

Land Dispute and Traditional Customs in the New Territories: Analysis of Tang Kwong Yu Tong Case

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Abstract. In this paper, one of the most important methodologies is the literature analysis, that is, the use of legal provisions and the original text of the judgment as the basis for the interpretation of the Tang Kwong Yu Tong case. Since the second half of the last century, a large number of scholars have been critical of the present-day land administration and traditions in Hong Kong, which have been regarded as a travesty of the law. However, an inquiry into the reasons for the existence of this custom in judicial practices requires not only legal analysis, but also consideration of the historical background. As a legal history paper, this paper will investigate the causes of land custom and the reasons for its continuation to the present day by combining case studies with historical knowledge. Despite the irrationalities and anachronisms of traditional land practices, these customs are bound to exist for a long period.

Keywords: Land Law; Legal History; Chinese Clan; Legislation; Custom; HKSAR.

1. Introduction

Even though the "Qing Code" was no longer used in the New Territories of Hong Kong as early as the 1970s, its influence can still be seen in legal proceedings in the 21st century, particularly in disputes over the distribution of property in clan communities or land tenure in the New Territories. "The New Territories Ordinance" (NTO), enacted after the British occupation of the New Territories in 1898, required the Hong Kong judiciary to apply traditional Chinese law when dealing with land litigation in New Territories. In 2002, the 3rd Fong of Tang-Kwong Yu Tong conducted a lawsuit in the High Court of Hong Kong against other four managers, requiring them to return the profits to the Tong and prohibiting them from distributing the collective assets without the unanimous consent of all clan members. After a series of hearings and trials, the judge reached a template for similar cases that may arise in the future: "the property of Tso is inalienable, indivisible, and perpetual"[1]. According to the view of Berman Harold, the decision made by judge reflected the dilemma of "historical continuity in the resolution of existing legal problems"[2], referring to the principle that traditional custom could be flexibly adapted in the practice of the positive law. However, the presence of the positive law frequently conflicts with traditional folk customs nowadays, since judicial sentences must balance the protection of private property and the respect for traditional land customs.

2. Research Motivations

There were two contentious questions in this case:

The first question was the limitations about the specified scope of the NTO. The NTO provides judges for the adjudication of land-related disputes, but does not specify whether issues such as land ownership/use and yield rights are to be considered under the same principle. Apart from this, if there is a discrepancy between traditional customs and other legal provisions, the NTO does not specify which standard should take precedence in this situation. Even though the Hong Kong government provided exemptions for potential disputes in the New Territories Exemption Ordinance in 1996 to regulate exceptional cases, it has not made specific provisions for the division of ancestral estate and only regulate disputes in accordance with the Section 10 of "Intestates' Estates Ordinance" [3]. Due to the fact that the manager on behalf of each stripe was the subject of the lawsuit in this case, and

each stripe had the right to require a division of the ancestral estate. Thus, determining the legal responsibility precisely was difficult.

The second question is about the conflict between the traditional cognition of ancestral property division and the legal interpretation. In China, inheritance is the most common method for the clan succession [4]. The legal definition of the heritage in Hong Kong judiciary is the same as that in Western countries (especially in the U.K.), which means the property that is transferred after the death of the previous estate holder [5] and its subject is always limited to a specific individual successor. Unlike the consuetudes in Western countries, where the inheritance transfer is based on the rights of private property, the inheritance in rural China is akin to an intergenerational disposition of property dominated by an abstract clan: The disposer must ensure that the continuation of the clan while taking into account the actual needs of the current generation to divide it. This determines that the division of ancestral property involving the existence about the form of clan cannot be fully explained by law of property.

Through the study of this case, the author hopes to investigate how traditional Chinese land custom and rural geopolitical ties are applied under in the margin of laws.

