retention of customary law, Malaysia is chosen as a study subject for its application of the Chinese customary law before and after the colonial days. For a comprehensive comparative study of the dual system of British colonialism, see J. N. Matson, "The Common Law Abroad: English and Indigenous Laws in the British Commonwealth"(1993) 42 *International and Comparative Law Quarterly* 753.

### The Colonial Rule of *Laissez-Faire*

Hong Kong consists of three main areas that were lost to Britain by China in three different battles between 1842 and 1895.<sup>4</sup> After 156 years of colonial rule, Hong Kong can be said to be the last remaining colony of the British heyday of territorial imperialism. Although it is its last colony, Hong Kong is also the most prosperous British possession. Indisputably, it is the most industrialized and urbanized colony the world has ever seen. Next to Japan and Singapore, it has the highest per capita income in Asia. It is a major trading exporter, rated seventh in the world. It has a substantial stock market and is a leading financial centre.<sup>5</sup>

This record of achievement should not obscure the fact that Britain did not take over Hong Kong due to its own inherent significance. Back in 1842, Britain conquered Hong Kong by force. Unlike other conquests, the primary motive of the British was not territorial expansion but securing a naval base and an economic *entrepôt* through which the British economic interests in the Far East could be protected and expanded. From the outset, Britain used Hong Kong as a link in British trade with China. The dominant concern was the management of relations with China and the exercise of the British extraterritorial jurisdiction in treaty ports.

Lord Stanley, who was then Secretary of State for War and the Colonies (1841–1845) wrote to Pottinger (the Plenipotentiary and Superintendent of Trade and the first Governor of Hong Kong) in June 1843, expressing his view that the *raison d'être* of Hong Kong was to serve as a diplomatic, commercial and military post. The major duties of Pottinger were to negotiate with the Chinese emperor, to superintend the trade of British subjects and to regulate the internal economy of the settlement.<sup>6</sup> This was reiterated in 1856 by Labouchere, Secretary of State for the Colonies, who expressed the view that “great commercial interest and the future progress of civilization throughout the East are to a great extent involved in the maintenance of British rule and orderly government in Hong Kong.” Hong Kong was to be held “simply as a subsidiary to the intercourse between the Chinese and British Empires.”<sup>7</sup> Since the Plenipotentiary and Superintendent of Trade had to reside in Hong Kong—he

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4. In 1842, the Hong Kong island was acquired after Britain's victory in the First Opium War. The Kowloon peninsula was ceded to Britain after the Second Opium War of 1858–1860. Finally, China's defeat by Japan in the war of 1894–1895 enabled Britain to demand the lease of the New Territories for 99 years.

5. The data was compiled in 1995. See “The Most Update International Economic News” *The International Chinese Newsweekly* (28 April 1996) at 73.

6. G. B. Endacott, *Government and People in Hong Kong, 1841–1962* (Hong Kong: Hong Kong University Press, 1964) at 20.

7. *Ibid.* at 52.

was also the Governor of Hong Kong—, the role of the Governor in early colonial days was to provide a trade link between China and Britain.

At the time of cession, Hong Kong was a barren island with an estimated settlement of 5,000 inhabitants, most of them fishermen. The settlement was small and most British residents were itinerant traders. The major concern at this time was to develop a laissez-faire market serving expatriate business houses. Economic power was concentrated in the hands of a few giant conglomerates dominated by British capital. The famous *hongs*, or big enterprises, still play a significant role in present-day economy.<sup>8</sup>

The early vision of Hong Kong as an unrivalled emporium for the East turned out to be the fate of Hong Kong for the following century. Though the signing of the unequal treaties was a national humiliation keenly felt by all Chinese, local resistance<sup>9</sup> against British occupation diminished drastically when Japan started its aggression against China in 1937. Hong Kong became a shelter for refugees until 1941 when it was occupied by the Japanese troops. The end of World War II in 1945 and the Communist takeover of China in 1949 sent millions of refugees from China to Hong Kong. By 1953, the population has swelled to more than 2 million. The Cultural Revolution of 1967 sent another wave of refugees from China to Hong Kong. The refugees were in no mood to challenge the British colonial authority. On the contrary, there was a sufficient coincidence of economic interest between the colonial regime and its people.

Though Britain recognized the new Communist government soon after it was established, most Western countries did not establish diplomatic contact with the People's Republic of China. Hong Kong became an important centre for trade contacts and financial negotiations. It provided a place where China could earn foreign currency to pay for its development programmes. The

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8. "Jardine Matheson" dated back to its foundation in 1782, making money in smuggling opium to China in the 1820s. It has since developed into a set of holding companies which own a couple of subsidiaries engaged in activities that include shipping, air transport, engineering, construction, property development, hotels, insurance, airport supplies and retailing. Local franchises owned by Jardine include Mercedes-Benz, Christian Dior, and Pizza Hut. The main rival of Jardine can be said to be "Butterfield and Swire," founded in Shanghai in 1866 as a shipping and trading company, that entrenched itself in Hong Kong. It owns the colony's main airline, Cathay Pacific Airways.
  9. At the beginning of the British occupation, most Chinese felt they were impotent to do anything in the face of marked superior Western military power. After the overthrow of the Qing imperial dynasty in 1911, there was a flurry of patriotic sentiment for the new Chinese government. The seamen's strikes in 1922 and 1925 were attempts to stop the British government from turning Hong Kong into an international port. For further discussion, see N. Miners, *The Government and Politics of Hong Kong* (Hong Kong: Oxford University Press, 1991) at 15.

economic value of Hong Kong to China provided a convincing reason for not seeking to recover Hong Kong in the immediate post-war years.

When the People's Republic of China joined the United Nations in 1972, the status of Hong Kong was left deliberately vague. China denied its status as a British colony and ruled out the possibility of the gradual development of a representative government and, ultimately, independence.<sup>10</sup>

Eventually the British government had to face the fact that the lease of the New Territories (part of Hong Kong) would expire on 30 June 1997. In 1984, the *Joint Declaration on the Question of Hong Kong* was signed by the British and Chinese governments. One of the major provision of this agreement was that Hong Kong would become a "Special Administrative Region" of China after 1997 and would enjoy a "high degree of autonomy" under China's model of "one country two systems." The reassurance that Hong Kong's people have is "stability and prosperity" for at least 50 years after 1997. The familiar saying that "horses will race as usual and the people will dance as usual" has been echoed in everyone's mind.

