

**Comments on Dr. Patrick Hase's paper
"The Clan and the Customary Law:
Tso and Tong in the New Territories"**

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Dr. Hase's paper is probably the most thorough survey to date of the various aspects of the Tso and Tong. We have, for a long time, known of a class of property-holding that was the *zuchan*, held as common property at the lineage or segment level, distinct from the property of individual families.¹ We have also (since the seminal works of Maurice Freedman), known of the important role played by Tso and Tong in lineage segmentation.² We have nevertheless been aware that the organisational form of the Tong could be used for a wide variety of purposes, and that the significance of these remarkable institutions could not be exhausted by noting such basic functions as providing for the ritual or communal needs of the lineage.

Dr. Hase's insights not only shed light on the various aspects of these institutions rather different from our own forms of property holding, but they also take us through this internal diversity of the forms and functions which could be assumed by Tso and Tong. This in turn leads us to see the flexibility of these institutions, which made it possible for Tso and Tong to be utilised in incorporating a

¹ As an early treatment of the subject, Shimizu Morimitsu, *Chugoku zokusan seido ko* (Tokyo: Iwanami Shoten, 1949). Here I am using the word "lineage" to broadly mean self-professed unilineal descent groups: I believe this to be not far from the meaning given to the word "clan" in Dr. Hase's paper.

² Maurice Freedman, *Lineage Organization in Southeastern China* (London: The Athlone Press, 1958); *Chinese Lineage and Society: Fukien and Kwangtung* (London: The Athlone Press, 1966); Hugh D.R. Baker, *A Chinese Lineage Village: Sheung Shui* (London: Frank Cass & Co., 1968).

group of people in a range of social contexts: most obviously at the lineage or descent group level, but also at sub-branch, village, intervillage alliance, or even household level.

On assuming control of the New Territories in 1898, the British colonial government quickly realised the complexity of landholding arrangements. This led to a full-scale cadastral survey of the area, and settlement of conflicting claims through the activities of the Land Court. Property holding by Tso and Tong was preserved in this process, and as Dr. Hase has shown, continues to function to this day.

The legal basis for such property holding in accordance with Chinese law and custom is to be found in section 13 of the New Territories Ordinance, which reads: "In any proceedings in the High Court or the District Court in relation to land in the New Territories, the court shall have power to recognise and enforce any Chinese custom or customary right affecting such land."³

The importance of this legislation with regard to Tso and Tong has been vital, in that if it had not been for this section, many Tso and Tong in the New Territories may very well have been declared null and void as violating the Rule Against Perpetuities.

This was implied by a court decision as early as 1911,⁴ but was most dramatically brought out in a case which was decided in the Court of Appeals in 1990.⁵ A brief outline of the case would be as follows. In 1875, one person bought 3 blocks of property in Central Hong Kong, and donated it to two Tong in his home village in China. The property was to be used for ancestral sacrifice on one hand, and also on "general welfare in the village" on the other. It appears that "general welfare" would mean such items of expenditure as funding schools, relief for widows, starting an enterprise to create jobs, and so forth. Now, these Tong were, to use Dr. Hase's terminology in his paper, "permanent trusts," and almost the whole point of these Tong appears to have been to go on

³ Cap. 97, L.H.K. 1984 ed.

⁴ *Lau Leung-shi v. Lau Po-tsun* (1911) 6 HKLR 149, 171.

⁵ *Ip Cheong Kwok v. Ip Siu Bun and others* [1988] 2 H.K.L.R. 247; *Ip Cheong Kwok v. Sin Hua Bank Trustee Ltd. and others* [1990] 2 H.K.L.R. 499.

indefinitely. The question that arose was: did these violate the Rule Against Perpetuities? If they did, the whole of the property -which at one point was valued at 210 million Hong Kong dollars- would revert to the original settlor's estate, and thus (in this case) could be inherited by one person who was appointed to represent the settlor's estate. Naturally, there were those who did not wish this to happen, and the line they decided to take was to claim that the trusts in which the Tong held the property were charitable trusts, and therefore exempt from the Rule Against Perpetuities.

To make a long story short, the court ruled that ancestral sacrifice could not be charitable, as it benefited only a part of a community which was defined by its relationship to a single person, namely the ancestor being sacrificed to. On general welfare in the village, it was first judged that since the beneficiaries were limited to lineage members the welfare was not "public" enough to constitute a charity. Then, in the Court of Appeals it was held that even if the welfare of the village could include non-lineage members, "general welfare" was not specific enough a purpose for the property to be used exclusively for charitable purposes. Thus the trusts failed, and the property in Central reverted to the original settlor's estate.

Finally, I would like to raise two points concerning Dr. Hase's paper, and end my comments.

The first point concerns the context in which we might understand the various rules of traditional landholding in China. At the beginning of his paper, Dr. Hase identifies this as being the paramount need to protect the position of the clan. However, it seems that while many of the Tso and Tong, ancestral and communal, did indeed serve this purpose, the flexibility of the institutions (which Dr. Hase clearly shows) made it possible for certain Tso and Tong to have the opposite effect, namely division of the lineage into smaller units. If a Tong was set up at the household level, for example, and funds were poured into this Tong in such a way as to provide for rituals which only household members could attend, and to set up property from which only they could benefit. This would set one particular household apart from the rest of the lineage, both in terms of ritual and wealth. Moreover, it must be

noted that such rules as to protect the position of the clan were part and parcel of a system which also included the rules of family division, which explicitly provide that family property must be divided equally among the sons. It appears that traditional rules of property holding are just as useful for the division of the lineage into various sectors as they are to the unification and strengthening of the lineage. Much of this is implied in Dr.Hase's paper, and I doubt that there is much we disagree about in this matter. It must, however, be stressed that the needs arising in social organisation in traditional China were not restricted to the well-being of the clan or lineage. The traditional system of property holding, of which Tso and Tong were a part, could provide powerful tools usable for a range of such needs, not limited to the lineage, or clan, level.

The second point I would like to raise is much more general, and it concerns the situation after the handover. On one hand, it must be fair to say that no one knows what will happen. The internal complexity of the PRC government makes its stance unpredictable to say the least, and perhaps not much could be gained from hypothesising. On the other hand, however, changes within the PRC suggest that the traditional mode of social organisation through the lineage is re-surfacing to a certain extent. Ancestral halls are being renovated, and their rites revived. Perhaps such institutions as Tso and Tong, on the strength of their flexibility, are still to play novel roles in the formation of Chinese society.