3. Background of the Case

During the Qianlong period of Qing Dynasty, the Tang-Kwong Yu Tong was built by the clan members of Tang in memory of their ancestor. They registered the ancestral land in Yuen Long District as a Tong in late 19th century. The descendants of this Tong shared responsibility for the land management. The annual rent from levied land reparations was used to cover the expenditures of upkeep of the Tong, ancestral graves and worship rituals. At set intervals, the clan members assisted the poor members of clan financially, which was known as the tradition called "Pai-Ji". In 1963, the Hong Kong government confiscated several lands for the constructions of communal facilities, in exchange for pecuniary compensation and a "land exchange certificate" (Letter B) to the Tang clan. After selling the right of use of Letter B, a disagreement arose regarding whether the proceeds from the sale should be distributed per stripe or per person. The Hong Kong government expropriated the ancestral land again in 1981, but the manager of the 3rd stripe refused to accept annual allocations issues because he and the other members in 3rd stripe could not reach an agreement on distributing the compensatory payment given by government. He claimed that other managers coerced him into signing without his consent. Owing to the previous controversies about property division had never been resolved, the money that should be divided was deposited in the bank. Between the year of 1983 and 1997, the Hong Kong government expropriated the land for nine times. TANG ON KWAI, the father of first plaintiff, requested an equal distribution of clan property in a letter to the other four defendants. However, this proposal was denied by the defendants. The defendants in this case, representing the first, fourth, fifth and sixth stripe, decided to pay HK\$1,500 from the interest of compensatory payment stored in bank to each member of the clan in 2001, but the plaintiffs refused.

Finally, in 2002, the defendant decided to use the deposit money for Pai-Ji as well as ancestral worship. The plaintiffs from the third stripe did not attend the meeting called by other managers and denied the efficacy of "Pai-Ji." They filed a lawsuit claiming that the distribution was illegal without the consent of entire clan and they demanded that the defendants return the property. Nonetheless, the defendants insisted that the 1982 distribution agreement was still in effect.

4. Tsos, Tongs and the Traditional Chinese Customs

Since the year of 1910, the "New Territories Ordinance" has recognized Tsos and Tongs as private landholding associations in the rural areas. There are several ways to unite the various clansmen in order to form a clan group based on traditional principles originating from a common ancestor, such as building Tongs, writing genealogies, and even worshipping their progenitors. These practices are also analogous to geopolitical ties among all members of a clan [6]. Tsos and Tongs are distinctiveness of Hong Kong and the Guangdong Province, which currently occupy approximately

6,000 acres of land in Hong Kong [7]. Aside from that, Tsos and Tongs have had legal status since the British Hong Kong period. Tsos and Tongs have nearly identical concepts in the practice of land administration, which refers to the land in the New Territories that is owned by an entire clan, family or traditional organization, rather than by an individual owner[8]. Managers of the clan are usually in charge of keeping and allocating collective property after being elected by all clan members.

5. Judicial Interpretation Against the Dispute

In general, the Section 13(1) NTO [9] was previously regarded as the basic clause for adjudicating issues involving land disputes in the New Territories. The issue of common property distribution in every village is primarily regulated by domestic discipline and clan rules. The usual concept of court decision is the preceding clause should be applied.

There was no doubt that the property in the name of Tong or clan belong to all the members. Accordingly, the compensation for expropriation of ancestral land is also pertains to the collective property. Nonetheless, the judge insisted that the NTO was not suitable for this circumstance because accrual of government compensation deposited in banks was not classified as land-related assets under the traditional definition. Instead, the principle of The Rules of the High Court was more appropriate when dealing with the property distribution in this case. His reasoning was as follows:

In conclusion, I find that section 13(1) of the NTO is not applicable to the compensation; but to the mesne profit in the bank accounts of the Tong and to the surplus income used for the 2002 Pai-ji. Hence, the system of law to be applied to the compensation is Hong Kong law [10] and that to be applied to the mesne profit in the bank accounts of the Tong and the funds used for the 2002 Pai-ji is Chinese customary law and custom [11].

According to him, the bank deposits were compensation for the land acquisition from government. Previous cases could not be used as references since the portion of land used for continuation in this case no longer exists. Furthermore, the plaintiff demanded that ancestral property be divided in accordance with traditional Chinese custom, but “*the common law rule against perpetuity is not applicable as it is not a concept known to Chinese customary law*” [12]. However, the Qing code did not specify whether they could legally sell these properties under the authority of the clan. Although land compensation is also part of the common property of the clan, Chinese custom does not include the conception “perpetuity”. He believed that custom should not be used as the reference for the judgment and the clan property must be treated as divisible inheritance, but doing so would mean the dissolution of Tong. For both parties of the case, this result was unacceptable.