The vision of the Chinese government in modern times is essentially the same as the one held by the British government back in the 1840s. Hong Kong is to be maintained as a strong economic centre. It is not its political underdevelopment (that is, its lack of representative government) but its economic prosperity that made it all the more appealing to its rulers.

Throughout Hong Kong's history, the market has definitely provided a strong identification base for the British government, the local communities, and the coming Chinese government. Thus, the coincidence of interest between the ruler and the ruled made the governing of the colony much easier. The British style of *laissez-faire* government lent active encouragement to economic development.

The following discussion will look at the gradual ousting of the Chinese narrative in relation to Chinese customary law.

### **Inclusion and Exclusion of the Chinese Narrative**

#### ***Home Rule?***

Captain Charles Elliot declared the cession of the island and harbour of Hong Kong to Britain, and took formal possession on 26 January, 1841; on 1 February, 1841, he issued the first proclamation in his capacity as "Her Majesty's Commissioner, Procurator, and Plenipotentiary in China." The proclamation declared that "the natives of the island of Hong Kong, and all natives of China thereto resorting, shall be governed according to laws and customs of China

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10. *Ibid.* at 6.

(every description of torture excepted) by the elders of villages, subject to the control of a British magistrate ...”<sup>11</sup>

All other persons were to be governed under the English law. Another proclamation dated 2 February, 1841 affirmed that the “natives” of Hong Kong and of China who came to Hong Kong would be governed according to the laws and customs of China but that powers of government would be exercised by the Chief Superintendent of Trade. British subjects and foreigners would enjoy full security and protection, subject to the jurisdiction of the criminal and admiralty courts already established in China; and the Chief Superintendent would make rules and regulations. When the *Treaty of Nanking* was ratified on 29 August, 1842, Hong Kong was formally ceded to Britain. On 5 April, 1843, Sir Henry Pottinger was commissioned as the first governor of the colony and the following year, the first legislature was founded.

Elliot's proclamations carved out a “dual prospective system of law”<sup>12</sup> and a separate judicial administration by declaring that Chinese law and custom were for the Chinese while English common law was for the British. Though the legal capacity of Elliot to issue the proclamations has been doubted,<sup>13</sup> Sir Henry Pottinger supported Elliot's idea of establishing a dual legal system due to pressing political circumstances. Internally, the peasant militia had been most effective in combatting the British troops. Externally, there was pressure from the Chinese government that the Chinese be tried by Chinese mandarins. The Evangelicals were also instrumental in implementing a humanitarian policy to safeguard the interests of the people in the colonies.<sup>14</sup> In addition, the dual approach of establishing an enclave of British society, which was regulated by English colonial legislation, while the local population was left primarily to its own devices, was entirely consistent with the British style of colonial rule.<sup>15</sup> It is a constitutional practice in a ceded colony that pre-cessional laws remain in force until repealed by a new sovereign and unless such local law is repugnant to the fundamental principles of English law.<sup>16</sup>

As a result, a separate administrative system was established by various pieces of legislation. For example, laws were passed in 1844 for the above purpose. *Ordinance No. 10*<sup>17</sup> provided that Chinese offenders were to be

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11. P. Wesley-Smith, *Constitutional and Administrative Law in Hong Kong*, vol. 1 (Hong Kong: China & Hong Kong Law Studies, 1987) at 34.
  12. The phrase used by the Supreme Court in *Ho Tze Tun v. Ho Au Shi and others* (1915), 10 H.K.L.R. 69 at 79.
  13. P. Wesley-Smith, *The Sources of Hong Kong Law* (Hong Kong: Hong Kong University Press, 1994) at 207–08 [hereinafter *The Sources*].
  14. Endacott, *supra* note 6 at 28.
  15. D. J. Lewis, “A Requiem for Chinese Customary Law in Hong Kong” (1986) 32 *International and Comparative Law Quarterly* 347 at 350.
  16. *The Sources*, *supra* note 13 at 209.
  17. Repealed by *Ordinance No. 10*, 1890.



punished according to Chinese usage before a Chinese Justice of Peace. *Ordinance No. 13*<sup>18</sup> provided for the appointment of native Chinese peace officers. *Ordinance No. 15*<sup>19</sup> provided that, in criminal proceedings within the Supreme Court jurisdiction, the court could exercise its discretion to impose punishment according to Chinese law.

Given the limited financial resources, manpower and uncertain policy objectives in early days of colonial rule, this form of indirect rule was inevitable. The preservation of customary law was a convenient method to preserve administrative control and buttress local acceptance of the colonial rule. One can conclude that the recognition of customary law had its basis in practical necessity and political theory.

However, later in 1844, the colonial government being concerned that the Chinese government might claim that Hong Kong was only under British occupancy but not sovereignty,<sup>20</sup> *Ordinance No. 15* was enacted. "The law of England" was declared to be "in full force in the said Colony of Hong Kong except where the same shall be inapplicable to the local circumstances of the said Colony or of its inhabitants."<sup>21</sup> Similar measures to give the Chinese their own administrative officials were equally half-heartedly taken. For example, Chinese peace officers had little authority to administer justice and to combat crime. Moreover, they were poorly paid. The colonial government recognized a possible conflict of interest between the ruler and the ruled. The separate judicial administration of criminal law was abolished after one year of implementation by *Ordinance No. 6* of 1845. It seems that only in areas of less direct conflict with the colonial government were Chinese law and customs preserved.<sup>22</sup> Such an initially friendly and compromising gesture on the part of the British turned out to be a means of administrative necessity for a better colonization in days to come.

As noted above, the English criminal law was universally applied while, in civil areas, the Chinese inhabitants of the colony were left to look after their own affairs. The characteristic of the entire legal system was its focus on criminal law and public control, the need to establish peace and order and to provide a stable legal system for the development of British trade in the East.

