

**Comments on Dr. Patrick Hase's paper  
"Customary Law in the New Territories,  
Hong Kong: A Century of Change"**

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Dr. Hase's paper has provided us with valuable insights concerning the operation of Chinese law and custom in the New Territories throughout the years, based on intimate knowledge of the region and first-hand experience in its administration. The main thread of his argument appears to be as follows. Due to the lack of an interface between the customary practices of the New Territories and the metropolitan legal system of Hong Kong, the customary law lived a life of its own -unlike either the state of affairs in Qing China or in metropolitan Hong Kong. This customary law, administered by the District Officers, involved practices that would not have been upheld by the courts had there been such an interface. However, this state of affairs changed around 1960 in accordance with overall social changes of the time. New Territories customary law drew closer to metropolitan law, in face of the new complexities in social relations, which involved, among other factors, shifts in the patterns of industry, and an influx of people from mainland China.

In this general trend, the relationship between the indigenous inhabitants and the District Officer, on which the unique operation of Chinese law and custom rested, withered away after the 1980s. However, even at this point, there were certain aspects of New Territories society that were dependent on the operation of Chinese Law and Custom. One of these was the area of succession. The rules of family property division, which involved the equal division of property among the sons to the exclusion of daughters, were very much alive. However, even this changed in the 1990s under the

colonial government, as part of the efforts of the government "desirous of showing itself to be politically correct on the wider world stage." Dr. Hase's view is that the changes undermining the operation of Chinese customary law in the New Territories are changes over a longer term and not just related to the change of sovereignty.

The value of Dr. Hase's insights lies not only in the above assessment of the process (and time-scale) of change, but also in his analyses of the operation of the various aspects of Chinese law and custom in the District Officers' administration. Given Dr. Hase's comment that the District Officers were wary of putting either the customs or their decisions into writing, it is quite easy to see the significance of such analyses.

As commentator, the task I have been given is to provide some background to this paper, especially concerning the legal side of the situation. After attempting to do so, I would then like to go on to raise a couple of questions in the hope of stimulating further discussion.

Up to the early 1970s, even in metropolitan Hong Kong, the laws governing matters of family and succession were Chinese law and custom. It had been recognised that the Chinese customary law in these areas was "clearly so much at variance with the English law relating to marriage, succession, and the next of kin, as to demonstrate the utter inapplicability"<sup>1</sup> of English law.

Here, I would like to concentrate on the issue of succession. As is well known, it was not part of Chinese customary practice to make out wills.<sup>2</sup> Consequently, most cases of succession among the Chinese population in Hong Kong were intestate. The system enforced by the courts in these cases was a dual system. The process of succession would be divided into two phases, that of administration and that of distribution. The process of administration, which involved the granting of letters of administration to an administrator who would take charge of the

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<sup>1</sup> *Ho Tsz Tsun v. Ho Au Shi and others* [1915] H.K.L.R. 69, 80.

<sup>2</sup> The most thorough treatment of this subject is to be found in Shiga Shuzo *Chugoku kazokuho no genri* (Tokyo: Sobunsha, 1967).

division of the estate, would be governed by English law. The process of distribution, through which it was decided who took what portion of the estate, would be governed by Chinese law and custom -this duality was made explicit in a court decision in 1925.<sup>3</sup> On one hand, such a dual system maintained the traditional Chinese form of succession, and continued the practice of passing on property through the male descent line to the exclusion of daughters. On the other hand, the system had its own consequences. For example, the widow, who came to be entitled to the letters of administration by English law, could wield considerable power. Moreover, certain daughters came to regard their claim to a dowry as something they were entitled to, an individual right rather than a custom which involved the keeping of "face" for the family.

Such changes would only have been part of the general changing attitudes among the Hong Kong residents, concerning individual rights, the position of women, and so forth. In line with such changes, as part of a package of legislative reforms in the early 1970s, the Intestates' Estates Ordinance was passed in 1971.

The details of this ordinance have been analysed elsewhere.<sup>4</sup> I will here state that it was effectively an introduction of the English rules of distribution of property in succession, upholding the rights of women to inherit. However, this ordinance was not applied to the New Territories. Section 11 of this ordinance said: "Nothing in this Ordinance shall be taken to affect the application of the provisions of Part II of the New Territories Ordinance<sup>5</sup> to land to which Part II of that Ordinance applies. That Ordinance and the said provisions shall continue to apply to such land to the same extent and with the same effect as if this Ordinance had not been enacted."<sup>6</sup>

So even after 1971, succession in the New Territories took place

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<sup>3</sup> *In the Estate of Chak Chiu Hang* [1925] H.K.L.R. 35. "The Law of England relating to the grant of Letters of Administration to the lawful widow of a deceased intestate is not inapplicable to the local circumstances of the Colony or of the inhabitants."

<sup>4</sup> D.M. Emrys Evans "The New Law of Succession in Hong Kong" *Hong Kong Law Journal* 3, 1 (1973) 7-49.

<sup>5</sup> Cap. 97, L.H.K. 1984 ed.

<sup>6</sup> Cap. 73, L.H.K. 1971 ed.

in accordance with the customary rules of property division, until the decision whose importance Dr. Hase stressed, to allow women to inherit in the New Territories as well. The legal side of this decision was to repeal Section 11 of the IEO, which was done in 1995.<sup>7</sup>

Having said that, I would like to raise two questions concerning Dr. Hase's paper, to start off the discussion.

The first question is a historical one, concerning the assessment of the District Officers' administration of the New Territories. Dr. Hase mentions that by 1910, the New Territories were controlled by the government far more tightly than in 1899. Indeed, the general lack of direct contact between the Qing government outposts and the local communities in what became the New Territories is well known to the scholarship.<sup>8</sup> While administration by the District Officers purported to preserve the existing social order, in many cases actual contact with a government official was a totally new phenomenon. While the inhabitants referred to the District Officers as *fu-mu-guan*, a traditional term used for Qing local officials, it was often the first time they actually saw a *fu-mu-guan* in the flesh. The effect, which Dr. Hase mentions of this situation, is that fewer decisions were being made by the village elders, and more was placed in the hands of the District Officer. Did this not, in certain cases, affect the internal power structure of the village? On the one hand, it seems that the new presence of a *fu-mu-guan* would provide opportunities for those wishing to challenge the power of the elders. On the other hand, perhaps the District Officer's interest in keeping the existing social structure had a hand in preserving the status quo, or maybe the power of the elders in the village was quite secure, and such issues did not arise as a result of British rule.

The second question is of a slightly more current nature, concerning the evaluation of the handover process, in the changes that have come about. Dr. Hase's main argument is that the changes

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<sup>7</sup> Repealed 57 of 1995 s.8.

<sup>8</sup> For an illustration, see David Faure, *Structure of Chinese Rural Society: Lineage and Village in the Eastern New Territories, Hong Kong* (Hong Kong: Oxford University Press, 1986) pp.129-140.

are of a much longer term, and I would basically agree. However, when one compares the legislative reforms in the 1970s with the recent decision to allow daughters to inherit in the New Territories, the handover process does seem significant. In the former case, the changes indeed appear to be in accordance with the longer-term changes in the thinking of the residents, which may well have started with the beginning of the colony. In the latter case, however, it seems that the legislation is very much in line with the various constitutional changes after the joint declaration, concerned with protection of civil liberties and human rights in general. While the two changes are both in accordance with a general trend toward the abolition of customary law, would the impact of the looming handover not be a significant factor in understanding the situation in the latter case?