The Chinese custom of dealing with land disputes in the New Territories could be problematic and controversial. During the British colonial period, as the Chinese tradition in Hong Kong was artificially devised by the colonizers, including the law codes and jurisdictive procedures, even the literal origins[13]. Consequently, the interpretation of the custom became inaccurate and overly idealized. Even after the reunification of Hong Kong in 1997, this pattern still influences Hong Kong legal practitioners in the 21st century. It is necessary to refer to past similar jurisprudence, since similar results could be obtained in similar situations, no matter who is involved [14]. Therefore, the expert witness of defendants (*Professor Dicks SC*) used relevant case from the Republic of China to illustrate his perspective:

He referred to Appeal No 771 of the 4th year of the Republic of China (1915) of the Da Li Yuan, the first supreme court of the Republic of China during the year 1911 to 1927, in support of his opinion. In that case, in applying the 6th Li of the Qing Code as part of the Law Temporarily in Force in the Republic of China pending enactment of the relevant books of the Civil Code in 1930.[15]

In the case mentioned above, the attitude of the Da Li Yuan was that it recognized the indivisibility of ancestral estate. Nevertheless, on the basis of traditional Chinese customs and clan rules, the Da Li Yuan could still distribute the property at the request of the majority of the administrators and ignore the attitude of the opponents [16]. This approach actually used the majority voting principle

in Western law to interpret the customs of Chinese families. In contrast, the traditional Chinese way of resolving disputes over the distribution of common property was through negotiation and concessions, not by the attitude of majority[17]. Judges in the Qing Dynasty usually referred to previous case decisions, and the binding effect was limited. Negotiation mainly handled civil disputes. With regard to the principle of adjudication in accordance with traditional folk customs mentioned in the NTO, the cases he presented were clearly not applicable.

In the light of the expert witnesses for the side of plaintiffs (*Professor Chang Weijen*), he elaborated on the discrepancy between the definition of “customary law” and “custom” to the judge, pointing out that the “customary law system” did not exist in traditional Chinese law. He said:

Most clan charters had provisions prohibiting division and that such custom as suggested or found by the Da Li Yuan was neither frequent nor widespread. As clan property was meant to be indivisible and inalienable, it could not be lawfully sold, not even by unanimous consent of all members of the clan against the wishes of the founder.[18]

The preceding demonstrated that the so-called the principle of majority vote in modern Western legal system had nothing to do with traditional Chinese jurisdictive practices. Apart from this, there was no concept of "private law" in the legal system of Chinese feudal dynasties. Considering that a widely accepted customary law system was not existed in the ancient Chinese society, and that the customs of each clan were quite different. From a legal standpoint, the property of Tong can be divided equally as long as the majority of the common property owners agree. In order to maintain the presence of clan, almost every member in conservative Chinese rural areas denies the divisibility of the entire ancestral property, but the case available for reference [19] violated this custom. As a consequence, whether they refer only to traditional customs or only to legal provisions, they would be unable to solve the problems that emerged in this case.

6. Traditional Custom, The Conclusion and its Far-reaching Influence

Although the ancestral estate is dividable, the portion owned by either the elder or the younger generation still does not commit the existence of private property rights. Based on the perspective of Fei Hsiao-tung, the fundamental element of Chinese vernacular society is the village community, and the boundary of the community is often defined by blood ties and of collective goods [20]. Therefore, the meaning of ancestral estate in traditional customs is only reflected when all the clan members are entitled to share. The Tong was built to venerate the common ancestors of a clan, in turn, the status of the common ancestor in a certain clan has a decisive influence on the population and scope of the clan members being linked by the existence of Tong [21]. If clan property could be divided at personal willingness according to precedents and laws (even the attitude of majority), it is fundamentally not only a denial of the legitimate status of the Tong, but also a destruction of the geopolitical connections.