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18. Repealed by *Ordinance No. 6*, 1857.

19. Subsequently repealed by *Ordinance No. 6*, 1845.

20. *Supra* note 5 at 40.

21. Section 3 of the *No. 15 Ordinance*, 1844, repealed by the *Supreme Court Ordinance No. 6*, 1845. See *The Sources*, *supra* note 13 at 89–90.

22. Thus, Chinese family law and succession law were retained until the early 1970s. Chinese law and custom on marriage, concubinage, divorce, adoption, and succession were abolished by the *Marriage Reform Ordinance* (Cap. 178, Laws of Hong Kong, 1971 ed.), *Intestate's Estates Ordinance* (Cap. 73, Laws of Hong Kong, 1971 ed.), and the *Adoption Ordinance* (Cap. 290, Laws of Hong Kong, 1972 ed.).

Subsequently, when the Kowloon peninsula was ceded to Britain after the exchange of the ratification of the *Convention of Peking* on 20 October, 1860, and when the New Territories were leased to Britain for 99 years under an Order in Council dated 29 October, 1898, this kind of “fused common law”<sup>23</sup> jurisdiction was extended to these newly annexed areas.

### *The Ousting of the Local Narrative*

Between 1844 and 1994, the progressive transformation of Chinese law and customs is noticeable. For the Hong Kong island and the Kowloon peninsula, the dual system gradually dwindled for various social and political reasons.<sup>24</sup>

A slightly reworded version of the Supreme Court Ordinance was introduced in 1873,<sup>25</sup> announcing and confirming the growing importance of the English law in Hong Kong.

The diminishing importance of Chinese customary law coincided with a parallel movement in the case law. The earliest case on the dual aspect of Hong Kong's legal system was *Ho Tze-tun v. Ho Au-shi*<sup>26</sup> in 1915. In this case, the Chief Justice treated the Elliot proclamations as an express reservation of the laws and customs of China. He further asserted that to apply English law in place of Chinese family law would be to violate the assurances contained in the *Proclamations*.<sup>27</sup> However, in 1925, the Court held, *In the Estate of Chak Chiu Hang*<sup>28</sup> that the Proclamations only reserved Chinese law to the extent that subsequent enactments of the Legislative Council had not replaced it. In other words, Chinese law and custom would continue to apply, subject to their repeal or modification by statute. Although, at that time, the role of Chinese law and custom was already declining, this was not really brought home until 1957 when it was decided in *Wong Yu Shi and others v. Wong Ying Kuen*<sup>29</sup> that Chinese law

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23. “Fused common law system” refers to the departure from the original intention to keep a dual legal system for the benefit of the Chinese population in Hong Kong. For further discussion, see B. Hsu, *The Common Law in Chinese Context* (Hong Kong: Hong Kong University Press, 1992) at 13.

24. *Ibid.* at 13.

25. The relevant section declared that “[s]uch of the laws of England as existed when the Colony obtained a local legislature, that is to say, on the 5th day of April, 1843, shall be in force in the Colony, except so far as the said laws are inapplicable to the local circumstances of the Colony or of its inhabitants, and except so far as they have been modified by laws passed by the said legislature.”

26. (1915) 10 H.K.L.R. 69.

27. *Ibid.* at 80.

28. (1925) 20 H.K.L.R. 1. The case concerned the effect of the *Probate Ordinance*, 1897 on Chinese customary law.

29. [1957] H.K.L.R. 420.

and custom would only prevail if the corresponding English law was inapplicable in the sense that it could not be applied without “injustice or oppression.”<sup>30</sup>

The diminishing status of Chinese law and custom was further confirmed in 1966 following the enactment of the application of the *English Law Ordinance*<sup>31</sup> (amended in 1971). Section 3(1) stated that:

- [t]he common law and the rules of equity shall be in force in Hong Kong—
- (a) so far as they are applicable to the circumstances of Hong Kong or its inhabitants;
  - (b) subject to such modifications as such circumstances may require;
  - (c) subject to any amendment thereof (whenever made) by—
    - (i) any Order in Council which applies to Hong Kong;
    - (ii) any Act of Parliament<sup>32</sup> which applies to Hong Kong; or
    - (iii) any Ordinance.

In other words, by 1967, Chinese law was preserved only to the extent that English law was inapplicable to the local circumstances, as in *Wong Kam Ying and Ho Po Chun v. Man Chi Tai*.<sup>33</sup> Hence, although not totally abolished from the Hong Kong system, Chinese law was downgraded to a peripheral and residuary role, with the result that the burden of demonstrating its applicability (in place of common law) was shifted from the party claiming the use of English law to the party claiming the use of Chinese law. Chinese customary law was subject to expressed abolition and elimination by subsequent statute. Instead of actively preserving it, the colonial government treated Chinese customary law as a rapidly declining system of law.

### *The Transformation of the Local Narrative*

The conscious preservation of Chinese law and custom at the early stage of colonization and the later equally conscious “integration” can be seen as a natural process of colonial rule. As the Hong Kong courts, staffed with

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30. *Ibid.* at 443.

31. Cap. 88, Laws of Hong Kong 1966 ed.

32. The specific English statutes that are applicable in Hong Kong are listed in the Schedule of the *Ordinance*. As a result, the 1966 Ordinance only changed the form of receiving English statutory law from wholesale reception in 1845 and reception by a reference date in 1875 to reception by listing in 1966.

33. [1967] H.K.L.R. 201. The case concerned a claim on behalf of a concubine's children under the *Fatal Accidents Ordinance*. The concubine was refused recognition as a wife under the Ordinance but her children were recognized as “children.”

expatriate judges, were employed to rule on Chinese law and custom, many difficulties were encountered in the interpretation process.

The court had a hard time wrestling with concepts such as what exactly Chinese law and custom was, and whether there could ever be an exact reference date to Chinese law and customs. Chinese "law" was based on the Qing dynasty code, *Ta Ching Lu Li*, with a heavy emphasis on criminal law, whereas civil law was based on "custom," which varied in each locality. Traditionally, there were many Chinese subcultures and customs growing out of different economic and geographical environments. Even within one single province, customs were not uniform. Many lineages could also set rules and penalties for their members.<sup>34</sup> Besides the inherent fluidity of Chinese law and customs, the court also had difficulty in deciding the temporal reference of Chinese law and customs.

In *Ho TzeTsun v. Ho Au Shi and others*<sup>35</sup> and *In the Estate of Chak Chiu Hang*,<sup>36</sup> it was held that Chinese law and customs meant the "local circumstances" as on 5 April 1843. In *Re Tse Lai-Chiu*,<sup>37</sup> local circumstances would be those of the present time and the ruling in former cases was not followed. But in *Re Wong Choi-Ho and Wong Yuk-Shu*,<sup>38</sup> the Chinese law was held to refer to the Qing dynasty law and customs as they existed in 1843 with such "modifications in the custom and in the interpretation of the law as have taken place in Hong Kong since that period."<sup>39</sup>

The imposition of a cut-off date for customary law compromises its flexibility. This method has been criticized as an attempt at "freezing" and "ossifying"<sup>40</sup> Chinese law and custom, inhibiting later possible changes, and leading to a "hardening of the arteries of development."<sup>41</sup> As succinctly put by Wesley-Smith, "in the paradigm of colonial legal pluralism, customary law within the state courts assumed an artificial life 'in its subjection to the alien procedures and requirements of the English judicial system'."<sup>42</sup>

In the meantime, the search for the meaning of Chinese law and customs led to heavy reliance on expert witnesses. However, most "experts" could not attest from their direct experience because they were merely scholars on Chinese

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34. *The Sources*, *supra* note 13 at 217.

35. *Supra* note 12.

36. *Supra* note 28.

37. [1969] H.K.L.R. 159. The case concerned the capacity of Chinese to make a will under Chinese customary law.

38. [1969] H.K.L.R. 391. The case concerned the status of concubine of the defendant.

39. *Ibid.* at 394.

40. E. S. Haydon, "The Choice of Chinese Customary Law in Hong Kong" (1962) 11 *International Comparative Law Quarterly* 231 at 246.

41. *The Sources*, *supra* note 13 at 223.

42. *Ibid.* at 206, note 5. Wesley-Smith quoted C. McLachlan, "The Recognition of Aboriginal Customary Law" (1988) 37 *International Comparative Law Quarterly* 368 at 381.

literature on law and customs.<sup>43</sup> As would be expected, their opinions often conflicted. In *Lui Yuk Ping v. Chow To*,<sup>44</sup> the court was reluctant to adopt expert advice by stating that “law [was] a matter for counsel, who [would] state their authorities, it [was] not a matter for witness, unless it be foreign law.”<sup>45</sup> The court ruled that expert evidence was not admissible to prove Chinese customary law. It would only take judicial notice of it.

Tired of the “open-ended” nature of Chinese law and customs, expatriate judges had a tendency to resort to English legal reasoning and English cultural values in interpreting Chinese law and customs. In this regard Evans remarked, discussing the case of *Li Tang-shi v. Li Wai-kwong*,<sup>46</sup> that by granting letters of administration to widows and concubines the court had “totally altered the balance of interests under the customary law and put the widow, and more startlingly a concubine, into a position which she could never have in the customary law.”<sup>47</sup> Under Chinese customary law, women would not have had any right to inherit.

### ***The Freezing and Distortion of Local Narrative***

The paradoxical effect of retaining Chinese customary law is most exemplified in the New Territories and in the field of succession law.

The New Territories may be viewed as the main benefactor but also the major victim of the dual system because of their unique economic, social and geographical development.<sup>48</sup> Geographically, it shares the same border with China. Distinct from other parts of Hong Kong (which was mainly a fishing port in early colonial days), the New Territories was composed of farmlands. Residents there were organized into villages and had strong ties to the clan system. Ownership of land was held by families instead of individuals. These caused the New Territories to be the only close adherent to the dual policy.

In 1899, when the 99-year lease on the New Territories was signed between the British and Chinese governments, the Hong Kong governor gave the express undertaking that the land and commercial interests of all inhabitants residing there would not be interfered with. The *New Territories Regulation Ordinance*<sup>49</sup> exempted the New Territories from certain Hong Kong ordinances so that

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43. *The Sources* *ibid.* at 216.

44. [1962] H.K.L.R. 515.

45. *Ibid.* at 530.

46. [1969] H.K.L.R. 367.

47. D. M. Evans, “Common Law in a Chinese Setting: The Kernel or the Nut?” (1971) 1 *Hong Kong Law Journal* 10 at 24.

48. The New Territories were closest to China. Most people lived in villages or clans. Their lives were governed by traditional Chinese values and customs.

49. *Ordinance No. 12*, 1899, as rep. by *Ordinance No. 34*, 1910.

Chinese customs could be maintained. For example, clans were exempted from the *Company Ordinance*, under section 28, and there was no need for any deed, will or instrument to be verified by oath under section 31 of the *New Territories Regulation Ordinance*.<sup>50</sup> Succession for New Territories residents was exempted from the *Intestates' Estates Ordinance*.<sup>51</sup> In that same year, the *Local Communities Ordinance*<sup>52</sup> provided for geographical divisions of the New Territories and setting up local tribunals composed of elders to deal with petty cases.<sup>53</sup>

An examination of cases in the law courts concerning customary succession shows that most disputes centre around factual details. The general rules are easy to understand, but it is often difficult to be sure of the facts of a case.<sup>54</sup> The experience of a magistrate in the New Territories, Austin Coates, who confessed to never having had any legal training, but who was a special magistrate in the New Territories for seven years between 1949 and 1956, is instructive. He considered his main job to be to decide cases based on the principle of benevolence and the pursuit of harmony.<sup>55</sup>

Legal development in relation to succession to land in the New Territories can be described as being "frozen" between the period between 1899 and 1994. In *Tang Kai-Chung and others v. Tang Chik-Shing and others*,<sup>56</sup> it was held that Chinese customary law should apply to all the New Territories land in all cases under section 13 of the *New Territories Ordinance*.<sup>57</sup>

The original rationale behind the application of customary law was to protect the ancestral land and the clan system of land holding.<sup>58</sup> Essentially, daughters were excluded from all rights of inheritance. Women were not allowed to hold land as they would marry outsiders from the village. Land ownership by women would mean devolution of the clan property. With the development of the New Territories into an urban area, and with the greater mobility of people, this rigid form of land holding resulted in an unjustifiable denial of women's rights, that is a form of discrimination against women. Men continued their dominance based on customary law in the last century with the

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50. *Ibid.*

51. *Supra* note 22.