In past judgments, the Hong Kong courts have generally treated the deposit of Tong as property held in trust and the organization of Tong is regarded as a charitable trust with a clear objective [22-23]. Therefore, the use of ancestral property should be viewed through the lens of public welfare. As the founder of the ancestral hall intended, one of the most important purposes of ancestral property is to ensure the livelihood of future generations [24]. They could divide all clan properties as long as all the five managers agreed, implying that the Tang Kwong Yu Tong would be vanished. If this occurs, it would violate the original intention of the founder, as well as against the interests of the subsequent descendants in the future. Finally, a reasonable decision was made by the judge (*Anthony To*):

Though I am not prepared to hold that the 1982 Agreement is illegal under the Qing Code or Chinese criminal law, the agreement is obviously unlawful. With the two well established Chinese customary law principles in mind, it can readily be appreciated that t'ong property is intended to be held in perpetuity for the benefit of its present and future members. Any appropriation of t'ong property to the present generation otherwise than under circumstances of necessity would have the effect of

depleting the t'ong of its property and depriving the future generations of the use and benefit of the property [25].

Tong is a special modality of land trust, and it is impossible for the present generation to have full dominion over this intergenerational land trust. Trustees could be either individual or collective. Since the Japanese juriconsult *Matsubara Kentaro* illustrated that one of the preconditions about dividing ancestral estate was ensure the of all clan members to dispose and demur against property-based issues [26]. Therefore, the prerequisite for the separateness of ancestral estate is how to guarantee the right to control the family property in the name of all members. From a jurisprudential point of view, the members of the Tong enjoy only the *de facto* [27] right to use the ancestral property, but not any legal right to divide property for their own. According to the objection of professor *Chang Weijen*, the property of Tong was not an absolute gift to any certain individual or generation. In fact, the Tong, not an individual owns the ancestral land. All the methods of allocation should benefit both the current generation and their descendants, with the interests of every single clan member limited to the use and benefit of the land property during his or her lifetime. If the property is treated as a general divisible trust, the property will be divided among current generation completely, which also means a deprivation of the legal rights of future generations.

Finally, the Judge agreed with the opinion of Professor Chang and made it clear that the agreement in 1982 was invalid. The burden of providing proof fell on the defendant party to demonstrate that there was a concrete written proof about the customary distribution of surplus income within the clan. If it is unable to provide the evidence, the profits from the ancestral land should be held in trust and the legality of not to be handled without the consent of all the five managers representing every single stripe.

To avoid a repeat of this situation, the Hong Kong Legislative Council decided to have all compensation involving land acquisition held by the Hong Kong government on its behalf. Furthermore, this case also established the principle for Hong Kong courts not to allow the division of ancestral property in non-exceptional circumstances in order to prevent fraudulent land transactions[28].

7. Comparative Analysis and Further Cogitation

When it comes to the distribution of ancestral property in the New Territories, it appears that traditional land customs are usually in conflict with legal provisions. Specifically, the Tang Kwong Yu Tong case reflects another more profound historical problem- the conflict between Chinese and Western thinking on the rule of law as well as the unavoidable defects of the colonial law under the concept of the British common law system. As we all know, Hong Kong's special historical background determines that its judicial system is a complex system synthesized by the British law, the traditional Chinese laws and customs, and the ordinations formulated by the Hong Kong government [29]. The dominators from British Empire in the 19th century mainly used indirect rule to administer the colonies. In order to make the principles of British law more acceptable to the colonized people, the British government usually adopted the practice of incorporating the original traditions or customs of the colonies into the principles of common law jurisprudence [30]. In fact, in the early 20th century, District Officers in the New Territories preferred to refer to traditional Chinese customs and land practices rather than British property law provisions in resolving disputes, and accordingly produced a list of customs for the reference of their successors when handling disputes in court [31]. Even in the 1970s, when traditional customs in the New Territories were subject to more legal restrictions, in the case *Tang Kai-chung v Tang Chik-shang*, in an experienced former New Territories District Officer trial opinion as an expert in the court, insisted that the principle of “*the inalienability of ancestral land*” was a long-standing land tradition in the New Territories. Even though the concept had long been recognized as an antiquated opinion, the judge still relied on his assertion as the ultimate basis for the final decision [32]. Similarly, in *Chu Tak-hing v Chu Chan Cheung-kin*, a Chinese landowner in the New Territories went back on his words shortly after he had