52. Cap. 97, Laws of Hong Kong.

53. Hsu, *supra* note 23 at 12.

54. S. Selby, "Everything You Wanted To Know About Chinese Customary Law (But Were Afraid To Ask)" (1991) 21 Hong Kong Law Journal 44 at 77.

55. A. Coates, *Myself A Mandarin* (Hong Kong: Heinemann Educational Books Ltd, 1975).

56. [1970] 1 H.K.L.R. 276.

57. Cap. 97. Laws of Hong Kong. This ordinance was amended in 1994.

58. For further discussion, see J. Van Dale, "Chinese Custom in the New Territories: Non-Indigenous Women's Right to Inherit Land" (1994) Hong Kong Student Law Review 111.

backing of colonial legitimacy. Regardless of whether women were still living in a clan in the New Territories, they were not entitled to New Territories land, while men who had moved away from the village might still claim a legal share in the property. Women continued to be constrained by custom while men were taking new opportunities and enhancing their dominance over women. The protected form of land holding should have been limited to indigenous people who were residing in the New Territories. The distinction between indigenous and nonindigenous residents,<sup>59</sup> and the distinction between rural and urban lands, had the unsatisfactory result that even nonindigenous residents living in urban areas might have had to follow customary law. Customary law needed to play a radically different role after the penetration of capitalism. Therefore, a revision of the substantive content of customary law in the New Territories was made necessary. If land was considered as property belonging to the whole clan, then whoever contributed to the village life should have a share of it.

It was not until 1994 that the *New Territories Land (Exemption) Ordinance*<sup>60</sup> abolished the inheritance law on the ground that it was discriminatory to females. It was disappointing to see that only male interests were represented in the government consultation on succession to land in the New Territories in 1993. The elderly men in the villages were consulted. The Heung Yee Kuk, a male-dominated group in the New Territories, had a seat in the Legislative Council. They were openly hostile to women's rights.

Besides the freezing of customary law in the New Territories, the court often distorted the interpretation of customary law. The recent case of *Re the Estate of Ng Shum (No. 2)*<sup>61</sup> gave an ironic twist to the application of Chinese customary law in a family setting. The dispute was between the inheritance rights of two surviving wives of a man who died intestate. The issue was whether the second wife could claim under the *Intestates' Estates Ordinance*.<sup>62</sup> The first marriage took place in 1942, while the second one took place in 1944. Both marriages were celebrated before the *Marriage Reform Ordinance*.<sup>63</sup> Under section 4 of the ordinance, Chinese customary marriages celebrated after 1971 were not considered legally valid.

The judgment was preoccupied with whether the second "wife" was a wife or a concubine. Under the Qing *Imperial Code*, the Ta Ching Lu Li, a man who married a second time while the first wife was still alive would be liable to 90

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59. Indigenous residents should be limited to those who had ancestors that were residents in 1898, when the New Territories were leased to Britain.

60. Cap. 97, Laws of Hong Kong. The original bill was a private member's bill moved by independent legislator and active feminist, Christine Loh.

61. [1990] 1 H.K.L.R. 67.

62. *Supra* note 22.

63. *Supra* note 22.

strokes.<sup>64</sup> However, Chinese marriages were not strictly monogamous unions.<sup>65</sup> A man could have one wife but many concubines. In social practice, there were a lot of exceptions to the *Imperial Code*. If a wife failed to give a male descendent<sup>66</sup> or if the first wife consented, the husband could take a "secondary wife."

Caught in the dilemma between a clear black letter rule which was probably never enforced and the actual social practice of polygamous marriage, Mr. Justice Liu drew a tortured distinction between the "legal" and the "social" effects of a marriage; and the distinction between "Chinese customary law" and "Chinese customs." The second marriage was crowned with the empty recognition of "social effect" complying with Chinese customs but failing to comply with the legal rule and Chinese customary law. In the end, only the first wife was granted the inheritance right.

Despite the painstaking effort at following the *Imperial Code*, it was an interpretation that was far from satisfactory. The *Imperial Code* provided for the exact punishment to be meted out by the *hsien* (magistrate) for acts or omissions which were already understood by the local population. The local courts, yamen, had a lot of flexibility in applying the rule according to local circumstances.<sup>67</sup> The paradox of the case is that Mr. Justice Liu neither complied with Chinese customary law nor statutory law. On the one hand, if Mr. Justice Liu was using the analysis of Chinese customary law, the outcome would have been that both women would not have gained inheritance rights. A better judgment would have been for the male descendants to inherit the property and to take care of their mothers instead. On the other hand, if Mr. Justice Liu was making an analysis under the statutory law, he should not have used a modern standard to punish a family organization dating back to 1944, when Chinese customary marriages were still very common.

### **British Colonial Policy of Indirect Rule**

#### ***The Policy of Indirect Rule***

Though Chinese law was being consciously preserved, its nature was undergoing a tremendous transformation. Because of the difficulty in ascertaining what exactly was Chinese law and custom, and because English

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64. G. T. Staunton, *Ta Ching Lu Li: Being the Fundamental Laws of the Penal Code of China* (Taipei: Cheng-Wen, 1966 at 110, book 3, section C3.

65. C. G. S. Tan, "The Twilight of Chinese Customary Law Relating To Marriage in Malaysia" 42 *International and Comparative Law Quarterly* (1993) 147 at 149.

66. This is referred as the *kim tiu* marriage, where one branch of a family lacks male heirs, and the heir of another branch marries to beget sons for that one.

67. Tan, *supra* note 65 at 150.



judges were applying English standards to decide customary cases, there was a subtle but progressive erosion of customary law.