legally changed the nature of his land to become part of the ancestral property of Chu's clan and wanted to retain the land after changing its nature again. The judge chose to look directly to the law of trusts and found that this was contrary to the principle of irrevocability of trusts under the law of trusts, but he ignored the fact that in traditional Chinese land custom, the founder of a Tso or Tong could not have intended to create a trust [33]. This phenomenon is essentially the use of British-style trust law to conduct the interpretation of the Chinese tradition of land shared by the certain clan that is inherited from their ancestors, which will inevitably lead to confusion when applying the standards of judicial decisions [34]. Due to fact of this, when dealing with cases involving land or property disputes in the New Territories, the judges usually adopt the practice of relying heavily on expert advice in order to fully incorporate traditional land customs into the trial. However, the fact is that only the indigenous inhabitants of the New Territories have the best knowledge of local customs and are the most authoritative to speak; but in view of the intricate clan relations in the New Territories, it would be contrary to the principle of judicial fairness to use the opinions of the indigenous inhabitants as the basis for adjudication. In view of this, the Hong Kong judges have developed an inertia in this predicament, for example, trials are conducted with substantial reference to the final results of past jurisprudence, and the results of a large number of judgments involving the distribution of ancestral property prior to the 1970s were determined or profoundly influenced by land customs [35]. Although this practice is still controversial, it continues to be the preferred choice of Hong Kong judges to maintain a balance between traditional customs and the letter of the law.

What's more, if there is an additional will stating how the property is to be distributed, the traditional land custom shall take precedence over the provisions of the law relating to inheritance. A comparison between *LAU YUE KUI v. LAU YU HI* [36] and Tang Kwong Yu Tong case is good for reference. In the case of LAU family, the judge and experts insisted that the custom of this clan did not allow the male descendants make distributions by their willingness. Nevertheless, before the eldest member of the Lau family deceased in 1946, he made it clear in his testament that the ancestral estate was divided into nine shares equally before his death, eight of which should be inherited by his eight children, and the ninth share was dedicated to the expense of ancestral worship and rituals which should not be embezzled by anyone of the clan [36]. In contrast, the case of Tang Kwong Yu Tong only referred to a dispute among the managers of each stripe, and there was no will written by any elder member of the family. As a consequence of this, based on the Chinese land custom in most of the precedents indicated, the four defendants should be barred from dividing their ancestral property without the nominal agreement of all members in Tang Kwong Yu Tong.

This problem may also be explained by the concept of common ownership in the context of property law. The "Property and Conveyancing Ordinance" [37] mentioned two definitions: **Joint tenancy** and **Tenancy in common**. The ancestral estate in a clan is usually held in common, as well as the property of Tso is also a certain type of joint tenancy; Tong could exist as a joint relationship only if the property exists. Unlike tenancy in common, joint tenancy does not specify the number of shares that should be allocated, and co-owners should not request the division of their common property while the joint relationship is still in effect, or the relationship will be destroyed. The approval of division in this case also represents the dismissal of Tong. It is also reasonable to use joint tenancy as the basis for determining that the ancestral property is undivided in order to ensure the continuation of traditional land-holding.

8. Conclusion

The current dilemma in rural land disputes is whether traditional customs should be used as the only evaluation for judicial sentences in modern society. Even though the ancestral estate is a form of dividable property, when it comes to the continuity of the Tong, it is necessary to maintain the integrity of ancestral estate. Future generations will be denied the right to use their property if the ancestral estate is divided by current members completely in accordance with the tenets of modern property law. Similarly, if ancestral property is entirely disposed of according to traditional practice, it absolutely fails to meet the fundamental requirements of a law-based society.

Even now, more than 20 years after the reunification of sovereignty over Hong Kong, the imprint of the British colonial era is still clearly visible in the area of land law. In the Basic Law, which is the superior law of the HKSAR, the traditional interests and customs of the indigenous inhabitants of the New Territories are also recognized and respected legally, as was the convention during the British colonial period [38]. Additionally, the emphasis on traditional land custom even the practice of making land customs take precedence over property law as the standard of judgement will remain for a long period until there are drastic changes in the political environment. While traditional land customs must be respected, they must be approached with caution. Traditional customs are bound to change as society develops due to actual circumstances. However, only continuous practices accepted by the majority of people could be called customs, which require being kept relatively stable. If a custom must be changed in response to the reality, this alienated custom should be regarded as a new regulation and no longer part of the traditional one, as it has lost the continuity.

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