The formal preservation but substantive dwindling away of customary law, however, is not a phenomenon unique to Hong Kong. It was part of the British imperial policy of "indirect rule"<sup>68</sup> practised in other colonies, such as Africa and South East Asia. The native courts in colonial East Africa were empowered to administer the customary law "prevailing in the area of jurisdiction of the court." However, customary law was applicable only if it was "not repugnant to justice and morality, or inconsistent with any [written law]."<sup>69</sup>

Though customary law was preserved, the structure and the workings of the legal system determined by the imperial ruler would often thoroughly transform or even create "traditions." As said by N. Brown, "the attempts to codify and enforce customary law often had the paradoxical effect of enshrining anachronistic or particularistic legal texts as the local standards."<sup>70</sup>

Malaysia seems to be a typical illustration of the above paradigm.

### *The Case of Malaysia*

The Malay States (Penang, Malaca and Singapore) became British colonies under the *Straits Settlements* in 1826. English law was applied "as far as the circumstances will admit." The *Charter of Justice* of the same year gave the vague direction that the court should "give and pass judgment and sentence according to Justice and Right."<sup>71</sup> As a result, the Muslim and the Chinese

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68. The term was coined by F. D. Lugard as a practical means of administration and control in Africa. Cameron, (who had served in Nigeria under Lugard) expressed, when he was Governor of Tanganyika in 1925, that "a system of indirect native administration had been instituted ... to which I attach the greatest possible importance as I believe that by that we shall secure, as far as it is humanly possible to foresee now, the political and social future of the natives in a manner which will afford them a permanent share in the administration of the country on lines which they themselves understand and can appreciate, building up at the same time a bulwark against political agitation and averting the social chaos of which signs have already manifested themselves in other countries similarly situated." See H. F. Morris & J. S. Read, *Indirect Rule and the Search for Justice* (Oxford: Clarendon, 1972) at 3.

69. *Ibid.* at 167.

70. N. J. Brown, "Law and Imperialism: Egypt in Comparative Perspective" (1995) 29:1 *Law and Society Review* 103 at 104. Brown's study was not on imperial rule as an instrument of social control but on the local elites using imperial law to their own advantage in colonial and post-colonial Egypt.

71. The three major islands of Malaysia were acquired by the British at three different stages. The *Charter of Justice* of 1826 was based on an earlier Charter in 1807, of which the latter only applied to Penang. For direct quote and detail discussion, see

communities were exempted to a certain extent from the realm of English law. Customary law was admitted as an exception to the general law, to be justified by he who sought its application.

Chinese customary law was, however, interpreted and applied in novel ways. In *Khoo Tiang Bee v. Tang Beng Givat*,<sup>72</sup> the Chinese rule of equating natural and adopted children was refused recognition. In *The Goods of Lao Leong An Deceased*,<sup>73</sup> it was held in the estate of a Singapore Chinese, that the wife and concubine were equal "wives" and were equally entitled to the widow's share under the (English) *Statute of Distribution* of 1670. Under the appropriate custom, a concubine was entitled no more than maintenance and support.

The distortion of Chinese customary law by the English common law courts continued after Malaysia became independent in 1957. The *Law Reform Act (Marriage and Divorce) 1967*<sup>74</sup> provided for the recognition of subsisting customary marriage. Carol Tan<sup>75</sup> has published an insightful study of the distorted understanding of customary law by common law courts in the case *Yeap Leong Huat v. Yeap Leong Soon*.<sup>76</sup>

The case involved the interpretation of a will by one Yeap who provided for the male born to his only son and his principal wife. Principal wife was defined in the will in accordance with the appropriate ceremony. The issue was the identity of the principal wife since the son had three wives. The first wife died and the dispute was between one Kim Lian and Hooi Kum Chee who claimed to be the principal wife.

Instead of examining whether there was an appropriate ceremony to elevate either woman to the status of principal wife, the trial judge put substantial weight on the residential arrangement of the Yeap family. Since Kim Lian never resided in the family home, she could not be considered as a principal wife according to Chinese family tradition.<sup>77</sup> On appeal, the judge paid more regard to the testator's express reference to Kim Lian as a secondary wife in the will. However, according to the custom practised, a man could have several secondary wives without a principal wife. A secondary wife could also be elevated to principal wife with the relevant ceremony.

The issues of requirement for a valid marriage for principal wife, the relevant rituals and ceremony were side-stepped by the court. Like with the

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R. St. John Braddell, *The Law of the Straits Settlements*, 3rd ed., (Kuala Lumpur: Oxford University Press, 1982) at c. 1.

72. (1877) 1 Kyshe 413.

73. (1827-1877) S.L.R. 418.

74. As amended by the *Law Reform Act (Marriage and Divorce) (Amendment) 1980 (Act A498)* and the *Law Reform Rules (Marriage and Divorce)* 1082 P.U. (A) 53 of 1982.

75. Tan, *supra* note 65.

76. [1989] 3 M.L.J. 157.

77. *Ibid.* at 161.

Hong Kong court's approach, the Malaysian court showed reluctance to admit expert evidence. Thus, a simplified answer to Chinese customary law was given by the common law court.

Tan commented that the particular irony of the above application is that "the Chinese were administered a law which did not accord with their own understanding of customary law."<sup>78</sup> The discrepancy between the "customary law" enshrined by the common law court and actual "customary practice" is also pinpointed by Woodman. The former can be referred to as the "lawyers' law," referring to customary law proved in evidence; customary law arising from previously decided cases on customary law; and customary law decreed by a state body. The latter is referred to as "folk law," as the actual peoples' law which regulates their social lives outside the context of state courts. It changes with time, reflecting changing values, and changing social and economic conditions in the community.<sup>79</sup>

In applying customary law, the court created a new body of law. The explicit desire of the British government to preserve and include Chinese law in the English legal system for Hong Kong had the paradoxical effect of excluding the Chinese narrative of this law. In the end, the system of rigid preservation has "killed" Chinese customary law. All the efforts to preserve it only undermined its existence.

### *The Changing Nature of Customary Law*

The means whereby customary law was administered inevitably changed its nature. In fact, the courts have never been an appropriate forum for its administration. Judges, magistrates, lawyers and various administrative staff were all agents alien to the early local system. The inevitable result of resorting to the courts was that customary law was being interpreted in a way it had never been before and it was being subject to the "modus operendi of the common law."<sup>80</sup> This "new" means of interpretation was in fact a process of gradual and selective incorporation of Chinese law into English law. As discussed in *Re The Estate of Ng Shum*,<sup>81</sup> the rigid adherence to the Qing *Imperial Code* entirely transformed the nature of customary law. The application of the Austinian notion of positive law to a fluid system of customary practice revealed a marked reluctance to recognize the existence of customary law. But what was the latter,

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78. Tan, *supra* note 65 at 154

79. G. R. Woodman, "How State Courts Create Customary Law in Ghana and Nigeria" in B. M. Morse & G. R. Woodman, eds., *Indigenous Law and the State* (Dordrecht: Foris, 1988) at 181.

80. Evans, *supra* note 47 at 27.

81. *Supra* note 61.

if not an inventory of rules of conduct that maintain effective social relation? Customary law existed formally but its content had been transformed.

In order to have a better understanding of the nature of customary law in a colonial setting, one cannot view the issue as a technical problem to be dealt with by the politicians or administrators. Customary law in its precolonial days had its special cultural identity. However, after the influence of colonization, urbanization and modernization, customs have interacted with different elements and emerged with a new and special identity.<sup>82</sup>

The development of customary law should be a natural development and response from society. Artificial intervention by the colonial ruler might only hinder the process. The government did try to intervene with the unsatisfactory condition of customary law in 1948 but it turned out to be a fruitless attempt.

The Strickland Committee was appointed by the governor in October 1948 to consider and make recommendations on the application of Chinese law and customs in Hong Kong. In December 1950, the committee made a few recommendations to modernize Chinese law and customs to enable a more equitable share for women in the family and to modernize other areas of law with regard to land matters, family law and succession.<sup>83</sup> In the end, no concrete actions were adopted as the public seemed to be indifferent to the recommendations of the Committee, as Chinese law and custom relating to concubinage and succession matters, in large measures, only concerned affluent families.<sup>84</sup>

After 1950, various women's organizations called for the abolition of concubinage and for new marriage laws.<sup>85</sup> There was a sudden rise of legal consciousness in the 1960s. This was mainly due to the fact that the post-war years of education for the younger generation had finally made its impact on society. In 1965, the *McDouall-Heenan Report*<sup>86</sup> reexamined the problem again. Chinese law and customs on marriage, concubinage, divorce, adoption, and

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82. In the study of customary law in Africa, P. Fitzpatrick identified the roles that customary law played in modern society. Customary law as (1) distinct and autonomous or; (2) subordinated to or dissolved within some wider entity or; (3) the representation of the dynamic interaction between customs and state law. Fitzpatrick favoured the third option. For an insightful discussion, see P. Fitzpatrick, "Customs as Imperialism" in J. M. Abun-Nasr, U. Spellenberg, U. Wanitzek, eds., *Law, Society and National Identity* (Hamburg: Helmut Buske Verlag, 1990) 15 at 17.

83. U.K., Strickland Committee, *Chinese Law and Custom in Hong Kong* (Hong Kong: Government Printer, 1953) at 36–81.

84. Hsu, *supra* note 23 at 17.

85. *Ibid.*

86. *The McDouall-Heenan Report on Chinese Marriages in Hong Kong* by J. C. McDouall & M. Heenan, (Hong Kong: Government Printer, 1967).

succession were abolished by the *Marriage Reform Ordinance*,<sup>87</sup> *Intestates' Estates Ordinance*<sup>88</sup> and the *Adoption Ordinance*<sup>89</sup> respectively.

One cannot deny the merit of this decision of the British Hong Kong Government. Customs that were contradictory to fundamental principles of equality were eliminated. For example, the *mui tsai* system which was a form of slavery (whereby poor parents who could not afford to rear a female child presented her to a well-to-do family to work as a domestic servant) was abolished by the *Female Domestic Service Ordinance*<sup>90</sup> in 1923.

Besides the formal changes of customary law by legislation, the informal forces of social and economic tides should not be ignored. The late legal reform in the New Territories is an example of the "freezing" of customary law without taking into account social and economic changes.

In the areas of family law where relationships and property are involved, the courts have not responded appropriately. This is an area that calls for judicial creativity, innovation and sensitivity. Judges should recognize that the dynamic of customary law in a modern state requires more than a mere correct identification of "traditional customary law." Customs are dependent on, and reactive to, elements in modern society. As time goes by, society becomes more and more sophisticated. Judges should "develop," instead of "freezing" customary law.

### The Post-Colonial Days or Neo-Colonialism

With 1997 approaching, the colonial era will finally come to an end. Yet, the prospect of returning to the homeland has resulted in a migration movement to overseas countries. Despite 156 years of colonial rule, Hong Kong inherited the "forced gift" of uniformity of law and the prosperity of a capitalist state.

The parallel rhetoric of *laissez-faire* government in the 1840s is resounded in the modern form of "autonomy." Hong Kong will become a "special administrative region" (S.A.R.),<sup>91</sup> yet the exact connotation of the term S.A.R. is still unknown.<sup>92</sup> The rationale is to enable "one country, two systems," leading to ultimate integration.<sup>93</sup>

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87. *Supra* note 22.

88. *Supra* note 22.

89. *Supra* note 22..

90. *Ordinance No. 1*, 1923, as rep. by *Ordinance No. 60*, 1969.

91. *Sino-British Joint Declaration 1984*, para. 3(4) and *Basic Law* (the future constitutional document for Hong Kong), preamble.

92. Under article 31 of China's 1982 Constitution, the state has the power to establish special administrative regions. At present, China has five autonomous regions: Inner Mongolia, Tibet, Guang Xi, Lin Xia and Xin Jiang. In 1997, Hong Kong will

The model of “one country, two systems” was forwarded by Deng Xiaoping in the late 1970s with reunification with Taiwan in mind. Its purpose was mainly for the preservation and coexistence of distinct economic systems, but not necessarily a political scheme for democracy of rights, under the embrace of socialist China. Hong Kong will thus become the first state to test the water.

Hong Kong’s value as a capitalistic city is fully appreciated by the Chinese government. Its nature is given special protection under the future constitution, the *Basic Law*. As noted by Yash Ghai, it can be seen as a “charter for capitalism.”<sup>94</sup> The bias for the market system has been enshrined as early as 1984 in the *Sino-British Joint Declaration*. Out of 11 substantive policies listed in the main text of the *Joint Declaration*, only two relate to the political system.<sup>95</sup> It seems one can safely conclude that the “autonomy” referred to by the Chinese government is only in relation to the maintenance of a market economy.

One may also foresee that, as discussed earlier in this paper, similar problems might be repeated in the future. Article 5 of the *Basic Law* provides that the socialist system and policies will not be practised in the Hong Kong S.A.R.. Under article 8 of the *Basic Law*, “the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained.” It seems, therefore, that Hong Kong is going to have another era of legal pluralism.

However, the demarcation between “one country” and “two systems” hinges on only a very thin line. The clash between the common law system and the Chinese civil law system may be greater than the tension between customary law and common law. Though the laws previously enforced will become applicable, article 23 of the *Basic Law* specifically requires the Hong Kong S.A.R. to enact laws “to prohibit any act of treason, secession, sedition, subversion against the Central People’s Government.” Secession is an entirely alien concept under the common law system. It will certainly be inappropriate to

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be the first S.A.R., followed by Macao in 1999, and hopefully with Taiwan in the future, thus completing China’s hope of unification.

93. For further discussion from a Chinese perspective, see Y. Y. Zhang, “The Reasons for and Basic Principles in Formulating the Hong Kong Special Administrative Region Basic Law, and its Essential Contents and Mode of Expression” (1988) 2 *Journal of Chinese Law* 5.
94. Y. Ghai, “The Rule of Law and Capitalism: Reflections on the Basic Law” in R. Wacks, ed., *Hong Kong, China and 1997* (Hong Kong: Hong Kong University Press, 1993) 345. The essay discusses the tilted nature of the *Basic Law* in favour of preservation of capitalism.
95. Y. Ghai, “Hong Kong and Macao in Transition (1)” (1995) 2:3 *Democratization* 270 at 274.

adopt the current law on treason and seditious libel by changing the subject from the Crown to the Central People's Government.

Article 82 vests the Court of Final Appeal in Hong Kong with final adjudicative power, but the power of the interpretation of the *Basic Law* is vested in the Standing Committee of the National People's Congress in China under article 158. In general, the Hong Kong courts will have power to interpret ordinary cases. Exceptionally, if the case is dependent on the interpretation of those provisions of the *Basic Law* which concern the responsibilities of the Central People's Government or the relationship between the P.R.C. and the S.A.R., the matter will fall within the realm of article 158. The fundamental question of who will decide whether a clause needs interpretation is left without an answer.<sup>96</sup>

Divergence in interpretation has been exposed in the recent debate on the interpretation of an act of state. According to article 19 of the *Basic Law*, "the courts of the Hong Kong S.A.R. shall have no jurisdiction over acts of state such as defence and foreign affairs." In the common law, "acts of state" refer only to defence and foreign affairs. Traditionally, it is for the courts to adjudicate whether an act will fall within the realm of "an act of state" or not before the court exercises or abdicate its jurisdiction over it.<sup>97</sup> However, according to the Chinese understanding, the decision to classify an act as "act of state" is an executive act. In addition, the scope of the "acts of states" interpreted by Mainland Chinese legal scholars is much broader. It may include the appointment of the Chief Executive and the principal officials for the S.A.R. government, the addition or deletion of the list of laws in the *Basic Law* (article 45) and the denouncement of the laws previously in force in Hong Kong that contravene the *Basic Law* under article 160.<sup>98</sup>

As a result, the return of sovereignty to China may lead Hong Kong into another era of dualism under "home rule."

### Conclusion

Behind Hong Kong's enviable economic prosperity, the legal system has been subconsciously and consciously playing the dominant role of social constructor. English criminal law was universally applied but Chinese customary law was only retained in civil areas. Hence, legal order was a matter of authoritative

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96. For further discussion, see T. Morris, "Some Problems Regarding the Power of Constitutional Interpretation Under Article 158 of the Basic Law of the Hong Kong Special Administrative Region" (1991) 21 *Hong Kong Law Journal* 87.

97. *Nabob of the Carnatic v. East India Co.* (1792), 2 Ves Jun 56; *Nissan v. A.G.*, [1970] A.C. 179.

98. Xiao Weiyun, *One Country, Two Systems and the Legal System of the Hong Kong Basic Law* (Beijing: Peking University Press, 1990) at 325 (published in Chinese).

guidance for social control while civil matters were neglected. Law did not create any catalogue of social interests between individuals.

The law in its colonial origin is a “violent positioning” of control and exploitation. As the imperial law had a heavy imperative flavour of command and control, there is a “double violence” in the law-preserving aspect with regard to the reservation of Chinese customary law within Hong Kong’s legal system.

The juridical foundation of law in a colony lies in its practical and political necessity. *Prima facie*, customary law is being preserved but the inherent nature of colonial rule renders it impossible to develop customary laws in the correct context. Customary law can hardly survive as its validity and enforcement are dependent on a “foreign” court.

When the flag of China is hoisted over Hong Kong on 1 July 1997, it will mark an end to foreign imperial rule but this may not solve the problem of Hong Kong’s dual legal character.

Indeed, this may only mark the end of one era of exclusion but the beginning of another era of paradoxical dualism, inclusion and exclusion. Hong Kong is entering a new and unprecedented era of legal pluralism under the model of “one country, two systems.” This time, it is a coexistence of common law and civil law legal systems under the bonding of mutual economic advantage and ancient blood ties. Hopefully, the stable legal system and the prosperous economy founded during the imperial reign will outlive the current political situation. Only by utilizing the above qualities can Hong Kong rebuild a new identity, one that can stand on its own and can identify with its new ruler.



